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

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

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

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

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

Wilson assailed Roosevelt's proposal of a federal commission with power to investigate any
business activity and Roosevelt's other unmentioned
proposal to set maximum prices for goods produced by
monopolists.

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

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

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

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

Now, the Commission has been subject to
withering criticism, indeed public scorn, in the past,
the 1969 studies, of course, are one, but the Washington
Post, not a necessarily restrained animal at all points,
called it a national nanny, as we all recall from 1979.
And yet if you look at the reports, virtually every one
of them ends up on an optimistic note, says we got to
keep the Commission and it can, in fact, improve and
perform better.
Indeed it was the 1969 ABA committee report that
said, however, if they don't take our guidance and don't
improve their performance, they ought to be terminated.
Today we get three perspectives on this 90-year history.
First, Marc Winerman, and I'm not going to give
biographies, it's in your book, you know these people
too well for me to go through the litany.
Marc Winerman, the unofficial historian of the
FTC has, of course, the seminal article last year in the
Antitrust Law Journal, it's only 97 pages, and it gets
you to Wilson's first appointees. So, he still has more
to do.
(Laughter.)
MR. GELLHORN: But it's nothing if not thorough.
He will provide a distinctive evaluation, at least if he
says what he told me he was going to say, of the
development and the record of the Federal Trade
Commission and its legislative origins to its early
struggles to its modern era in identifying differences
in public opinion of public attention given to the
Federal Trade Commission.

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

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

Finally, the paper for the conference will
include a commentary from Jesse Markham, who
unfortunately is unable to be here today, but he did
submit a paper, it's an interesting one. He was a
participant, he notes, in two other FTC symposiums, starting first 50 years ago. He was, of course, the chief economist for the Federal Trade Commission in 1953 through 1954, and he's going to look at the leading role that economic analysis has played in the Commission, really from his appointment and forward, and he describes it interestingly enough, as first a shotgun marriage that has matured and evolved into the golden years.

With that, we will start with Marc Winerman.

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

As we've heard, these laws culminated a
national debate about competition policy. They were a culmination, obviously, not the start, nor the end, of the debate.

The FTC was a response to industrial consolidation. During a merger wave that began in 1898, there were often mergers, where five or more firms united at once. On one occasion, 43 firms got together at once. The Sherman Act wasn't used to stop the merger wave until 1902. Though the government won that challenge against the Northern Securities Company, the court's decision exposed, not for the first time, deep disagreements about antitrust. Four of the justices said that the Sherman Act had no application to merger. Four of them basically said mergers that eliminated any horizontal competition were, per se, illegal.

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

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

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

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

In contrast, Taft, as we've heard, favored judicial exposition of antitrust. He gave ambiguous support to a commission, but the courts, he said, typified "what we shall meet in heaven under a just God."
Further, the Sherman Act announced the right industrial policy, and the rule of reason, which he equated to his own 1898 analysis in the Addyston Pipe & Steel case, held the key to its meaning. But Taft confused everyone. Most polemicists thought the rule of reason would kill antitrust, but Taft endorsed the rule of reason and stepped up antitrust enforcement. As we've heard, he was the only candidate who endorsed corporate dissolutions in 1912.

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

Louis Brandeis, advisor to Democratic nominee
Woodrow Wilson, agreed with these agrarians in part. He acknowledged that industrialization required increased scale, but thought business had grown larger than economic and what he called "social" efficiency warranted. He argued that size blunted innovation. To protect smaller enterprise, he would construe, bias, and supplement antitrust law. For example, he wouldn't make size per se unlawful, but he would establish a presumption that a restraint of trade affecting over 40 percent of a market was unlawful. He also anticipated a coming trend. Brandeis advocated collective activity through associations, albeit with an eye, which many of these so-called associationalists lacked, to antitrust.

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

Substantively, Wilson said that trust produced vast wealth if you cared about vast wealth no matter how distributed. He even spoke of giants gripping the throats of working men, blood dripping through their fingers -- but Wilson also said that large enterprise did not necessarily endanger
economic liberties. As a candidate, he opposed corporate dissolution, but not because, like Roosevelt, he welcomed growth. Rather Wilson trusted competition — potential competition. Once the giants were stopped from competing unfairly, then in his words, the pygmies would triumph.

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

What happened then was that the House, which first debated the antitrust package, couldn't produce
the clear legislative standards Wilson anticipated. Not surprisingly, it couldn't develop a clear formula to
distinguish illegal from pro-competitive price-cutting. When the House debates were winding down, George Rublee,
who straddled the field -- he had been a Roosevelt
speech writer and a Brandeis ally -- persuaded Brandeis
and then Wilson to back Section 5. It appears that they
originally intended to substitute Section 5 for all the
substantive provisions of the Clayton Act, although
ultimately the Clayton Act had substantive prohibitions,
enforceable through civil and administrative
proceedings, but not through criminal proceedings.

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

On the Republican side, Albert Cummins
had an agrarian distrust for size. In 1913, he argued
that a special tax on firms with a more than 25 of a
percent national market would target "so much dishonest
wealth." For Cummins, the commission should be part of
an broader antitrust package. For example, he opposed
specific limits on corporate size, but championed a flexible
ban against firms that grew so large that they prevented
substantial competitive conditions.

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

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

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

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

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

Their first Chairman was Davies, whose interests and disputes illustrate the potential and the problems of the early Commission. During Davies' years, the agency saw itself as a progressive-style problem-solver, prone to direct intervention. Rublee and Parry were Progressives, and Davies had similar instincts. When he became Commissioner of Corporations in 1913, he suggested to Wilson that they study the level of efficiencies appropriate to economy -- basically to find out if Roosevelt was right. On the Commission, when the agency was directed to investigate rising newsprint prices, he successfully urged the Commissioners to arbitrate a fair price. The plan fell apart when the Justice Department...
insisted on litigating, but when DOJ settled, the
settlement order provided that the FTC would be the
pricesetter for newsprint.

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

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

But the bill passed, of course. And on November
23rd, 1915, the Commission heard the Associated
Advertising Clubs of the World. They were a
self-regulatory body with "vigilance committees" that were precursors to the Better Business Bureaus. The AACW had drafted an anti-deception law and secured its passage by two-thirds of the states, so it could turn to state regulators when self-regulation failed.

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

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

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

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

Hurley assumed the chairmanship when Davies lost it. But Hurley told a business conference when he was offered a spot on the Commission, "I told the President that all I knew was business, that I knew nothing about
the new laws nor the old ones and that I would apply all the force that I had in the name of business." He added that German industry became safe when the government sanctioned cartels.

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

Wilson's later appointees worked better together than his initial selections. Indeed, they worked together through most of the next administration. They included Victor Murdock, who had headed the Progressive contingent in Congress for two years after ten years as a Republican representative. They included two Democrats, Huston Thompson, a Justice Department litigator, and John Nugent, who had been elected to a short Senate seat in 1918 and defeated in 1920, and when Wilson nominated him in 1921, he was confirmed, even though Wilson and he were both lame ducks, through Senatorial courtesy. Nugent later ran for his old Senate
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seat. Without resigning from the Commission, he conducted a
Senate campaign. He lost.

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

Humphrey did have an affirmative agenda. He
aggressively backed challenge to fraud, for example,
and pressed the Cm mission to name magazine publishers
as respondents. He also expanded the trade practice
conference procedure, which was a precursor to modern rule-making. He had many successes, but two years into his term a curious thing happened. Another Coolidge appointee, Abram Myers, came on, and for two years, Myers proved far more effective than Humphrey, repeatedly clashing with Humphrey and winning. Humphrey tried to stop Commission investigations that lacked a specific law enforcement purpose, for example; Myers pushed through several such investigations.

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

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

This is a rough tool. It focuses more on the
big cases which, a lot of good and harm can be done through smaller cases.

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

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

Unfortunately, I've got to skip through a bit now, but there's one thing that I would like to focus
on, in particular. First of all, the Commission's press coverage dropped substantially for nearly two decades. I'm sorry about bypassing the '30s. In contrast to substantial coverage during World War I, only two first-page stories covered the Commission in World War II: During a cigarette shortage, the Commission acted to ensure an adequate supply for soldiers.

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

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

Thank you.

(Applause.)

MR. COX: You saw that peak up there?

(Laughter.)

MR. COX: That was us. I think it was Adlai Stephenson who said that every speaker gives three speeches. The first speech is the one that he prepares,
the second speech is the one that he gives, and the
third speech is the one that he wished he had given
afterwards.

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

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

   And 45 minutes later, the speech was over to a
small smattering of applause and the room was half
empty. Well, he didn't take that too well and went back
to the White House and called in the speechwriter and
said, look, I wanted a 15-minute speech, you gave me a 45-minute speech. The speechwriter responded,
Mr. President, I gave you a 15-minute speech and two copies. Well, although this is prepared and I do have some copies, I hope it won't go that way.

(Laughter.)

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

And more relevant to this 90th Anniversary Symposium, 1968 was the year that Ralph Nader assembled a group of seven students to do a summer study of the Federal Trade Commission, a study which resulted in a self-styled student task force report which received extensive press coverage when the report was issued in January 1969. All the student volunteers had just graduated from or were attending either Yale or Harvard Law School with the exception of myself, who had just
graduated from Princeton. Judy said that this was
college students, I was the only one I guess who could
qualify since I had just graduated from college. All
the others were really very high-powered graduates of
law schools or who were about to graduate from law
school.

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

In the fall of 1969, I entered law school and
went on to other things. I did not give any significant
thought to or interact in any significant way with
either the FTC or Nader until I was invited to
participate in this symposium. I can only liken my
preparation for this as the opening of a time capsule, a
time capsule full of things that I knew intimately at
For the subsequent FTC history, I am very indebted to Marc for his patient tutoring over the phone and source references, and to the thoughtful writings of Richard Harris and Sid Milkis, among others, on the subject.

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

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

In 1969, Richard Nixon, newly elected as President, asked the American Bar Association to conduct an independent investigation of the FTC. The ABA report
findings were remarkably similar to the conclusions of Nader's Raiders, though couched in more temperate language. In January of 1970, Nixon appointed Caspar Weinberger as Chairman of the FTC. Weinberger was an activist Chairman. By the early 1970s, the FTC would be a revitalized Agency.

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

"I think that the Nader Report came at a time when no matter how we had done, no matter how much we had changed small things, the basic problems of staff, senior staff, were not going to change. So, no matter how many bright people you had on the staff, it wasn't really going to change the whole passion and direction of the Commission. The Nader people have a different
style and a lot of polemics, a lot of adjectives. I'm not an adjective person," says Mary Gardiner Jones. "So, it's hard for me to take the report without more balance in its appraisals. But I have to admit, it did the necessary job. Without it, the FTC probably wouldn't be anything where it is today."

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

Preface by Ralph Nader. "The Commission could have been an exciting and creative formatter of consumer democracy. In reality, the little old lady on Pennsylvania Avenue was a self-parody of bureaucracy, fat with cronyism, torpid through an inbreeding unusual even for Washington, manipulated by the agents of commercial predators, impervious to governmental and citizen monitoring. As the tide of consumer
dissatisfaction rose in the 1960s, the FTC droned on, seemingly oblivious to the billions of dollars siphoned from the poor and middle class. Consumer-like by deceptive practices hiding shoddy and harmful products and fraudulent services."

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

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

Well, that constituency was building up, and it
still has that constituency of the consumer movement.

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

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

So, when Nader predicted back then, what he
wanted to do in fact for the most part, for the FTC, and
for the consumer generally, and for people, students who
want to be part of working for the public interest, has
worked itself out. This was not just a critic who made
criticism. This is a person who was looking into the future and built something and we, the students who worked with him on the Federal Trade Commission report, were part of that. Were his instruments, I could say, in doing that.

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

As the summer progressed, however, Chairman Paul Rand Dixon, FTC's Chairman at the time, realized that we were not just a bunch of nice college kids in suits, but we were very aggressive and asking searching and antagonistic questions. The door then was both literally and figuratively shut in our face. In one instance, Chairman Dixon bodily threw out our leader, John Schultz, who had a very annoying way of persistently asking questions. Threw him out of his office bodily and ordered the staff to shut us down.
One early turning point, before that incident, which no doubt initiated and irritated Chairman Dixon very much, was an article in the Wall Street Journal which I generated by finding in a search of the personnel files, and that -- what we discovered, there was a purely patronage office in Oak Ridge, Tennessee, which was manned by a friend of Chairman Dixon's, a certain Judge Castro C. Gear.

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

Let me just read to you the way that interview between Landauer and Judge Gear on the telephone went. He started off, let me just say, by calling Judge Gear's boss, who could not say precisely what kind of work occupied Judge Gear, but adding parenthetically, but I understand there's a good deal of work down there in Oak Ridge, Tennessee.
The telephone interview with the Judge himself proceeded as follows. Landauer: What date was the Oak Ridge office open? Judge Gear: You will have to get that information from the central office. Landauer: What type of work primarily occupies you? Judge Gear: You will have to get that information from the central office. Landauer: You mean to say that they know more about your work in Washington than you do in Oak Ridge? Judge Gear: Well, they have the first hand information there.

Long pause.

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

(Laughter.)

MR. COX: So, that gives you a flavor of what we did. What resulted was what I guess they would call these days in campaigns a lot of earned media, which was priceless to our cause. And Dixon didn't help himself by noisily trying to shut us down. It didn't work either. Phil Elman opened all his files to us, regardless of what the Chairman said. And right down
through the staff, there were lots of good people then, who were willing to talk to us, who wanted to help us, they wanted the Commission to become what it could be, what its basic powers and the way it was meant to be, would come to fruition.

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

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

(Laughter.)

MR. COX: The thought that went through my mind, it could all be over in a minute. And then after we
released our report, later on there were, of course, extensive news articles and then hearings before a Senate committee, which really was very congratulatory, Ribicoff and others saying what wonderful kids we are to volunteer this time and do all this great work.

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

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

Now, President Nixon's foreign policy initiatives are well known, but Richard Nixon is also the President who much to the consternation of his political base, not only went to China, but also established the EPA, signed OSHA and Title IX with
respect to equality for women in athletics on campuses, signed those two acts into law, established the Consumer Product Safety Commission, and reduced the percentage of segregated schools in the south from 90 percent to 10 percent, quietly, but got it done, the only way to do it, thereby recognizing respectively the environmental movement, with the EPA, the workers safety movement, with OSHA, the women's rights movement, Title IX, the product safety movement, with respect to the Consumer Product Safety Commission, and the civil rights movement. It was only logical that President Nixon's administration would pick up on the imperativeness of the consumer group, when the noise made by Nader report on the FTC, put the FTC on the front burner.

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

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

With the support of the White House and his fellow Commissioners, Cap Weinberger, who would earn the nickname "The Knife" as Governor Reagan's Budget Director in California, put in a top-to-bottom overhauling of the organization and personnel of the FTC, consolidating operations into two principal operating bureaus, which is the way it is now, competition and consumer protection, upgrading the Bureau of Economics to apply sound economic analysis to those operations, establishing a planning office to help set priorities, revamping and upgrading the regional offices to enable local enforcement initiatives, and
most importantly, attracting very capable young attorneys with a strong commitment to consumer protection.

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

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

While Nader gave great kudos to we students who produced the Nader Report, Nader received the credit generally, and properly, for the report. It was a
political force and specific assistance of this
coopelition that made our report and its ultimate impacts
possible. It was also this coalition that put an
increasingly strong consumer movement wind behind the
FTC's sails, culminating in Mike Pertschuk's
administration under President Carter.

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

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

In conclusion, I see three basic views of the
Federal Trade Commission. One holds that the free
market can sort out the problems which the FTC was
designed to solve, and therefore, it should be
abolished. David Stockman apparently held this view when he was Director of the Office of Management and Budget, and seriously propounded it in his budget proposals.

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

For all its rhetoric, some of which tended to the latter view, our report on the Federal Trade Commission and immediate results which were produced are based on a third view, the premise that neither the government nor the marketplace are perfect, and there are many areas where well-structured government intervention is much needed and should be implemented by creative, capable and well-directed professionals. If an immediate and present example is needed of where that happened, I believe I can point to Chairman Muris's Do
The FTC came into being in 1914, under President Wilson's New Freedom administration, as Marc pointed out, but its legislative design, giving it broad regulatory authority over the entire economy smacks more of Teddy Roosevelt's New Nationalism. The result is that those of you who are privileged to staff it have front row seats to view and be potential actors in the great drama and success story of our ever-evolving American economy.

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

(Applause.)

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

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

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

What I would like to look at is the basic question of how we evaluate performance over time. And I would like to look, as Ernie mentioned before, at the vast literature on the Commission. It's fair to say that the academic literature that looks at the Federal Trade Commission easily exceeds the literature on any other federal government regulatory body. It's unmistakably voluminous and has been, literally over
decades from the very time of the Agency's creation, an extraordinarily powerful source of attraction for commentators.

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

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

I want to underscore how institutional design and capabilities shape policy results. There's a natural tendency for all of us, I think, when we talk about competition or consumer protection policy, to focus on developments of doctrine. Those are the most interesting things we do. Those of us who are teachers, that's what we teach. You move away from that and our
students become completely somnolent. Audiences at
conferences start flipping through the program to see if
there are concurrent sessions they can attend, start
making lunch plans, but in so many ways, this is the
vital infrastructure that determines the success of an
institution over time.

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

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

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

To divide the massive commentary basically into
three baskets, the first are large blue ribbon panels of
the kind assembled at President Nixon's request in 1969
by the ABA; the 1949 report of the Hoover Commission,
being perhaps second in importance in this category.

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

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

Among the more flamboyant phrases in Ralph
Nader's introduction in the Nader Report is a single sentence that says, we're not talking about competition policy here. It was focused on consumer protection, although its institutional concerns spread well beyond the boundaries of the consumer protection mission.

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

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

And one of the key points that came out of his
volume and is emphasized in subsequent work is that if you don't have a metric, a process, a strategy, for deciding what you're going to do, you will be buried over time by what simply comes into the door. You will be completely reactive, you will have no capacity to sort out the trivial from the important, you will be utterly ineffective.

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

A second basic theme deals with the cumbersomeness of the procedures for administrative adjudication and for the routine execution of work. And I have to admit, this remains still a sore spot. Why? A key assumption in the formation of the Commission is that it would have a comparative advantage, not simply with respect to substantive analysis, but with respect to speed in the treatment of competition and consumer protection matters, and a continuing battle and a continuing area for improvement which is identified throughout the commentary and I think quite rightly, is that conceptual general ambition in many respects still hasn't been realized and practiced, although there's been dramatic, dramatic progress in that respect.
Steve Calkins, who will wrap up this session, played an enormous role in setting in motion internal administrative reforms and adjustment in procedures. Although I don't think we're at the point where Congress expected us to be in 1914 in this respect, what is promising is that the modern trend has featured significant progress in that direction.

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

And the basic message that came out of the commentary is that if you want to obtain deference from reviewing tribunals, you have to provide a compelling basis to obtain the deference. Notwithstanding the formal standard that gives you deference with respect to substantial evidence. The basic message of the commentaries, quite properly, I think, is you get the deference you deserve, notwithstanding the legal standard. That has to be earned all the time, if it were a mathematics exam, you've got to show your work in a way that convinces the instructor that you've done good work.
The fourth observation deals with ineffective management. Partly as a matter of the overall government design, but partly as the manner in which individual managers at the most senior levels of the Agency allocated their time and did their work.

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

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

A key lesson about how institutional design
directly affects substantive outcomes, the '50
Reorganization Act, which allowed the President to
designate the chair, so that you would have a chair that
would serve more than 12-month terms, instead of having
the continuing disruptions over time, was a vital
adjustment.

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

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

There are painful instances in the '69 report in
which Rand Dixon, and he not only told it to the Nader
folks, he told it to others, said that is my philosophy
for hiring: I can hire really good people out of school, but they'll go away. I want to hire people who will not go away. Unlike the Air Force, which aims high, I'm going to be like the Navy and dive deep. I'm going to penetrate those lower strata of the class, people who are inert and will stay forever.

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

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

First, bad history. What do you see in lots of the studies? You see the rote recitation of earlier studies. And I understand what's going on, they didn't have the time to go back and really dig through original sources that Marc did, they take the earlier study and take the punch line and say it's still true, still true, still true.
But what don't you have in the earlier studies? You don't have common agreement about what the Agency ought to be doing, except some generalized view that it ought to do stuff that's important. Do important stuff. Henderson's punch line, for example, that the Agency spends too much time on trivial matters highlights this. Henderson thought consumer protection was pointless. Don't worry about deception, why are you wasting time on these advertising cases? The unmistakable inference of Henderson's work is that everything ought to be channeled in the direction of competition policy, period. Yet, every subsequent author recites Henderson's words, quote that says, "the same criticism is true today," yet none of these authors, I think, really parsed his work to see that he was really talking about having an antitrust agency only, nothing to do with consumer protection.

Weak data in many of the stories. David Hyman, my colleague in the General Counsel's Office, now at the University of Illinois, is fond of telling me, in God we trust, all others provide data. Too many of the formative studies rely on impressionistic assessments of authors without giving you the specific cases that would inform your judgment about what they're thinking about. In so many instances, no context is provided. Criticism
did not take account -- and I've got a CF site to Tom McCraw at the bottom. Tom McCraw, just about 25 years ago, held a wonderful seminar at the FTC on industry. Tom McCraw said, regulatory experiments must be judged to a standard true to their own time. And so often the evaluations of the Commission's work ignore what other people were telling it to do at the time. That is a dynamic policy environment in which standards are changing, expectations are changing, but modern assessments about what should be done are superimposed as a way of denigrating the quality of the contributions. That in academic terms is a wonderful ex post approach to evaluation as opposed to an ex ante standard that would focus on the reasonableness of choices made.

Further problem, there's such a fondness for caricatures, the literature -- and you can tell so often, a certifying mark of the weakness of the literature is they talk about the horses. So many authors have thought and they smack themselves on the forehead as though they've discovered this for the first time, ah, the symbolic importance of the horses. If you see any reference to the horses in a study, one full grade off, every study. Sorry, Ed. There is a great architectural exegesis at the beginning of the book.
MR. COX: I was an architect student at the time.

(Laughter.)

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

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

And the consequences is that you suffer from the exaggerations over time. The ABA '69 report and the Congressional reaction basically said that everything that's gone before is a failure, and there has to be a tremendous dramatic continuing revival. History just
isn't like that. There's a lot more continuity, many
more links over time.

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

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

This literature suggests there are no upward
limits on capacity, but if you do one good thing, you
can immediately do another. It's like thinking on the
basis of Do Not Call that Do Not Spam is right around
the corner. You went to the moon yesterday, you're
going to go to Mars next month, aren't you, and Saturn
after that. No sense that doing one thing well
immediately means you can do a natural extension to
something else immediately. And it ignores the
cumulative nature of policy.

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

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

In economic terms, there is a tremendous
capacity there. If you're not internalizing the
results, in effect, to impose huge external costs on
your Agency. You don't fill out the score card, at
best, when any individual chair leaves, the grade is an
incomplete, because you don't know until years later what the actual grade is.

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

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

How did the story end? What were the consequences both with respect to process and outputs? Implication for good leadership. What should good leaders do based upon this literature? You maximize positive externalities for the Agency and new leaders in the future. You make their lives better, as well as those of the employees.
You engage in a continuing process of self-assessment and you promote critical public debate. In short, we're not really in the business of looking for best practices. So, to say best practices suggests that there's a final fixed destination, it's a continuing search for better practices, and that's what I think the literature says we ought to do.

Thank you.

(Applause.)

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

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

Well, let's spend the next ten minutes just following up with some questions, some suggested by the
audience, others by my sitting and listening here. One of the things that's sort of unique in this area, both in antitrust and consumer protection, is we have more than one federal agency addressing the question. We've got two antitrust agencies, we have at least four in consumer protection when you think of the Consumer Product Safety Commission, the Food & Drug Administration, the Securities and Exchange Commission, which grew out of the Federal Trade Commission. I would like to, you know, pose to the panelists, why that event, is it just a historical accident, and second, does it make any sense?

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

So, I think we can explain the initial decision
partly as a bit of experimentation diversification, partly, certainly, as a matter of legislative interest in having its own institution. That is an unmistakable part of the original legislative design. I would say that, you know, I have to come clean on this, it's awkward to be an academic and take these jobs.

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

(Laughter.)

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

MR. COX: Just for a short answer, I'd like to take two, the Consumer Product Safety Commission, yes, it's almost the same kinds of things that are being done
as consumer protection. Securities and Exchange Commission, I'm a securities lawyer, that's a completely different analysis, way of doing things, different marketplace, one that wouldn't -- even though it came out of the Federal Trade Commission, it was initially organized at the Federal Trade Commission, it would not be one that should be consolidated as part of that consolidated consumer protection administration.

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

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

MR. COX: Actually, I would go back to something that Bill said about continuity, and I agree with that, continuity is very important. I think every agency of
government has a DNA, a basic DNA of how it was conceived and put together, and the FTC came out of the Bureau of Corporations, and you go through Marc's history of it, and then it ran into World War I and then it ran into the conservative '20s and then it ran into the judicial problems -- the problems that President Roosevelt had with the Supreme Court and the New Deal and that's the way it was born, if you will, and that makes it a confusing history.

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

MR. GELLHORN: Marc?

MR. WINERMAN: Well, two thoughts, first of all, it's much easier to measure the success of the SEC because you're dealing with a more limited universe.
The Commission's universe, and particularly on the consumer protection side, because that's where the comparison is a broader universe and --

UNIDENTIFIED SPEAKER: Use the mic.

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

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

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

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

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

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

MR. GELLMHORN: Well, we have to leave time for
the next panel, so one final question for the panel, and
that is, let's assume you're attending the 100th one ten
years from now, and I hope we all are here, what would
you expect different to be said at the 100th than at the
90th? I tried to stump the panel.

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

MR. WINERMAN: I guess I would say that the
terms of the various competition debates won't change,
but although the terms won't change, I would hope that
the Commission continues to participate vigorously in
the debates and react to the debates and initiate parts
of the debate, and on the consumer protection side,
particularly the Commission stays highly adaptable to
technology, both in their use of the furtherance of the
Commission and in preventing the abuses of those
technologies, and again, the changes in front of us, but
hopefully the Commission will continue to look after
MR. KOVACIC: Let me mention the three norms that I hope will be well-established by that time and they have roots going back a number of years already. The first is that the routine habit of after-the-fact assessments will become -- without picking a number that that will be something that one expects and sees happening every single year with respect to the work we do.

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

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

Right now, if there was a box score, and you asked about the contribution of good advocacy, for example, stopping a bad idea, unraveling an existing bad
idea that's embedded in another public policy, that
doesn't show up in the box score. It's not elsewhere
classified. It's not there. Good work on that front
has to count as much as bringing the case.

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

COMMISSIONER GARDINER-JONES: Could I make a
statement?

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

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

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

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

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

(Applause.)

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

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