MS. PARNES: We would like to start the second panel to keep ourselves on schedule. That was very fast, thank you so much.

I'm Lydia Parnes, I'm the Acting Director of the Bureau of Consumer Protection and I would like to welcome you. Oh, no. Oh, no. I am like -- you know, we're the technology bureau. Okay. This is law and order, BCP style. We've got enough of that.

But we do have a panel today of forensic legal scholars who've reopened files on three of the FTC's most visible rule-makings: The 1964 Cigarette Rule, the
1978 Children's Advertising Rule, and the 2003 Do Not Call Registry. I'm delighted to introduce the stars of our panel.

I'll start with our writers. Teresa Moran Schwartz is a leading scholar at George Washington University's Law School. She served the Bureau with distinction as its Deputy Director and also served as an attorney advisor to Commissioner Mary Gardiner Jones. Teresa is currently a member of the Board of Directors of Consumers Union.

Bill MacLeod is one of our two former Bureau Directors on our panel today. Bill came to the FTC as an antitrust lawyer. He saw the light and joined a distinguished and growing group of antitrust lawyers who have become skilled consumer protection practitioners. Bill is a partner at Collier Shannon with both consumer protection and antitrust expertise.

And Sidney Milkis serves as the White Burkett Professor of Government and Foreign Affairs in the Department of Politics at the University of Virginia. Although Sid never worked at the FTC, he is the co-author of the Politics of Regulatory Change, a very insightful look at the FTC's recent past.

Providing what I'm sure will be lively commentary on these papers, Orson Swindle, the FTC's
Senior Commissioner. Commissioner Swindle is actually the one person on this panel who actually voted on one of the rules that we're going to discuss, and we look forward to hearing his unique perspective on the Do Not Call Registry and his insights on the other issues raised by these rule-makings.

And I guess if I knew baseball better, I would know what hitter it is, the wrap-up hitter or the something like that. Clean-up hitter, thank you. Jodie Bernstein, who served twice as Bureau Director in BCP, and I have to add as a mentor to countless FTC staff members. For her extraordinary contributions to the Agency, she received the Miles Kirkpatrick Award last year and Jodie is currently of counsel at Bryan Cave.

And with that, I will turn this over to our first presenter, Teresa.

MS. SCHWARTZ: First, I'm going to raise the podium. Jodie got this podium so that it would be lowered, but it also goes up.

My role today in ten minutes is to describe these three bold rule-makings and their legal legacies. So, to get started first with the Cigarette Rule. When it came to the Cigarette Rule in 1964, the FTC was not the little old lady on Pennsylvania Avenue described in the Nader Report. Here it took on a powerful industry,
it acted with incredible speed, and it used rule-making, which it had never used before under the FTC Act, and which many, including many scholars, thought it didn't have, power it did not have.

From Commissioner Phil Elman's oral history, we know it all began on a Saturday in January 1964 when the Surgeon General Committee on Smoking and Health issued its landmark report on the health hazards of cigarette smoking. Three FTC Commissioners were sitting waiting for the report at the Commission and sat together and read it through. When they finished, the Chairman, Paul Rand Dixon, put down his cigarette and said --

(Laughter.)

MS. PARNES: -- that's my last cigarette. The three Commissioners agreed the FTC should respond by issuing a trade regulation rule requiring that cigarette makers warn of the health hazards of smoking.

That day, Commissioner Elman asked his genius assistant, who happened to be Richard Posner, to draft the notice of proposed rule-making, and by the end of that week, it had been approved by the Commission, and announced.

Only six months later, after public hearings and following a written comment period, the Commission issued the final rule requiring that all cigarette ads
and labels contain a warning that "cigarette smoking is
dangerous to health and may cause death from cancer and
other diseases."

The statement of basis and purpose, also crafted
by Richard Posner, was an impressive brief from the
rule, crafted to withstand any legal challenge. It
argued that massive advertising portraying smoking as
pleasurable without warning of its risks was deceptive
under the traditional principles, unfair under a new
formulation of the unfairness doctrine, and both
deceptive and unfair in its exploitation of children,
long recognized as deserving special protection under
the FTC Act.

The cigarette industry appealed the rule, not to
the courts, but to Congress, which responded with
legislation preempting the rule.

A lasting legacy of this rule-making was its
framework of three factors to be taken into account in
determining whether an act or practice was unfair. They
were whether the practice offends public policy
established by statutes, the common law or otherwise,
whether it is immoral, unethical, oppressive or
unscrupulous, whether it causes substantial injury to
consumers or competition.

Now, the Commission did not actually apply these
factors to the rule-making at hand in any systematic
way. Its unfairness analysis for the Cigarette Rule
focused instead on the tremendous market power that the
cigarette industry had achieved over consumers by its
decades of massive advertising that camouflaged the risks
of the cigarette smoking and created barriers to
information about those risks.

It was this market power, the Commission said,
that imposed a special duty of fair dealing on this
industry to inform consumers of their product's hazards.

The three-factor approach to unfairness was
given new life in 1972 when the Supreme Court cited it,
approving in the Esperion Hutchinson case. Within a few
years, the Commission was using the Cigarette Rule and
its unfairness test to support far-reaching
rule-makings.

Most controversial among them was the
Commission's 1978 proposal to regulate television
advertising directed to children. The decision to
proceed with this rule-making was based on a
comprehensive staff report on Children's Advertising
that concluded, among other things, that any advertising
to children too young to understand its purpose was
deceptive and unfair, as was the advertising of sugared
products to children incapable of evaluating the health

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risks of such products.

The notice of proposed rule-making invited comment on three remedies, a ban an all TV ads at times when a substantial percentage of the audience would be children too young to understand the purpose of advertising, a ban on TV ads of highly sugared products when a substantial percentage of the audience would be children ages eight to 12, and a requirement that ads for other sugar products be balanced with health and nutrition information.

Even for the activist Commission of 1978, the proposal was far-reaching, and, of course, raised serious First Amendment concerns. Interestingly, the Commission in 1964 had cautioned against using the Cigarette Rule as precedent for regulating the advertising of products such as foods and candy. Nevertheless, the staff here relied on the Cigarette Rule for its proposal to regulate children's advertising and used the unfairness test of the Cigarette Rule in a way that revealed just how malleable the test had become.

For example, here a substantial injury was to children's dental health, which studies showed parents were ineffective in preventing in the face of powerful television advertising of sugar products. Another
injury was to the parent/child relationship. It was unfair, the staff argued, to put parents to a choice between buying products advertised to their children and enduring the conflict that goes with refusing to buy the products. Some of us can relate to this.

(Laughter.)

MS. MORAN SCHWARTZ: However, with this argument, the staff really rendered almost meaningless the requirement for substantial injury. The other two criteria were similarly easily met. The advertising practices were offensive to the public policies of protecting children, and the practices were oppressive because of the highly disparate power exercised by advertisers over children through their use of the powerful medium of television.

The critics, and there were many, focused on the notion that it was government's role to protect parents from having to say no to their nagging children. In a scathing editorial, the Washington Post said it would turn the FTC into a national nanny, a moniker unfortunately which stuck.

The Commission terminated the rule-making in 1981. After three years, the rule-making record had failed to show that advertising actually affected children's attitudes towards foods and which foods
contributed to tooth decay. Further, there were insurmountable difficulties in crafting advertising bans that would not be either under or over-inclusive, since children make up a small percentage of any TV audience. While not framed as a First Amendment analysis, the staff's assessment clearly reflected constitutional concerns.

There was no rule, but the rule-making had a legal impact. It spawned a serious Commission effort to reformulate the Unfairness Doctrine. In 1980, the Commission articulated a much more demanding test for unfairness, making consumer injury the primary factor and requiring the injury to be substantial, not outweighed by countervailing benefits to consumers or competition and not reasonably avoidable by consumers themselves. And then in 1994, Congress basically enacted this approach to unfairness.

Finally, with minutes to spare, in turning to the rule creating the National Do Not Call Registry, we move forward almost two decades and turn from the FTC Act to the Telemarketing Act that gave the Commission authority to regulate abusive telemarketing practices, including making unsolicited telephone calls that reasonable consumers would consider abusive of their right to privacy.
In the original Telemarketing Rule, the Commission had prohibited telemarketers from calling persons who had previously asked them not to call. This was the so-called company-specific approach to Do Not Call. In the 2003 amended Telemarketing Rule, the FTC took Do Not Call to a whole new level. In creating the national registry, it allowed consumers, in one easy step by telephone or email, to register their choice not to receive commercial telemarketing calls. For consumers nationwide who had been experiencing over 16 billion telephone calls a year, the registry was wildly popular. In the first 24 hours of operation, 10 million telephone numbers were registered and the number today exceeds 64 million.

Congress also liked this rule, and quickly enacted laws to support its implementation and ratify the fact that the Commission had authority to establish it. Not surprisingly, the industry appealed the rule, not to Congress, but to the courts. One of the principal challenges was that the registry unduly restricted protected speech under the First Amendment. The Commission had anticipated the challenge, since the registry does impact nonmisleading commercial speech and therefore must meet the standards of Central Hudson, that it address substantial government interest,
directly advance those interests, and be no more
expensive than necessary.

The Commission had done an excellent job in
developing a solid rule-making record and carefully
crafting the registry provision to withstand the
challenge. It argued convincingly that the privacy
interests here involving the privacy of one's home are
substantial government interest. It could show on the
basis of its solid rule-making record that the registry
would significantly reduce unwanted calls and thus,
directly advance those privacy interests.

Most importantly, the Commission had narrowly
tailored the rule so as not to unduly restrict speech.
It had exempted charitable solicitations from the
registry so that only core commercial speech was
affected. The registry also was designed to involve no
direct restriction on speech by government, it only gave
private individuals a tool to restrict unwelcomed speech
directed to them, and then, only if they chose to use
it.

Finally, the rule-making record clearly
demonstrated that the less restrictive company-specific
option was not an effective alternative to serve the
privacy interest at stake. In Mainstream Marketing
Services versus the FTC, the 10th Circuit Court of

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Appeals strongly endorsed the Commission's careful approach. In a ruling with significance beyond its immediate impact on the registry, it reaffirmed the importance of protecting privacy rights and gave the Commission helpful First Amendment precedent in this delicate area of law. If the ruling stands, and it should, it could be one of the most important and lasting legacies of the rule.

My time is up.

(Applause.)

MR. PEELER: Thank you very much, Teresa, and our next speaker is Bill MacLeod, and I would note that we've asked our two law professors to condense their graduate seminar course to 10 minutes. So, we appreciate your work.

MR. MacLEOD: Thank you, Lee. As Lydia mentioned, I did start out my career as an antitrust lawyer. As a matter of fact, you will be seeing two of my mentors over the course of proceedings over the next couple of days. First was Ken Elzinga at the University of Virginia, with whom I studied economics but especially antitrust economics, and it was partly through Ken that I learned my love of the subject, and then, of course, down at the University of Miami where Tim Muris was my antitrust professor when I took it as a
law class. And as you look at them and look at me, I will tell you that even back then they looked younger than I do, so nothing has changed.

But let me tell you about my arrival at the FTC back in 1982. It was actually Tim who lured me out of my antitrust practice in Chicago to come to become an attorney advisor for Jim Miller, the Chairman, and I still remember very vividly my first senior staff meeting in the Chairman's Office when I was introduced to Tim and Tom Campbell and Carol Crawford and the rest of Jim's senior staff and they all told me that our job here is to stop the Star Trek law enforcement. We are no longer going to go boldly forth where no man has ever gone before, and I was wondering what are they talking about, because I had been practicing antitrust law and I had found it a pretty good way of making a living.

I was defending companies who had to worry about their distributional restraints that were still being governed by a very Draconian rule that had not yet changed from the GTE Sylvania precedent, but consumer protection obviously is where we were heading, and as a matter of fact, I got a first sense of what the senior staff meant when I did my courtesy calls to the Commissioners.

I went up to Mike Pertschuk's office, and those
of you who will recall, remember that Mike over the door
of his inner office had a sign that said, Washington
headquarters for jokes, tricks and fireworks. All who
enter here, you felt like you were entering a place
where we were going to have fun and I began to realize
very quickly that what we were going to be facing in the
1980s was the battle between the artist and the
engineers, the left brain, the right brain, the
economists and the activists, and what we had to do in
the Miller team was to figure out how to articulate that
in an agenda that would hold up in court.

Well, let me start with the Cigarette Rule. My
assignment today is to talk about the effects of these
rules, and Teresa enumerated very well the statement of
basis and purpose, the rule's unfairness articulation
that we got. One thing that Teresa did not mention was
the introduction that the FTC gave to its three elements
in the rule as well as the introduction of the Supreme
Court cited in the S&H case, and that was no enumeration
of examples can define the outer limits of the
Commission's authority to prescribe unfair acts and
practices. When the Commission said that, I can't
imagine they really believed it, but when the Supreme
Court repeated that, once again, in a competition case,
S&H was not the affirnnce of a consumer protection
rule, it was a competition case. It was a competition case at the Supreme Court that told the FTC that it did not have to observe the outer limits of its rules.

    Well, that led to two things. Number one, one of the FTC's most lasting gifts to the Food & Drug Administration, and that was the legislation that followed the Cigarette Rule. I don't know if I would call it preempt as much as I would call it amend. We did get a rule from Congress that was at least a variation of the rule that the FTC was going to impose, but as far as the industry was concerned, far more importantly, what we got from the Cigarette Rule was the law that the Supreme Court held just a few years ago really occupied the field and preempted any FDA role to regulate cigarettes.

    Interestingly enough -- and another person who will come up again shortly in the Kid-Vid proceeding -- the person who really spearheaded the FDA effort, Judy Wilkenfeld, was a major player in our next rule, and that was the Kid-Vid Rule-making.

    What was it about Kid-Vid that was especially notable in our progression of rules and especially on the evolution of the Agency? I think you can look at the initial staff report recommending the rule and compare that to the final staff report recommending the

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closing of the rule and see in a very short period of
time the maturation of the FTC and the analysis the FTC
started to deliver to a number of its rule-making
proceedings. Kid-Vid followed what was in both
Chairman Pertschuk's description and in Chairman Muris'
description a frenzy here at the FTC.

After the S&H case, using the unfairness
criteria that were not really criteria, the Commission
had launched about two dozen rules, most of which were
still open and pending during the late 1970s, and it was
not really until Kid-Vid came along that the world took
notice. The funeral industry took notice, the
automobile dealer industry took notice, they were up on
the Hill already lobbying to get the FTC constrained,
but it was really Kid-Vid, as Teresa mentioned, that
got the attention of the country and really galvanized
the forces against the Commission.

What did the FTC do? They hired this appellate
attorney from, I believe the NLRB was her last
assignment before the FTC, and Judy actually just told
me this morning that her job when she came in to
spearhead the staff effort to review the Kid-Vid
Rule-making, was to report back to the Commission not
how can we kill this Rule, not how can we make this rule
that is already obviously politically incorrect

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something that will go away forever, her job was to
determine whether the Rule would survive an appeal,
because that was her function at the Commission. And
Judy said she went through the record and she came back
and she reported, we just don't have the evidence, this
is not going to make it.

What kind of appeal might it have been? Well,
one of the interesting things that I discovered as I was
doing this original research, and I was frankly very
surprised to find this, is that the economics that was
coming out of the competition and antitrust policymakers
here at the FTC, but even more importantly out of
academia, was gradually taking over the consumer
protection policies and they were coming into the
Federal Trade Commission, but they were also going
somewhere else very importantly and that was the same
Supreme Court that gave the FTC the S&H decision.

In 1976, we all now well know it was the Supreme
Court deciding to extend the First Amendment protection
to commercial speech, which up until that time had been
held for a number of decades to be without First
Amendment protection.

Why did the court do this? Well, if you look at
the court's famous quote, advertising, no matter how
tasteless, nonetheless serves an important role in a

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free enterprise economy, you will see a couple of
citations. One is to an FTC antitrust case, FTC versus
Procter & Gamble, one of the most criticized and
dismissed cases, these days in antitrust law. That was
the case where the FTC decided that the Clorox Company
could not be acquired by the Procter & Gamble Company,
one of the reasons being that there would be
efficiencies in advertising that would simply make
Procter & Gamble an unfair competitor in the
marketplace.

    Well, it was not that decision that the Supreme
Court cited, it was the concurrence of Justice Harlan,
and Justice Harlan said, I frankly don't buy the view
that the FTC, and I don't think this court should buy
the view, that the FTC propounded in its rationale to
block the merger, I think the FTC should not take it
upon itself to determine when advertising is part of a
social illness, but should recognize advertising as an
important measure of the free market economy and how
that economy allocates its resources.

    The second FTC cite was a cite to another FTC
rule-making. It was the original FTC Prescription Drug
Rule-making, in which the FTC, out of its Bureau of
Consumer Protection, was actually practicing competition
policy. The FTC in a number of its early rules was
promulgating rules not to mandate disclosures or not to reform advertising in some fashion, it was to tell industries that they had to stop restricting advertising amongst themselves, and the Supreme Court cited the FTC's Drug Rule-making for the proposition that it could actually lower drug prices.

This blending of economics and law coming from competition policy, you can see in the final report dismissing the Kid-Vid Rule-making and I think you can see throughout the 1980s when we were going through rule-making after rule-making with Ph.D. economists starting with Howard Beales, Fred McChesney in the early '80s, Robert Pitofsky in the late '80s, applying the kind of analysis to rule-making proposal after proposal and saying, this simply does not pass the test of the market analysis that we have to use.

One word on Do Not Call. Where does Do Not Call fall in this continuum? I will put to you that there is one feature of Do Not Call that makes it fundamentally different and also fundamentally safer than any rule probably the FTC has ever had to promulgate, and that is the consumer choice that all the rules were analyzed during the '80s and which caused some to rise and some to fall, is the integral part of Do Not Call. It is we consumers who decide whether or not the rule will apply.
to us and that is going to make it a very hard rule to
overcome. I think economics has finally made it an
integral part to the FTC rule-makings.

With that, I will turn it over to Sid.

(Applause.)

MR. MILKIS: Good morning, everybody. It's a
real honor to be here as an outsider, a political
scientist. I feel a little bit like a token, but not
too much that way. I guess I should start in the spirit
of Judy Bailey's disclaimer this morning and I should
say that my views don't necessarily represent those of
the University of Virginia.

I think the 90th Anniversary celebration of the
Federal Trade Commission marks a good time to evaluate
the promise and the performance of the Agency, and it
also provides an opportunity to examine the critical but
uneasy relationship between the bureaucracy and American
political culture. As we are heard this morning, the
FTC was born of the Progressive Era reform period rather
that only began the unending task of reconciling the
expansion of national administrative power on the one
hand and the anti-bureaucratic tradition of America on
the other hand.

In one sense, these three initiatives discussed
on the panel, the Cigarette Rule, the Children's
Advertising Rule, Kid-Vid, and the Telemarketing Sales
Rule, indicate that the FTC's efforts as an independent
regulatory commission with a sweeping mandate to
navigate a non-partisan and professional regulatory path
amid an ongoing conflict between consumer activists and
champions of free enterprise.

At the same time, however, the Commission's
consumer protection initiatives reveal the FTC's
connection to the political process, and reveal its
exposure to sweeping political developments.

Now that the FTC can't escape politics large and
small doesn't mean it does not exercise independent
influence. Indeed, two of the common narratives about
the Commission's history that deny this independence
can't explain developments at the Agency in consumer
protection over the last 35 years.

One theory holds that the FTC's dominated by
Congress, especially the Oversight Committee. Now,
although Congress is surely a substantial influence on
the Federal Trade Commission, it doesn't dominate it.
Since the development of the Agency into an ambitious
professional regulator, during the early 1970s in any
case, an ambition that has smitten conservative as well
as progressive Commissioners and staff, the FTC has
demonstrated considerable independence from Congress in

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pursuing consumer protection policy.

In all three of the policies in question, the Commission played a leading and independent role in advancing consumer protection policy, sometimes, as in the case of the Telemarketing Rule, at Congress' urging. Although remember, Congress authorized the Federal Communications Commission, not the Federal Trade Commission, to explore the possibility of a Do Not Call Registry.

Other times, as in the case of the Cigarette Labeling Rule, without consulting legislatures at all, and for that, the FTC was flogged pretty dramatically by the Congress.

In the case of Children's Advertising, the FTC was prompted to take some initiative against the marketing of unhealthy foods to young children, but it went much further than key members of Congress wanted. A situation that was made more tense by changes in the members of the Commission's Oversight Committee during the latter part of the 1970s.

Now, a common second narrative about the FTC is that it goes through pendulum swings as it comes under the influence of different presidential appointees. The Commission, this narrative presumes, became too aggressive during the 1970s, did far too little during...
the 1980s, and reached a pragmatic middle path during
the 1990s, a path that has continued to travel during
the early part of the 21st Century.

Now, this story line, I think, also fails to
shed adequate light on the three policy initiatives
under discussion. Both the Cigarette Rule and the
Children's Advertising Rule proceeding depicted the FTC
as it became a leading ally of a rising consumer
movement. Ed Cox described this very well this morning.
A consumer movement that has had considerable bipartisan
support as well as an important influence on the
nation's regulatory politics for the past three decades.

The FTC's intrepid successful opposition to the
tobacco industry and cigarette advertising during the
late '60s and early '70s, in spite of suffering a strong
initial rebuke by the Congress, that signaled the rise
of a movement which the FTC was connected to that was
dedicated to reforming consumer preferences and
restructuring corporate capitalism.

The Commission's humiliating failure to complete
the Kid-Vid initiative, that testified, as Michael
Pertschuk put it, to the pause -- I love that word -- to
the pause of the reformist impulse. Similarly, the Do
Not Call Registry doesn't represent, I think, a prudent
middle course between consumer activism and conservative
efforts to roll back social regulation. Rather, the Telemarketing Rule represents the most recent and impressive effort to develop an alternative form of consumer protection that was put in place during the Miller years.

Viewing the right to privacy as a conservative principle that complemented, if it didn't conform to his view of the Commission, as an agent of market competition and consumer sovereignty, Tim Muris, a Reagan Republican, showed that conservative activism is not an oxymoron. That conservatism and activism are not competing principles.

Now, the two approaches that have shaped consumer protection since the mid-1960s, one dedicated to corporate reform, and this view informed the Cigarette Labeling Rule and Children's Advertising. The other committed to competition and choice, this informed the Do Not Call Registry initiative. They represent the competing frameworks of consumer protection policy that shape and oftentimes polarize contemporary regulatory politics.

As the Joe Camel controversy revealed, the FTC is still occasionally buffeted by the conflict by consumer activists and champions of the market. But most recent Commissioners and a substantial part of the
professional staff appear to take pride in the FTC's ability to remain free of the raw and disruptive ideological struggles that roil many executive departments and regulatory commissions. They relish working at an island of sanity, as one staffer put it to me, in a sea where many regulators prodded by Congress, the White House, or powerful interest groups have pursued ideological agendas that seek to accomplish, through rule-making and enforcement actions, or inaction, policies that never could have been accomplished through legislation.

The FTC's privacy program may be the best example of the bipartisan policy deliberation that has made the Commission a rare, if unique, beacon of regulatory sanity. The Democratically-led Pitofsky Commission put the privacy program on the map, and it matured during the Republican-led Muris Commission. It represents a bold but prudent restriction on business practices, practices like identity theft and irritating telemarketing calls that dog many Americans' days and haunt many Americans' dreams at night.

Like the fraud program, which the Miller Commission put on the map and which reached maturity under the Pitofsky Commission, the privacy program reveals how the FTC can be an aggressive servant of the
public interest without substituting its will for the
government's will.

Now, I'm getting a red flag waived at me, so I
will finish. Let me just very quickly say something in
conclusion. One of the exceptional ingredients of the
FTC's recent success is that a Democratic Chairman like
Robert Pitofsky and a Republican Chairman like Timothy
Muris recognized that government has an important role
to play in American society. They both recognize that
the emergence of a global economy, for all its
blessings, poses fundamental challenges to consumer
sovereignty.

Consequently, the FTC has avoided the pitfalls
of the vitriolic, but I think, often stale debate
between champions of big government and celebrants of
the invisible hand. This has given FTC Commissioners
and staff the luxury -- you are so lucky -- the luxury
of participating in a principal debate about what the
role of government should play in promoting the welfare
of individual consumers at the dawn of the 21st Century.

Perhaps this makes the Federal Trade Commission
exceptional, but perhaps it establishes the Commission
as the edge of a wedge that might provide an opening to
a renewed consensus about the role of government in
regulating the society and the economy. Thank you.
(Applause.)

MR. PEELER: Our next speaker is Commissioner Swindle.

COMMISSIONER SWINDLE: Good morning. I don't think I could add to anything that's been said. In fact, if I were to write a paper, it would probably be a combination of all this. But the first thing I want to remark, Lydia, the bumper music that you were using earlier, I first thought it was, I Heard It Through The Grapevine, which I assumed was going to be an introduction of how I got my background in law and antitrust and consumer protection.

(Laughter.)

COMMISSIONER SWINDLE: But I was pleased to see that it had other meaning. Listening to Teresa talk about some of those descriptive terms of the first unfairness doctrine or policy or explanation or whatever they called it, I think some of the words were unethical, unscrupulous, harmful to consumers. I thought we were able to have a dissertation or discussion of politics today in campaigning, but we'll save that for another day.

I feel compelled to perhaps just talk about a novice's impression of all this, and in reading the papers, which they're incredibly entertaining and

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interesting and informative -- I would hope that they are going to be formalized and made available to the masses -- you cannot help but see in the presentations and the history of the rule-making in the Federal Trade Commission, and particularly these three actions, are almost representative of the evolution of what democracy is all about and what our Constitution is all about and what we as a people are all about.

You know, you start off with the Cigarette Rule, a great need suddenly burst on the public, only a few people really get it, but to do something about it, you've got to go against one of the most powerful economic forces in the country, a major economic sector, and if you happen to be from the South, like I am, and you know who the politicians that were going to be involved in this are, or were, you see it's going to be a tremendous obstacle, and to the FTC's credit, it ventured forth, got knocked back a little bit, but it got a foothold on the beach that would lead to later things.

Contrary to its promise that they wouldn't use this as a precedent to do things in a different generation, here we go using it as a precedent, we try to move out, Kid-Vid comes along, and here's an example that we see every day in our society in the way we live.
and work and interact with one another. An absurd idea, the arrogance of it, in my personal opinion, that an organization such as this would think it was in a position to inject itself between a family, or members of a family, namely the parents and the children, is a pretty presumptuous thing. While they might have thought there's a hell of a need here because we've got a problem, and I personally happen to agree, we probably do have a problem, but it gets down to how you do things.

And the essence or the best example I've seen of an agency such as this getting involved in something that could be controversial and doing it the right way was the Telemarketing Sales Rule or the Do Not Call Registry. Just an incredible example of doing it the right way, but you know, you learn to do it the right way by experience. You know, you win some, you lose some.

I remember reading recently about Michael Jordan making a comment that in his career he had missed over 9,000 shots, he had lost over 300 games, and on dozens of occasions he had been given the ball to take the last shot to win and he missed. And he said, through my failure, I succeeded. And in a sense, through the setbacks that we've suffered in doing some of this
stuff, we've learned, and we've learned sometimes the
hard way, sometimes the easy way, but the point is we
learn and we evolve and that's the way we grow.

And if you look at the history of our country,
you know, how can a country so great on the rights of
individuals be responsible for an era and accepting the
concept of slavery? We've evolved through all this
process, so we keep working at it, we keep making
mistakes and we keep making improvements.

And again, I think we arrived at the Do Not Call
Registry through a process of learning from past
mistakes and trying to do something and getting knocked
back, and what it boils down to is if you're going to go
and fight a war, you gather around you all the possible
allies you can gather. And in the case of the Do Not
Call Registry, we did a lot of spade work. The
precedent had been set through some bumps and knocks and
minor successes along the way, but when we got to this
one, we did a lot of spade work. And it would be hard
for anybody to really argue against the overwhelming
success of that, if you're trying to turn it around and
go the other direction, which a couple of people in the
advertising industry did try to do that and some of them
have retired since then. But nevertheless, that's the
way life goes.
And, as you all know far better than I, this has all been challenged in the courts, questioning the authority of the FTC to do these things. And, you know, the perception of the authority vary.

I remember listening to George Carlin one time, you know, the stand-up comedian. He got up and he was talking about authority and power and he said, you know, I've got about as much power as the Pope, my only problem is I don't have nearly as many people that believe that I have the authority of the Pope. So, you've got to have people who believe you have authority, then you've got to move in with confidence and you've got to do it the right way. You can be right and do it the wrong way and lose.

The Muris Commission, my dear friend Tim Muris, with this marvelous success and the praise that's been heaped upon him, he's got cartoons written about him and all these neat things, you know, caricatures and articles and everything and praised him and Tim is a dear friend. But it's the same Tim Muris who we tried to do something with the Department of Justice on the antitrust or the competition allocation of who deals with whose cases, that we didn't do our spade work, and we sort of forgot that there's another party up on the Hill and we didn't tell certain key people and we got
our hat handed to us. It's how you do things. And I
think that's the essence of what we're trying to do
here.

You know, today there's an awareness of the
increasing importance of the countervailing forces in
our society. That's the thing that keeps us in balance
and keeps us in the middle where we are the greatest.
We're not the greatest over here on the left wing or the
right wing, we're great in the middle.

We've got a more open process and technology has
helped immensely here. We've gone through these years
with these rules. We've been able to learn more as
people and we've learned how to push information out to
people and that's part of the marshalling of your
forces. We've come to recognize the ultimate, and of
course, the Cigarette Rule was the way I look at it, and
of course I don't look at it from a legal standpoint,
because I don't have that background, but I see it as
knowing who the forces at play are in the game. And
there we took on a powerful force. But today, there is
another special interest that is recognized as a
powerful force more so than it ever has been in our
history, and that's the consumer or the citizen, better
said. That's the ultimate special interest.

We've come up with a realism that governance has
to be realistic, it has to be practical, and that we
also learned that government does have a role to play in
all this. It can't be an excessive role, but sometimes
when industry doesn't do what it ought to do, not what
it said it was going to do, but what it ought to do, do
the right thing, we conservatives worry about too much
government, too much regulation, but I have come to the
conclusion, maybe it's because I've been working with
Jodie Bernstein, but you know, I think the reason
industry gets regulated is because of industry and what
it does do and perhaps, better said, what it does not
do. If it does things responsibly, we don't need
regulations.

That's why so many of us advocate self-
regulation, and the advertising industry which we are
talking about is a good example of self-regulation. A
lot has been learned by others other than the FTC in
this process. The rule-making process has educated all
of us.

Common sense, middle of the road governance is a
key. Congressional influence, you know, it's a given,
but Sid made the comment that the FTC has sort of come
out of all of this sometimes chaotic conditions and the
efforts to influence it, it's come out as being quite
autonomous, and reading the history of it, I'm just
amazed to see how much Congressional pressure and
ersuccessful influence was imposed on the Agency. And
I've had the pleasure of working in the Department of
Commerce, the Department of Agriculture and the Defense
Department, and I am just absolutely thrilled first, but
amazed at how autonomous we really are.

There will be little runs at us from time to
time by members of Congress, but, you know, if you do
good work and you don't step out of bounds and go too
far, you develop a credibility and when you've got
credibility, it's awful tough for a person in Congress
to come and try to get you to do the wrong thing for
what he considers the right reasons.

The Agency and the people who have been here
through all these years are to be commended for the
stellar efforts that they have put forth -- and there's
Carol Crawford in the back. Hi, Carol.

But, you know, so many people have played a role
in this. And Sid was talking about it and there was too
much in the '70s and not enough in the '80s, and I'm
reminded -- I'll close with this. Of all people to
quote, Ho Chi Min, with my background.

(Laughter.)

COMMISSIONER SWINDLE: Ho Chi Min didn't have
anything to do while he was in jail one time and he
wrote something, I've forgotten what it was, some garish
title to it, but it was a piece of prose that said,
without the cold and desolation of winter, there could
not be the warmth and splendor of spring. Time has
tempered and hardened me and turned my nerves into
steel. That made him the great leader that he was.

These swings back and forth that Sid referred to
help us find the middle, and in the middle, if we do
things logically, rationally, we will not be subjected
to a lot of criticism, and more importantly, we will be
able to do the work we're supposed to do, not that which
some politician might want us to do. And I look forward
to the questions and answers.

(Applause.)

MR. PEELER: Thank you, Commissioner Swindle,
and last but certainly not least, Jodie Bernstein.

MS. BERNSTEIN: Thank you, Mr. Lee, thank you
panelists and thank you for all the preparers of the
papers, which were just absolutely outstanding. I read
every one of them, including yours, professor, and
learned a great deal. And, of course, a wonderful
occasion of the 90th birthday party of the Federal Trade
Commission, and I wanted to say, just by way of
disclaimer, that neither Orson nor I, who were selected,
interestingly enough, to be the commenters of the 90th
birthday, were here 90 years ago.

For me it sometimes seems like it, because, of
course, my long history, which now goes back almost 35
years, back to that period just following the ABA Report
and the Nader Report, which were so wonderfully
described this morning, that I really thought, as I was
reading the papers and thinking about what I wanted to
say, both about the rule-making authorities that have
been raised here this morning, and what I could
contribute really to this very learned discussion.

And what I concluded was, going back again to
what we came to call, as we were working there together,
the Lean, Mean Pitofsky Machine. That's what we were,
because we were facing, as lots of you well know --
Commissioner Jones was there with us -- we were facing
national advertising that was totally unregulated and
had many problems connected with it, and importantly
fraud. Fraud, fraud, fraud. And how many of us were
there? There were like, you know, it was a dollar and a
quarter's worth of lawyers that we had, and very, very
few resources to address either of these issues.

That's what we were trying to deal with back
then. So, that's my background in terms of where I came
to this discussion. And part of what I learned from
Professor Pitofsky, and I learned it again when I was
back with him again, was whatever you're going to say, be provocative. And I've done that over the years. (Laughter.)

MS. BERNSTEIN: I intend to do it today. So, first, I'm going to address my question about this program, to Professor Lee Peeler. I'm holding him responsible for this, and here's what the question is, Lee: Why these three rules? Why were these three rules selected? Think about it. Cigarette Rule, which Lee Peeler characterizes as a qualified success; the Kid's Rule, that's a failure; the DNC, the Do Not Call Rule, an unqualified success.

So, from this, are we supposed to come to the conclusion by this biased -- I would say biased selection -- that my Commission, the Lean, Mean Pitofsky-led Bureau was totally misguided in the '70s, leading up to this debacle with the Kid's Rule, right? And so, we should never again take on serious health issues nor deal with special audiences, namely kids. And I don't have to point out to you that there continue to be problems in both of these areas.

So, let me just use one example of why I think your selection of these rules biased this discussion. Go back again to the fraud situation. Commissioner Jones used to say to me every week, Jodie, what are we
doing about it? There is fraud in the carpet industry, there is fraud in the used car industry, people are getting lemons, there are no protections. In fact, I'd like to quote, if I may, from actually a recent North Carolina Law Review article. And here's what it says: "Inner city stores were selling shoddy furniture. Fly-by-night contractors were promising to install aluminum siding that never appeared. The proverbial used car dealers were hocking lemons, and countless other shady characters were operating in similar fashion in scores of different fields in each of these cases. The defrauded consumer was saddled with the bill when a holder in due course demanded payment."

Now, what could we do about all of these matters? 13B was not yet available to us. And that meant that we could bring administrative cases, one case at a time, against these operators all over the country. It was going to have no effect whatsoever. And dealing with that kind of massive fraud, massive fraud, the Commission -- and it did with the leadership of Bob Pitofsky and the Bureau -- came up with a brilliant solution that cut through the fog of fraud. That's really hard to say, the fog of fraud, but it was such a good phrase, I couldn't pass it up.

(Laughter.)
MS. BERNSTEIN: So, let me tell you what it was,
and I'm not going to talk about it in detail, because
many of you will have heard of it, possibly many of you
have not heard of it, and that was to abolish the
so-called Holder in Due Course Doctrine, which had been
in commercial law from -- I guess the British gave it to
us and we kept it all those years.

But we did not try to abolish Section 3 of the
Uniform Commercial Code. We did not even try to attack
the doctrine, per se. What we did was to make it
illegal for a seller to participate in a typical
consumer credit transaction unless the instrument
includes a specified notice that any holder is subject
to all the claims and defenses the debtor could assert
against the seller. Just for consumer transactions, not
for commercial paper.

Now, I've got to tell you that that was one of
the most controversial rules of all time. If you want
to talk about opposition. Not only was the credit
industry, as it existed at the time, opposing it, but
more importantly, and I remember this specifically,
because Lou Engman was my then Chairman, the Chairman of
the Federal Reserve, the Chairman of the Fed, whose name
was Byrnes, his real name was Bernstein, but he
regularly denied it --
(Laughter.)

MS. BERNSTEIN: -- when I reminded him of it occasionally. He came over and said to Lou Engman, you must not promulgate this rule. You must not promulgate it, it will bring down the credit market as we know it. Well, Lou Engman signed it and it went into effect. It had a tremendous effect, a tremendous beneficial effect of cutting through fraud throughout the country.

So, why didn't you pick that one? I don't know.

(Laughter.)

MS. BERNSTEIN: Similarly, I will make one more point, because I know I'm running out of time. Bill MacLeod's excellent and useful chart that he included identified several '70s vintage rules which were adopted and implemented, and also addressed consumer issues very equally effective. I'll only mention two, the Octane Rule, which was a disclosure rule, and my all-time favorite, the Care Labeling Rule, which generations of Americans applaud to this day.

So, each one of them achieved very high levels of compliance, saving resources. Now, I ask you, how would you compare that to the problems that the Commission and Americans faced in trying to deal with those one at a time, with the very short resource assessments that we had at the time? What I've tried to
do, briefly, is for the benefit of those who were not here in the early '70s, is rebalance, perhaps, the contributions of the Commission during the '70s that were not all focused on Kid-Vid, and were major, I believe, contributions to consumer welfare in the United States. Thank you.

(Applause.)

MR. PEELER: Thank you for those excellent remarks. We will definitely change the name of the panel to four rules. And I would say that all of these papers have been posted on our website. The people who have read them have all said they are excellent papers. If you're practicing consumer protection law or working in the Bureau of Consumer Protection, you really should read these papers.

So, with the time remaining today, I think I would like to ask the panel to comment on sort of the findings of the research that was done. There is a tendency, I think, to look at these three rules or these four rules as separate happenings that represent sort of a discontinuous policy development at the Agency. The research really shows that there is a continuous policy development at the Agency, and probably the best example is at the time the Kid-Vid Rule is finally closed up and the boxes are being packed, the Commission's fraud
program, which leads to the development of the TSR, which leads to the development of the Do Not Call Rule, is being launched.

So, from what you've learned, what are the one or two things that you would tell a new attorney who is coming to the FTC or a new Commissioner who is at the FTC they should draw from this experience over the last 40 years? Teresa, do you want to start?

MS. SCHWARTZ: Well, knowing your history and learning the lessons, I suppose, from the past is a good place to start. And many people have told me when they first come to the Commission, what they do hear about, but kind of vaguely, are some of these rules we've been talking about.

And I suppose one lesson would be to go back and take a look at those, because I think the Commission has learned from these experiences, sometimes, in fact, in fairly dramatic form, the Cigarette Rule and the Advertising Rule, of course, were rules, and you couldn't enjoy the slow evolution that you might through case law development. They were big and visible, with a very broad impact. So, doctrines were put to the test in a very visible way, but learn your history. That's one lesson.

MR. PEELER: Bill?
MR. MacLEOD: Well, I think the first lesson is when Lee tells you what he wants done, tell Lee he's right, and the research will confirm that he's right as soon as you come back with it.

I think the lesson from these rules, and the lesson for any Federal Trade Commission aspiring employee is that limits what? As I said at the outset, the question facing us in the early 1980s was limits versus no limits. What did these rules give us? If we had not had the Cigarette Rule, would we have had Kid-Vid? If we had not had Kid-Vid, would we have an unfairness policy statement. If we did not have an unfairness policy statement, would we have a deception statement?

Remember what Judy Wilkenfeld said was her assignment when she had to analyze the Children's Rule-making record, will it hold up on appeal? That is where the limits will cut at the Federal Trade Commission, and if you are not ready at the beginning of a rule-making or the beginning of an investigation of a case, to confront those limits, then sooner or later, you may have a very unpleasant experience.

MR. PEELER: Sid?

MR. MILKIS: You want me to give advice to attorneys? That's a delicious opportunity. I decided
not to go to law school after my first prelaw meeting.
I would echo a bit what Teresa says about history, and
I particularly like the primordial history that we heard
about this morning. You know, Bill was putting down
those statutes, the horseman, you know, the guy holding
the horse back. I love those statutes.

You know, when you look at them, the imagery is
kind of like the Soviet Union. You know, you think
of -- it invokes some kind of Soviet control and these
pictures you're getting and the red flag of the market.
But what's fascinating is the Federal Trade Commission
is given this power to regulate the market in the United
States and to do so in a way that avoids socialism.
That was a big issue during the Progressive Era.
Remember, McKinley was shot by an anarchist, and I think
you recognize that you are at a Commission that has a
sweeping responsibility to protect against unfair and
deceptive business practices.

But you must do it in such a way that you
respect the deep-routed commitment to privacy and
individual responsibility in the United States. That is
a hell of a balance to strike, but I think every
attorney who walks into this building has to consider
that kind of a mandate.

MR. PEELER: Jodie?
MS. BERNSTEIN: In this instance, I agree with your comments particularly, Sid, and I guess for new attorneys coming to the Commission, certainly all of the past could be highly relevant to what they do. But I would urge them to continue to look to see what are the most serious issues facing American consumers and bring in their own creativity and their own innovation, and making sure that those new thoughts, even though you're a new attorney, are considered and raised, because I think that's been one of the great contributions of the FTC; that is, the innovative approaches depending on what's going on in the economy and what is most troublesome to consumers.

MR. PEELER: And Orson?

COMMISSIONER SWINDLE: You know, in talking to young people who are getting in this business, one of the first things I would suggest that they understand that wisdom is a combined product of intellect and experience, and experience is a great teacher and without it we continue to make the same mistakes over and over. So, I would say, obviously, the history aspects of this place is something to certainly be aware of.

Understand, as Jodie asked the question, yes, you do take on the sacred cows. I've done that all my
life and I swear to God it just really has made it interesting, and there's been a couple of setbacks along the way, but taking on sacred cows, that's my forte and I totally believe we should do that. But wisdom tells you to pick and choose carefully, because you've only got so much in the way of resources to do it and you can only survive the bullet a couple of times.

Know the legal basis for the actions that you're about to try to take, and then lastly, I think if I had to offer one thought to what this Agency has managed to accomplish with the bumps and obstacles in the road, it would lead us to the day to think in terms of empowering the citizens of this country.

The Do Not Call Registry was nothing more than empowering consumers to make a choice. And they loved it. And they made the choice. The consumers will make pretty darn good choices if given adequate information, and this whole process has been to get information out. The harmful things that we can eat, the harmful things we can do, the lousy cars, the lousy furniture, as Jodie mentioned, if consumers know this, they'll make a choice, if they're given an option to make a choice, and I think empowering consumers is all about giving consumers a choice.

However, I will say that I want it to be real to

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get back to what Sid just referred to as the Soviet Union, I'm not all that charmed with the Soviet Union. I've been there, I thought it sucked and it did. So, we want to give power to consumers that's real, not the promises of the Soviet Union to its people to give them people power, because that didn't exist.

MR. PEELER: Thank you. And I think we have about five minutes left, so I was going to see if there were any questions from the audience for the panel. Otherwise, I'm going to keep going.

(No response.)

MR. PEELER: Okay, I'm going to go back for another round. Starting with Jodie and Orson. Jodie, when you were preparing for this, Orson said that when you and he were both here, you were sort of the Annie Oakley and he was sort of the John Wayne --

(Laughter.)

MR. PEELER: -- of enforcement, and I'm wondering if you would both -- and I think Orson hinted at it in his remarks, but the relationship between the FTC's ongoing day-to-day enforcement program and major initiatives like this that seem to take up a lot of the history books, but the ongoing day-to-day enforcement takes up most of the Bureau of Consumer Protection's time. Your thoughts on the relationship.
MS. BERNSTEIN: The relationship between Annie Oakley and John Wayne?

COMMISSIONER SWINDLE: I want to hear that one.

MS. BERNSTEIN: I think I could shoot you dead, if I had to. If I had to.

The relationship between law enforcement and --

MR. PEELER: And the rules.

MS. BERNSTEIN: Oh, and the rules. And the rules.

MR. PEELER: I'm not just trying to get back for the holder.

MS. BERNSTEIN: I think you just loaded this question for me.

Well, I think my view would be, going back to when I was actually the Bureau Director, was that if there is any sort of sense of being able to use all of the authorities, the rule-making authorities, the law enforcement authorities, and any of the others, such as the consumer education that has been developed as one of the ways in which to inform consumers that it is neither of those two, I think I felt that we were very fortunate to have that number of options available to us, and the Commission still has that and uses it very effectively. So, it's something of a mix, because the Commission never has excessive resources, still doesn't, given this
huge broad mandate that it has over the entire economy.

So, I think it's kind of a mixture and the use
of rule-making at least in those early days, it seemed
to me, and it seemed to us then, was one of the most
effective ways of dealing with these broad, very broad
issues. But that was at a time when other techniques of
law enforcement had not yet been developed, not only
Section 13B, but joining cases together, the sweeps and
so forth.

So, that's my view of it. It's still a mixture
and I think it depends on what particular issues are
being faced at a particular time.

MR. PEELER: Commissioner Swindle?

COMMISSIONER SWINDLE: Jodie probably used
resources as well as anybody I've ever seen, given the
task that we've had before us, we still have them. And
I thought when you look at all of the things that the
FTC could do to all of the people who are doing things
they shouldn't do, there's no way. So, you can't pursue
each one of them, and you have to really invest in
educating people. And I think at least from my
experience since I've been here, and not knowing a hell
of a lot about the past before, but the consumer
education aspect of this may be the most important thing
we do.
I think we've brought in having workshops and
that's a little bit slightly different venue from where
Jodie was or where we are today, but we have people who
are working on trying to enlighten people, and that goes
back to what I said awhile ago. Empowering people helps
prevent a lot of things we might be tasked to go after
and that gives us a little more time to spend on other
things. And as far as the special events, if you will,
of the Do Not Call Registry, we invested an awful lot of
time on that, but from the standpoint of the paper
passing through my office, I didn't know the diminishing
of any cases being brought forth.

So, I think the Commission under Bob Pitofsky
was a remarkable place; I think it was remarkable under
Tim Muris. We did a lot of things, and I think my
impression is probably totally supported by the fact
that this Agency, from my observation, and I hear it
from people and friends all over the country that don't
know a hell of a lot about the FTC, but they know this
is a good Agency that does good things for consumers and
they appreciate it, and that was not always the case and
I think that's a tribute to those who were there when
that wasn't the case, who tried to bring it along and do
some daring things. And we saw the mistakes, we learned
from them, and look at the Agency today, you all should
be commended for what you have done.

MS. BERNSTEIN: Lee, could I add one thing? Bill Kovacic mentioned this morning something that I thought was very important, and that was transparency in the Agency. And I think both Chairman Pitofsky and Chairman Muris both focused on that.

I can think of very few things that are more important to the credibility of a government agency than its willingness to make its thoughts and decisions and so forth as public as is possible. I know confidentiality, of course, is an important issue, but it really does enhance the credibility of government generally and of this Agency.

MR. PEELER: And speaking of Chairman Pitofsky, I know he would be disappointed to know that there are three clocks in this room, and I think they all show different times, but I believe that we have two minutes left, and on the point that Jodie raised on transparency, Teresa Schwartz's paper talks about how the process used in the rule-makings may have affected their outcomes. Teresa, could you comment briefly on that?

MS. SCHWARTZ: Well, I speculated on the difference between Kid-Vid and Do Not Call Registry provision in terms of how the Commission laid a
foundation for the Rule. And in the current practice, especially under Jodie Bernstein, the use of workshops, public forums, getting the industry in, getting the experts in, and having a roundtable discussion with people who really thrash out the problems, starts you off with a foundation of understanding, I think is very, very helpful then in the crafting of the proposed rule and then the ruling in itself. And that was missing from Kid-Vid. There was study, there was research and so forth, but you never had this kind of a get-together in advance of starting down that path. And I kind of speculated as to whether that would have made a difference in Kid-Vid, who knows, but it might have.

MR. PEELER: Bill?

MR. MacLEOD: I think that's actually a nice combination of your last two questions, because I think between cases and rules, I think the transparency issue is the most important one. Cal Collier mentioned to me a little bit earlier here today that you can look at another very important Commission doctrine which popped right out of consent agreement, which the world did not know about it until they saw it and that was the Substantiation Doctrine in the Pfizer Agreement.

Now, the Substantiation Doctrine has been given plenty of vetting since that time, but when the
Commission is articulating and possibly even making new
and broad policies, the appropriate forum for that is
something like the workshops, if not rule-making, so
industry and all affected parties can have a chance to
weigh in.

When you are enforcing a very clear and very
well settled area of the law, then go ahead and sue.

MR. PEELER: Last word, Sid?
MR. MILKIS: I get the last word?
MR. PEELER: Last word.
MR. MILKIS: What a responsibility. I love the
workshop idea and I enjoyed reading the transcripts and
one of the interesting things about it is how
telemarketers themselves would disagree with one
another, which kind of cracked open the possibility to
take on a very powerful industry.

In terms of transparency, I just want to say
briefly that the politics of the Commission are
fascinating, and indeed the policies of the Do Not Call
Registry were fascinating. It wasn't automatic that the
Congress was going to go for this. It took some very
sophisticated statement crafting on the part of Tim
Muris to get this report and also the way he cultivated
public opinion. It wasn't a given that the public would
buy onto this as enthusiastically as he did, and I just
love the fact when Tim announced this on the McNeal --
it's not McNeal Lehrer anymore -- I'm dating myself --
but anyway the Lehrer report, that there was no
coincidence that the Do Not Call Registry began at 6:00,
6:00 p.m., the dinner hour. That kind of sophisticated
politicking is important not just for members of Congress
but also members of the Commission who take on the kind
of policy issues that the Federal Trade Commission takes
on.

MR. PEELER: With that, I'm over on all the
clocks, Judy. I want to thank the panel for their
wonderful work and also offer the three writers the
opportunity to add the fourth rule.

(Applause.)

MS. BAILEY: Just two quick items. Some of you
have heard all the mention about papers. Some of them
are already up on our website and after further
refinement, reflection and a little more amendment, they
are all going to be published in a few months in the
Antitrust Law Journal. So, you have that to look
forward to to get this all collected.

The other point is lunch. We have a panel, a
lunch presentation starting in 15 minutes with three
former Chairmen of the FTC and I think that will be a
real stellar event. And there are lunches available for
those of you who pre-ordered. The way we were set up, we were only, unfortunately, able to get people to sign up and pay and they're available, they're all identified. I am so sorry that we are unable to provide extra lunches for people who either couldn't get it together or didn't know about it. There is a deli in this building out G Street for those people wanting to grab a quick bite. So, we'll see you all back at 12:45 to hear Chairman Muris, Pitofsky and Collier.

(Whereupon, at 12:35 p.m., a lunch recess was taken.)