This transcript has been lightly edited for clarity

AFTERNOON SESSION

(Resumed at 12:45 p.m.)

LUNCH PROGRAM: "A CONVERSATION WITH TIM MURIS AND BOB PITOFSKY."

SPEAKERS: ROBERT PITOFSKY
TIMOTHY J. MURIS

MODERATOR: CALVIN J. COLLIERS

MR. COLLIERS: My name is Cal Collier. I think I'll stand up here just in order to launch the next part of the program, and then we'll be seated, and many of you unfortunately may have to look at our likenesses on the screen, but I know that would be fortunate in my case.

It is a great pleasure personally to be able to moderate this panel and absolutely delightful to be among so many old friends. We gather, as several have noted, to look both backward and forward at the Commission's work. We do this at a time, I think, when the stature of the Agency has never been higher and when its achievements, on behalf of consumers, has never been greater.
Surprise, surprise, we have with us, for this program, the two principal architects of these achievements. My task will be an easy one. I'll ask just a few questions to stimulate responses, and they'll be on a broad range of issues, and then I'll let Tim and Bob share with us their thoughts on their own and each others' remarkable achievements.

I'll start with this question. Bob, one of the initiatives during your chairmanship was the revival of the use of the public hearings to eliminate wrongful business practices, identify consumer and competitive issues, and explore appropriate regulatory approaches and responses.

Can you share with us your thoughts on this approach? How productive were these hearings, and when do you think their use makes the most sense?

MR. PITOFSKY: I thought the idea of hearings was "back to basics." I knew that President Wilson and his advisor, later to be Justice Brandeis, were not just interested in creating another enforcement agency. They had in mind an agency with broad fact finding authority that would conduct hearings and seminars and discussion groups, look at trends in the economy and report to the public and to Congress. I mean, that role is in the enabling statute.
In the 1920s and 1930s, the FTC did some excellent work in that direction, but then somehow through the decades, that approach got lost, and I thought we ought to restore it.

I asked people what they thought the first set of hearings ought to be about, and it was virtually unanimous: with respect to antitrust, it should be the globalization of competition with respect to consumer protection, it was the growing importance to consumers of the Internet as a new marketplace.

Did the hearing lead to real changes? I believe so. On the antitrust side, it led rather directly to negotiations with the Department of Justice to incorporate an efficiency defense in the horizontal merger guidelines. As Academics, Tim and I had both written on that subject before we came to the Commission, and I had never understood why there wasn't a stronger efficiency defense in the merger guidelines.

On the consumer side, it really focused our attention on the Internet, which I thought at the time was virtually a free fire zone. People selling products on the Internet didn't think anybody was watching. As a result, some of the most outrageous frauds I've ever seen were occurring in those early years on the Internet.

That's how we got started. Tim carried on in
that tradition. I think it is something that the Agency has a comparative advantage in and ought to be continued.

MR. COLLIER: Tim, what are your views on this subject because your Commission also used these tools?

MR. MURIS: Incidentally, it's great to be back here. Time moves in a funny way. It seems like a long time ago that I was here, and it's only been about five weeks.

You're going to hear a lot of agreement and a lot of praise, and I don't know how many times I'm going to say this was one of Bob's best initiatives, but this was one of Bob's best initiatives. It put on the map again a major function of the Commission.

We had two sets of hearings. One was suggested by Bob to me, and that was the intellectual property, and we also did the health care hearings. In both of those, Susan DeSanti and her people, and David Hyman with Susan DeSanti and her people in the health care one, just did a spectacular job.

Besides these excellent reports, you have 5-6,000 pages of transcripts on the public record, which is just a wonderful resource. Just as did the global hearings, they have an effect around Washington in the policy community of influencing the debate. It's an excellent role for the Commission.
The Commission is obviously more than an enforcement agency. It's an enforcement agency, of course, and most, in terms of resources, of what the Commission does -- this is probably the first time in five weeks I have managed to not say we -- most of what the Commission does in terms of resources is enforcement, but the other work can be more important, and it's certainly just as important.

MR. COLLIER: One area where public attention and I think some hearings were held in a the broad sense is the health care area. Perhaps more importantly in both of your chairmanships, the health care area had significant attention, as it should, and the approaches to addressing some of the issues was not limited to the traditional litigation techniques.

I thought it would be interesting to hear from both of you on the variety of tools and how they may have been employed in the health care area and why you felt that those were appropriate so that it's not just bringing a case or, at the other end of the spectrum, employ a very resource consumptive rule-making.

MR. PITOFSKY: Well, we -- I still say we you notice.

(Laughter.)

MR. PITOFSKY: The Commission, when I was there,
did make a priority out of health care, rightly so. Tim
did even more in that direction and deserves enormous
credit for doing that.

We brought some cases. First of all, I immediately
think of cigarettes when I think of health care, and I
thought the decision to challenge the Joe Camel tobacco
ads was a health care initiative. We brought other cases
as well.

Beyond that, Jodie and her group were very
energetic in consumer and business education, in trying
to facilitate self-regulation and also in initiating
guidelines. We followed up Janet Steiger's initiative
in weight control guidelines. We put out, not
guidelines, but a book of rules about dietary
supplements, which I thought was quite successful.
Christine Varney and Sheila Anthony were people who were
really pushing in that dietary supplement area.

So it was a combination of cases, consumer
education, business cooperation and guidelines that we
tried to put together in the health care area.

MR. MURIS: I think the health care area really
illustrates the use of the Commission's many tools. One
of the reasons to use those tools is if you're going to
be a competition policy agency -- and when I say that, I
include the consumer issues as well, because to me
they're two sides of the same coin -- you need to
understand that the economy obviously is regulated,
and that you can't directly deal with it through
cases. In health care that's true in spades.

A specific example of the many tools and the
Commission's many positive impacts is the pharmaceutical
area. If you just look across the board, it's what Bill
Kovacic dubbed as hitting for the regulatory cycle with
all that the Commission has done.

First, there are lots of cases. Bob started
the cases involving the agreements between the generics
and the brands not to compete. We finished the Schering
case and got it into the 11th Circuit where it now is,
and we extended the pharmaceutical case area to include
branded firms manipulating the system to keep out generics
in a way we thought wasn't protected under Noerr-Pennington.

As Bob was going out the door, he started a major
6B study which had tremendous impacts. The President of
the United States Cited that study in a Rose Garden ceremony.
The FDA adopted the principal recommendation. Congress
passed legislation. We also filed Amicus briefs that had
a very positive impact in the development of the law
involving the branded and the generic area.

Further, we did Congressional testimony. We did
hearings. We did the health care report. The
pharmaceutical area alone, and the health care area
more generally, show the tremendous use of the Commission's
many tools. I agree, as Bob said, that this represents
an institutional advantage of the modern Commission.

MR. COLLIER: I can't resist asking the
perennial question of two people who have contributed so
much to the Agency, which is the question that was
touched on earlier in one of the panels: What's the
value, what's the public value in having the consumer
protection responsibilities in the same agency as the
competition responsibilities?

This is to both of you, and there's been some
discussion on it over and over and over again, and I
would love to get your perspectives on it.

MR. PITOPSKY: They're not natural partners, and
yet the more you're at the FTC, the more you see the
virtues of putting these two enforcement initiatives
together.

On the consumer protection side, if the people
who are bringing cases or initiating rules don't
understand the market and market forces, consumer
protection tends to become protectionist, and it seems
to me that the antitrust lawyers and the economists in
the Bureau of Economics, who understand the market, can
be of great value in leading consumer protection in
the direction of a more sensible approach.

One of the reasons why the Commission adapted what I think were rather unwise, fictitious pricing rules -- rules that said you have to do a survey before you can say "lowest prices in town," you can't make a claim of a sale unless you have maintained a higher price for 60 days or 90 days, is a failure to understand how markets work. Many fictitious pricing rules really amount to a challenge to discounters, and the discounters can be, in many circumstances, friends of consumers.

On the antitrust side, now here we may find there is a little space between Tim and me. I don't think antitrust is just economics. I think antitrust is more than that. It's not supply curves and demand curves, and being in an Agency in which people think about consumer welfare not in solely economic terms, I think softens the edges of some antitrust initiatives.

Putting the two disciplines together and having a group of economists addressing questions on each side of the FTC, it seems to me makes each side of the agency a more sensible place for enforcement.

MR. MURIS: As the only person ever to head both enforcement bureaus, although not at the same time fortunately, it is a winning and complementary combination.

Bob started from the antitrust side. Let me start
from the consumer side. The fact that the focus is on consumers is extremely important. When you view the history of antitrust -- it's not true anymore -- but too often the history was of protecting competitors and not protecting consumers.

Another benefit from the consumer side that runs to the antitrust side has been the focus on institutions. On the consumer side, the Commission has done excellent work on the focus of the institutional role of advertising. I agree completely with Bob on the benefits of the antitrust side with its focus on markets as a check on some of the more egregious and aggressive consumer protection efforts.

Tonight will be interesting. I invited Dick Posner to revisit his 35 year old call to abolish the FTC. Maybe he'll think that at least half of it should survive. I don't know. It will be interesting to see.

MR. COLLIER: One of the areas that has engaged the Commission and involves typically, when it arises, a fair amount of public interest and media attention is in connection with advertising of violent entertainment products or alcoholic beverages, and in both of your administrations, you dealt with those issues under quite a spotlight.

Bob, why don't you comment, if you would, on how
those inquiries were stimulated and your evaluation of
the benefits that came out of them.

MR. PITOSKY: The examination of ratings on
movies, video games and music was very, unusual.
The precipitating event was the massacre in Columbine in
which some people thought that the young, misguided people
who ran around shooting everybody in sight were influenced
by violent entertainment materials.

I received a phone call, believe me very rare, from
the White House asking, would the Commission be willing to
examine the rating systems in those three industries and
issue a report. I checked with my colleagues. Everybody
was enthusiastic about it, and we started that project.

It was tricky because I said from the very
beginning, the Federal Trade Commission should not be
the thought police, and I have no objection to a parent
saying to a 14 year old -- it would be good for you to see
Saving Private Ryan or even Jaws.

On the other hand, I didn't think that Hollywood
was acting properly in rating these materials as R and
then conducting focus groups with 12-year-olds to figure
out how best to convince them through advertising to sneak
into the movie theater.

I hadn't played a video game in my entire life until
this project started. I played a video game, and I was
astonished at the violence I was inflicting on these pop-up figures in the games. Music also had serious problems. Not the executives but the performers tend to be rebels, and there is a lot of violence in contemporary music.

We conducted a study. We issued our report. As you know, we found all three segments wanting in the way they were rating games, and then there was a follow-on report and I think still another follow-on report.

My impression is that things are better, especially in movies. I think they were the most responsive in working to improve their rating system. In clarifying their rating system, getting tougher about ratings, giving parents more information about what a rating meant, I thought they did a first rate job. Many in Congress think that the music group has not responded in the way the other two have. I haven't examined that issue very closely.

On alcohol, first of all, you've got to give credit to Janet Steiger. She is the one who started paying attention at the Commission to alcohol advertising in college newspapers, high school newspapers, that sort of thing.

There, too, it was initiated outside the Commission by a committee of Congress. We brought some
cases. We brought a couple of cases on an unfairness theory. We issued a report, which I think was useful. I do not believe that, generally speaking, alcohol advertising is out of control. I think sellers are cautious about the way they advertise that product, but there were a few exceptions, and we challenged companies on those exceptions.

MR. MURIS: I have a somewhat different experience with violent video games. Given my two teenage boys, when one of my attorney advisors learned that I was about to attend a meeting with critics of these games, he said, "If they ask you to play, don't do well."

In part because of my two teenage boys, I became fascinated and depressed by Columbine, and I thought what Bob did there was another one of his most spectacular initiatives. In the '90s, the biggest thing in my life was my boys. I was a single parent, and I managed seriously boys' baseball for the whole decade, and by the time of Columbine it was all teenage boys, my boys having grown up. An issue with Columbine is that culture matters. It has to matter, and I thought what the industries were doing was wrong. The Commission helped clean it up, but the music industry has not advanced. I know Orson is probably here somewhere, and he feels
very strongly about that. The Commission, by keeping
the pressure on, has been helpful.

A problem with Columbine, however, is Columbine
is the high school to which everybody wants to send their
kids. Harris and Klebold do not follow any patterns. The
one kid, I confuse their names, to me it's Rosenkratz
and Gildenstern, but the one kid, he had a job, he had a
girlfriend, he was getting into a good college, he appeared
to be everything you would hope a kid would be.

He had a stable home life, but he was a
follower, and the other kid, who I think was just evil,
was a leader, and they had reacted to the culture in a
way where they didn't understand the irony in something
like the movie Basketball Diaries. Although I do think
the initiative was very positive initiative, I don't
know, in the grand scheme of things, what the impact will
be on future Columbines.

With alcohol, you can also see the FTC's impact.
When we released the second report, a follow-up report
to what Bob had done, the industry announced moving to a
much tougher standard on placement of advertising. They
moved to a where the adult population had to be 70 percent.

These reports are another example of where the
Commission has a very positive impact beyond its law
enforcement responsibilities.
MR. COLLIER: Which kind of brings to my mind anyway something that's been mentioned in several of the panels here, which is the Commission's work over the decades on consumer fraud. Tim, when you were Bureau Director at the Commission, you emphasized the importance of an effective anti-fraud law enforcement program.

Why don't you share what you're thinking was and why you felt that was an important initiative for the Commission, given the tools that the Commission has. And comment a little bit about some of the approaches that you took to make it effective.

MR. MURIS: When we came here with Jim Miller in October, 1981 in some ways it was an opportunity to start over. The effort, of which kid-vid was the most notorious, to do rules to rewrite the economy had failed and failed spectacularly.

I went back to Bob's first foray into the FTC which was the ABA report. The ABA report had focused on fraud, and there's an interesting article in the latest Antitrust Magazine about the origins of the fraud program in my office. One of the things I did was to abolish the Office of Policy Planning so I could take back the Bureau Director's office because Bob Reich talked Al Kramer out of it.
Space and furniture have a lot to do with bureaucracy! Anyway, we were back in the corner office and Dave Fix came in: he knew I wanted to do fraud cases, and he had a way to do them. I don't know if Dave's here, but it was an important moment in the Commission's history.

Somebody has analogized that, we were sort of like the Wright Brothers in those days. We were at a very early stage, and when I came back in 2001, under Bob and Jodie, they had really perfected going after fraud. It was like flying the corporate jet.

As you all know I'm a big fan of Jodie's: Jodie had, with her corporate background, established strategic and operational planning. They had also set up a this complaint system in Consumer Sentinel, and it took me awhile to challenge the staff to say, "don't be too self-satisfied here. The challenge in this decade is to improve as much as you improved in the '90s."

We all got on the same page and began to do several very useful things. We increased criminal enforcement. We redesigned Sentinel, which Do Not Call essentially was about to break. The cross-border fraud area, which had begun to be an important issue in the Pitofsky era, really has exploded. We're very close I hope -- I'm going to owe Anna Davis a lunch, she says it's a dinner -- but the Commission has got new legislation through the Senate, and
I hope it gets through the House. Fraud is theft, and it's an important role for the Commission.

The Commission is the leader in going after fraud. A lot of people can take great pride in the success the Commission has had, but there is a lot more to do.

MR. COLLIER: Bob, Tim's commented on your fraud program. Would you like to say anything about it?

MR. PITOFSKY: Well, I agree with every word Tim said, but let me address this question in a slightly different way. If there is a single area of Commission responsibility that one would single out as having changed the most between 1970 and 2004, it would be the fraud program.

When I first came to the FTC as a Bureau Director in 1970, all the emphasis was on national advertising fraud because companies just didn't think that there was anybody watching what they were doing and saying in ads.

One evening in 1970, the Chairman, the General Counsel and I, over dinner, sat in front of three television sets, and we only watched the ads. In that single evening, we came up with four ads worth investigating. There was an ad in which a company claimed that if a driver used their gasoline, his car could pull a locomotive up a hill.
There was another ad, in which there were two side-by-side panels of roaches. The advertiser arranged to spray one panel of roaches with a competitive product and then the other panel of roaches with its product. On the one side, all the roaches thrived. They grew big, fat and sassy. On the other panel, they all died. Later, we discovered that the advertiser had used a competitive product in when they knew that the special brand of roaches that they had selected, the German roach, was immune to their competitor's product.

That was then. When we came back in 1995, what we found was that national advertising, as a result of the most effective self-regulation that I've ever encountered, was really under control. We brought only a few national advertising cases in seven years.

On the other hand, Internet fraud was where the action was, and that's where the most outrageous deceptions and frauds were occurring, and therefore, we changed our priorities, and I think in less than four years, Jodie and her colleagues brought 100 Internet cases, the internet sellers also thought no one was watching, and therefore they could get away with saying virtually anything.

So the fraud program, as I started out saying, has changed radically over the 30 or 35 years.
MR. COLLIER: Tim, perhaps you would like to comment on the challenges that the new technologies posed. Bob just alluded to them, obviously the whole explosion of the Internet, the ability to manage and manipulate huge amounts of data, the very low entry costs for an advertiser, which is quite unlike the entry cost that businesses faced in the 1950s when they had to buy a minute of network time.

All of those things compounded misconduct and turned loose a whole bunch of Commission targets and challenges. I would like your comment on how you saw it and what occurred during your administration.

MR. MURIS: Let me extract away from privacy, where this was obviously a very big issue, because I think we're probably going to talk about privacy a little later. You can see it with just the proliferation of issues over the Internet that Bob mentioned, and the Commission had already begun with those global hearings in '95.

The whole issue of spam, it's another area where the Commission uses its multiple tools. We had in this room a three-day spam workshop where, to speak of Orson again, Orson had to break up a fight. The problems of spam have led the Commission to issue reports. There have been over 60 cases against spam. The Commission has also
done a lot in educating. There is a lot of street mythology about spam that the Commission has talked about. As the technology proliferates, and as the fraudsters, and spam is one of their favorite tools, use the Internet, the Commission has tried to keep pace. The Commission has actually educated a lot of people, not just in the United States, but around the world about how to detect and go after fraud.

Again, fraud is theft, and there will always be this arms race between the fraudsters and the enforcers, and it will continue. It will always be an important role for the Commission.

MR. COLLIER: Tim, implied that, the growth of these communications technologies raised a lot of public concern about privacy and the extent to which these technologies could invade personal privacy. Lots of folks turned to the FTC and asked the Commission to address that problem. That occurred initially during your administration and continued in Tim's administration.

I would like your comment on what you faced and how you dealt with it.

MR. PITOFSKY: The issue in the privacy area is not whether or not there are things going on that are inappropriate. I resent, and I think most people resent, being asked a series of questions in connection

For The Record, Inc.
Waldorf, Maryland
(301)870-8025
with some business transaction, for example, buying a
sweater on the Internet, and then the information is
accumulated and sold to somebody else without your
permission. It's also true that most agree, notice,
consent, access, and security are what you're entitled to
in terms of privacy.

The issue is, what's the best way to deal
with that, and I originally felt, and the majority of
the Commission felt, that self-regulation was the better
way. We issued a report and then another report in which
we found very disappointing results in terms of industry
self-regulation.

I still would prefer that it be done by
self-regulators. I think self-regulation is often more
flexible, more insightful about business realities and
so forth, but eventually under the influence of
Christine Varney first and then Sheila Anthony, we came
around to the view that, self-regulation wasn't working
because there's no law that that kind of behavior violates,
and therefore the self-regulators can't say: if you don't
stop it, we're going to send our recommendation to the
Federal Trade Commission or to somebody else to enforce
the law.

Therefore, in a very close vote, we finally came
around to the view that Congress ought to act in this area.
We never took a position on opt-in opt-out because that's the most controversial issue, but we did think that mandatory notice to consumers ought to be required by the law, but Congress has not acted.

I'll let Tim describe his approach which was aggressive law enforcement rather than legislation, and my impression is that the situation is better, but there are still problems in that area.

MR. MURIS: Well, this is one of the areas where I owe Bob probably one of my greatest debts. On the other hand, it's one of the few areas where we went in a different direction, as Bob was alluding to.

I owe him the debt because during my confirmation hearings, this was what most people wanted to talk about on the Hill. They wanted to talk about, whether I supported notice and choice legislation. They would ask, "Do you support privacy?" but they meant this legislation. I thought that was a very odd way to talk about privacy, but I didn't know a lot about it then.

So in the summer of 2001, Howard Beales and I, with the staff and a lot of outsiders, headed an extensive education process where we took the Commission in a different direction. I know Orson and Tom hadn't completely agreed with Bob or each other; they both had somewhat different positions from each other on the notice
The direction we took it in was to say, "Let's focus on the harms of the misuse of information." The harms of misuse of information, the most common and serious one for most people is identity theft, which the Commission had started to get involved with. Also a serious harm, in the aggregate, was the daily interruption of our lives from the phone calls and from the spam. That discussion in the summer of 2001 led to the Do Not Call Rule, so in that sense, I'm very grateful for Bob for having put privacy on the agenda.

It also led to some very important other Commission initiatives, not as well known, particularly in the security area. Consumers tell you, "We are concerned about privacy on the Internet." When we parse that out, what they overwhelmingly seem to mean, and there was some good data on this, is, "We're concerned about putting our credit card information in cyberspace because of the security concern."

So we brought several cases where people made promises of security and did not keep it. We looked for a good case to pursue on an unfairness basis, and one such case now exists, but I think it's still not public, so I should keep my mouth shut. I think focus on harm is a more sensible model for both consumers and business.
than the notice and choice model.

I'll close with my favorite example -- what I call the miracle of instant credit. You can walk in -- you guys have heard this, therefore you're probably yawning out there -- you could walk into a car dealership and borrow $10,000 from a complete stranger in an hour if you've got good credit. That couldn't happen if you could control your information. If you were a bad credit risk, if you could prevent that information from being shared, the credit system, as we know it, would collapse.

Notice and choice is good in theory, but most people aren't willing to exercise the choice because the costs, even though they're trivial in many instances, are not worth the benefits. Thus I thought the Gramm-Leach-Bliley provision that required a security rule was superb, but it had the provision that required all those notices that you get I called the largest junk mail in history. Quoting an Earl Long line, which I first heard from Mayo Thompson at the FTC: "It was as worthwhile to most Americans as socks on a rooster."

MR. COLLIER: One of the areas that was active under both of your tenures was the scope of the unfairness jurisdiction. Bob, how did the Commission use the unfairness jurisdiction when you were Chairman, and
probably more importantly, how important do you think it is in connection with the Agency's authority?

MR. PITOFSKY: I think it's important on the consumer side. Let me start with antitrust. I think I'm right that we didn't bring a single antitrust case during my seven years based on unfairness.

The only role of unfairness is filling the gaps that Congress unintentionally left in statutes like the Robinson-Patman Act. But if you're not going to enforce the Robinson-Patman Act, you don't have to fill in the gaps.

On the consumer side, I think that's different. First of all, I would say you use it very cautiously. On the other hand, there are matters that exploit vulnerable consumers that are not fairly characterized as deceptive or misleading. The leading example by far in my years was the Joe Camel campaign. There was nothing deceptive about that.

On the other hand, the matter never went to trial, but I think the evidence was fairly clear that the campaign was designed to influence young people toward the Reynolds brands of cigarettes or towards Camels. You couldn't get at it under deception.

There are other examples of unfairness jurisdiction like cramming -- putting charges on
complicated bills that you would never think people
would notice, but not many.

On the other hand, you want uniforms to be
available because some fairly raw types of exploitation
of consumers can occur in a way that's carefully designed
to avoid deception.

MR. COLLIER: Tim, would you like to comment on
unfairness and maybe a little bit also on the
evolution of the approach the Commission has taken to it.

MR. MURIS: Sure. This is an area where I'm
probably somewhat to Bob's left in the sense of being
somewhat more comfortable using unfairness for the
following reasons.

Unfairness has evolved. Speaking of Dick Posner,
he wrote the Cigarette Rule unfairness standard, which
when it got picked up in the S&H case was the most
catastrophic victory the Commission ever had in its
history because it convinced people that the Commission
could stop industry practices based on some vague public
policy notion.

That idea has been written out of unfairness. It
was clearly written out in the statute. Now it's a rigorous
benefit cost test, and that is a more flexible than on
occasion trying to torture the deception standard, so I
think it has its uses.
I agree with Bob. I think both of us are extremely leery of using the FTC Act in the antitrust side beyond the Sherman and Clayton Acts, but in consumer protection it can have a positive role.

MR. COLLIER: Let's switch gears for a minute. I actually should have done so about five or ten minutes ago. I'd like to talk about the competition side of the house.

First directed at Bob, the number of mergers reported under Hart-Scott increased from I guess 1,500 a year in 1991 to about three times that number in 1998. How did this merger wave affect the Bureau in your tenure, and what did you try to do to address it?

MR. PITOFSKY: It was the most significant influence on our priorities of anything else that happened during my years there.

As you know merger review has its own deadlines, and while the agency only challenges 3 percent of the mergers that it sees, you still have to look at the other vast numbers of mergers to see if they fall within the 3 percent.

Also, Bill Baer and his successors rightly believed, that there was no sense in a merger enforcement policy in which you took a quarter of a loaf or half a loaf and let the deal go through and declared victory. If you really thought the merger had anti-competitive effects,
that question should be decided by a court. Courts should not be dealt out of the game.

The result was that we were in court more often than had been true for a long, long time. I remember I would say to Bill, who is sitting here, I would say, Look, Bill, if we bring this case, do we have lawyers and economists to staff it, and he would say, Don't worry, I'll take care of it.

Somehow or the other, cases that were being litigated would fold just about in time to switch the staff over to another case. It was a magic act to find enough people inside the FTC to litigate those merger cases, but the consequence was that while we brought some very important non merger cases, Intel, Toys "R" Us and others, I always felt that we could have done more in the non merger area were it not for the fact that we were buried in some years by 4,500 merger proposals.

MR. COLLIER: Tim?

MR. MURIS: Well, we had what I regarded as the good fortune of not being in the middle of the merger wave. It allowed us to do a lot more in the administrative area. I was astonished at what good shape the Bureau of Competition was in when we arrived. The fact that it was still standing was itself a
testament to Bob and Bill and Molly and Rich.

This difference does make it actually very hard to compare our tenures in the sense that the focus was so different. But look, for example, at the excellent set of data we released on how the Commission had handled mergers. It was mostly cases, on Bob's tenure because of the merger wave and because Bob was here longer. It showed how sophisticated merger analysis has become.

This data was on horizontal mergers. There have been very few vertical merger cases, although there have been a few.

We have had a tremendous amount of learning that's occurred in these hundreds of Hart-Scott investigations, and it's one of the many areas -- and may be the best example -- of how there really is a bipartisan shared consensus on how to approach antitrust law.

The government has lost three cases recently, including the one that the Commission brought, the Arch Coal case. But most people in the private sector, and there are a lot of you sitting out there, including the three of us up here, are not willing to risk litigation. It will be interesting to see if those cases have much of an impact.

There are three recent cases where the judges, and the Heinz case is the third case, all rejected
virtually out-of-hand customers' complaints or support of the merger. The government regards that as highly relevant information and I think it will continue to, regardless of what the courts say, unless the Supreme Court happened to say it was irrelevant. I would be highly surprised if that happened.

MR. COLLIER: Talk just a bit about vertical mergers, Bob. There was some vertical merger activity during your chairmanship. Vertical mergers have not typically been the core of the merger enforcement program. Horizontal mergers have.

What should the public be concerned about in connection with vertical mergers and what was your experience?

MR. PITOPSKY: Of course, they're not as dangerous as horizontal mergers. They more frequently involve significant efficiencies, and therefore, there ought to be far fewer challenges to vertical mergers than horizontal mergers.

On the other hand, my guiding principle in deciding which challenges to initiate was to ignore the vertical merger guidelines. They are hopelessly out of date, and they ought to be revisited.

I'm about to publish a paper talking about this. I think something like five vertical merger cases were
brought by Tim and me, and a finally by the Department of Justice, over a period of about ten years, and I think all but one of them could not have been brought under the existing vertical merger guidelines, because those guidelines eliminate the concept of foreclosure. All three of its vertical merger cases brought when I was chair depended on the concept of foreclosure.

So it's not the most important area of the world, but we ought to get it right, and it seems to me that somebody should take another look at those guidelines.

MR. MURIS: Well, I agree that there are useful areas to do and that some marginal improvements could be made in transparency and explaining how the government does mergers.

In the vertical area it's more than marginal. The concern I have is I'm not sure that there's a consensus that exists about how to rewrite the vertical guidelines. Unless you try, you're not going to know for sure, so I think that is a worthwhile project.

The vertical cases that we brought and a lot of them that Bob and Joel brought did involve a raising rivals' cost theory where there was potential foreclosure, particularly involving the defense industry, the drug industry and areas where the government is an
extremely important part of the process. I thought because
of the entry barrier there, that the story made sense, and
it is certainly an evolving area in the law.

MR. COLLIER: We're closing in on the appointed
time, but I have to ask the following question of both
these fellows: What one or two or three things during
your chairmanship and administration do you regard as
being the most significant, then and in the future?

MR. PITOFSKY: Why don't you start, Tim.

MR. MURIS: Someone wrote my obituary while
I was chairman and said that they were going to put on
my gravestone that I had protected the dinner hour, which
is fine. I don't mind that, although I don't think
much about what's going to be on my tombstone. Obviously
in the general world, my tenure will be most known for
Do Not Call. I think that within this room and in the
policy community that follows us, I hope what we're known
for is -- and I do really believe that Bob's tenure and
mine are one of the same pattern -- applying careful
analysis in a way that abstracts from politics and
contention.

Our approach is fact based but uses relevant economics,
and it tries to protect the public interest. I think the
Commission has become an amazingly successful institution,
for which a lot of people in this room, a lot more than just
the two of us, deserve the credit.

MR. PITOFSKY: I agree that it is remarkable, the convergence that's occurred in 35 years in the antitrust world, especially when so much else in domestic regulation has become polarized: tax policy, environmental policy, health care policy and so forth, and yet you see in Bush One, in the Clinton's Administration years, and in Bush Two very similar antitrust approaches. There are some differences at the margin.

In terms of things that would matter, I've already talked a good deal about the Bureau of Consumer Protection and Jodie's creativity in developing an arsenal of approaches to Internet fraud, trying to prevent the fraud while encouraging the marketplace of the Internet. Doing both of those things at the same time is difficult.

On antitrust, I thought the cases, especially the merger cases like Staples, showed marked improvement and sophistication. I guess if I were to select a broad theme, it is the emphasis on access. That's what led us to a rather regulatory order in AOL/Time Warner, to protect the access of competitors of Time Warner to AOL's Internet properties. That's what led us to challenge Toys "R" Us because I thought of that as a
horizontal case, trying to get the toy manufacturers to preclude developing competition from the price clubs.

I thought of "access" as the reason why we were so aggressive in going after the Chrysler dealers for trying to persuade Chrysler to knock Internet car sales out of the marketplace, and I do think that antitrust has a very special role in keeping markets open and keeping access open, and I think that the emphasis in that area was not misplaced.

MR. COLLIER: Thank you. Our time is up. I'm going to recognize any questions or a couple of questions. No hands are up so I guess this is it.

MR. MURIS: This group of people has never been silent, but that's fine.

(Applause.)

MS. BAILEY: Just one brief announcement, we'll resume again at two o'clock, but I wanted anyone who has yet to buy a ticket to the ABA dinner who really wants to come, the ABA will be here for 15 more minutes with a few tickets remaining, so I encourage you to take this one last opportunity. See you at two

(Break in the proceedings.)