

1 FEDERAL TRADE COMMISSION

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4 COMPETITION AND CONSUMER PROTECTION

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IN THE 21ST CENTURY

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1 FEDERAL TRADE COMMISSION

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P R O C E E D I N G S

1
2 MR. TRAINER: Good morning, everyone. I am
3 Bill Trainer, the Dean of Georgetown Law, and it is my
4 honor and my pleasure to introduce this first set of
5 FTC hearings on Competition and Consumer Protection in
6 the 21st Century. And we at Georgetown Law are very
7 pleased to be host to this event, and I think it is
8 very fitting that we are here.

9 Georgetown Law's connection to antitrust and
10 consumer protection is longstanding and very deep.
11 Dean Robert Pitofsky served as Bureau Director,
12 Commissioner and then Chair of the FTC over his long
13 distinguished career. Numerous agency leaders have
14 been graduates of Georgetown Law, most recently, our
15 current FTC Chair Joe Simons, who we will be hearing
16 from shortly; also Commissioner Nominee Christine
17 Wilson, former DOJ Assistant Attorney General
18 Christine Varney, Monique Fortenberry, who is a deputy
19 executive director of the FTC. We are very proud of
20 having educated so many of the leaders of the FTC.

21 And among our current faculty, David
22 Vladeck, who is at the end of our panel today, was
23 Director of the Bureau of Consumer Protection; Howard
24 Shelanski was Director of the Bureau of Economics.
25 Professor Steven Salop was both a senior official in

1 the FTC's Bureau of Economics and a mentor to Chairman
2 Simons and Christine Wilson. Actually, the Chair and
3 I were just talking about how his time at Georgetown
4 Law had really prepared him in every way for the
5 career that you have had. So we are just very proud.

6 And it is appropriate -- and it is
7 particularly appropriate, I think, because in some
8 ways these hearings are intended to follow the path
9 that was sent by the FTC's Global Competition and
10 Innovation hearings, which were held in 1995, when Bob
11 Pitofsky was the FTC's Chairman.

12 So we can look forward over the course of
13 these hearings to a serious, insightful and
14 interesting set of discussion on some of the most
15 pressing questions facing antitrust and consumer
16 protection policy.

17 CHAIRMAN SIMONS: Don't take my thunder,
18 okay?

19 BILL TRAINER: Okay.

20 (Laughter.)

21 BILL TRAINER: Let me just kind -- do not
22 expect too much until you hear from the Chair who will
23 bring up your expectations.

24 The FTC will be continuing its hearings in
25 locations across the country, and over the next

1 several months, it will be exploring new ideas that
2 approaches to its historic statutory mission.

3 And for those of you want to hear more about
4 the antitrust issues of the day, right here at
5 Georgetown Law, our global antitrust symposium, which
6 is now in its 12th year and is one of the most
7 prominent antitrust conferences outside of the ABA's
8 spring meeting will take place in this room in about
9 two weeks.

10 So thank you all for coming. I want to
11 congratulate the FTC for its initiative and hard work
12 in organizing these public hearings. And, now, I
13 would like to call to the podium the Director of
14 Office of Policy Planning, Bilal Sayyed.

15 (Applause.)

16 MR. SAYYED: Okay, I will not take long
17 except to thank everybody for coming and to tell
18 people a little bit about what we will do today. We
19 will turn to the Chair in just a minute, but I just
20 want to tell everybody this event is being webcast.
21 The webcast will be posted to the FTC's website
22 shortly after we conclude. The session is being
23 transcribed and the transcript will be posted
24 quickly.

25 Tomorrow's planned session -- excuse me,

1 tomorrow's planned session has been canceled because
2 of concern about the weather, but it will be
3 rescheduled. We will make the effort to reschedule it
4 here at Georgetown fairly quickly.

5 Some of my FTC colleagues will be passing
6 out question cards. If members of the audience have
7 questions that they would like to put to the panel,
8 they should write them on the card and raise their
9 hand and we will come collect them.

10 We have an open comment process. So we
11 encourage people to continue to comment. That comment
12 process will be open through probably the end of
13 February. But we encourage people to comment on what
14 they hear today, both what is presented and what is
15 discussed.

16 And then all presentations made here will be
17 posted on the website. And as I noted, the transcript
18 of the session will be posted.

19 So with that, I will turn it over to the
20 Chairman and he will kick us off to get started.

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1 WELCOME AND INTRODUCTORY REMARKS

2 CHAIRMAN SIMONS: All right. Well, thank
3 you so much, Bilal.

4 Good morning, everyone, and welcome. On
5 behalf of all of us at the Federal Trade Commission, I
6 want to thank you for coming to the opening of our
7 hearings on Competition and Consumer Protection in the
8 21st Century. Our goal is to make these hearings as
9 informative, insightful, and consequential as
10 possible, covering some of the most important
11 competition and consumer protection policy and
12 enforcement issues of the day. We believe we are
13 situated to do just that.

14 These hearings, as has been discussed
15 already, are modeled on the ones that were held back
16 in 1995, by then Chairman Bob Pitofsky, who, in his
17 opening remarks, said at the time, "These hearings are
18 designed to restore the tradition of linking law
19 enforcement with a continuing review of economic
20 conditions to ensure that the laws make sense in light
21 of contemporary competitive conditions." We intend to
22 continue that same tradition with these hearings.

23 We are very fortunate to have a large group
24 of highly respected participants representing a
25 diverse range of views, including academics,

1 practitioners, enforcement officials, and
2 representatives from public interest groups. I am
3 proud that we are opening the hearings at Georgetown
4 University Law Center where Chairman Pitofsky spent
5 much of his career when he was not otherwise at the
6 FTC and where I received my initial antitrust
7 education, to a significant extent, from Professor
8 Pitofsky.

9 Today, I want to talk about why the
10 Commission is holding these hearing. Almost 30 years
11 ago, I came to the FTC the first of my three times, at
12 the tail end of the Commission's adoption of a
13 significantly revised approach to antitrust
14 enforcement. This change, which began in 1981 and was
15 implemented to a large extent by Tim Muris, who is two
16 or three people to my left here, this change, which
17 began in 1981, reflected new learning that had began
18 to influence Supreme Court antitrust doctrine.

19 It was primarily driven by the scholarship
20 of academics, the most prominent Phil Areeda, Don
21 Turner, Frank Easterbrook, Richard Posner and Robert
22 Bork, were associated with either Harvard University
23 or the University of Chicago. They applied
24 microeconomic principles to antitrust questions and
25 paid attention to empirical work, which lead them to

1 conclude that a lot of the pre-1970's antitrust case
2 law was inconsistent with rational, procompetitive and
3 economically beneficial behavior.

4 By the time I left the agency for the first
5 time in 1989, application of microeconomic principles
6 and economic models was routine and encouraged.
7 Notwithstanding some initial criticism, the Clinton
8 Administration's antitrust leadership, including Bob
9 Pitofsky, Anne Bingaman, and Joel Klein, largely
10 adhered to the same principles.

11 So when I returned to the Commission as
12 Director of the Bureau of Competition in 2001, there
13 was substantial support for and an acceptance of the
14 antitrust reforms that had been initiated 20 or so
15 years prior. In other words, there was a general
16 consensus on how we ought to think about antitrust
17 enforcement and policy.

18 But now at the beginning of my third stint
19 at the Commission, things have shifted. The broad
20 antitrust consensus that has existed within the
21 antitrust community in a relatively stable form for
22 about 25 years is being challenged in at least two
23 ways. First, some recent economic literature
24 concludes the U.S. economy has grown more concentrated
25 and less competitive over the last 20 to 30 years,

1 which happens to correlate with the timing of the
2 change to a less enforcement-oriented antitrust
3 policy, beginning in the early 1980s. These concerns
4 merit serious attention and they will be part of
5 today's discussion.

6 Second, some are debating the very nature of
7 antitrust itself, calling for antitrust enforcers to
8 take account of policy goals beyond consumer welfare.
9 Inequality, labor issues, excessive political power
10 are perhaps the main examples. We will discuss some
11 of these suggestions during later sessions. These
12 concerns raise a challenge to antitrust agency
13 leadership, the courts and legislators to think hard
14 about whether significant adjustments to antitrust
15 doctrine enforcement decisions and law would be
16 beneficial to our country in order to accommodate
17 these concerns.

18 As I noted in announcing the hearings, it is
19 important that the antitrust enforcement agencies be
20 at the forefront in thinking about these issues, not
21 bystanders to this debate. To that end, today and
22 continuing through the fall and the early winter, we
23 have invited interested parties to discuss these
24 issues, both through public comment and public
25 sessions with us and each other. We do this with the

1 goal of understanding whether our current enforcement
2 policies are on the right track or on the wrong track,
3 and if they are on the wrong track, what do we do to
4 improve them.

5 I approach all of these issues with a very
6 open mind, very much willing to be influenced by what
7 I see and hear at these hearings. I am old enough to
8 have witnessed, in my own career, dramatic changes in
9 antitrust policy and enforcement. These changes have
10 largely been driven by developments within the
11 economic community which were then adopted by the
12 legal community.

13 The movement by economists, however, has not
14 always been in the same direction. In the 1950s and
15 '60s, a substantial body of empirical economic work
16 purported to show significant antitrust effects --
17 anticompetitive effects at relatively low levels of
18 concentration. In 1968, the DOJ issued merger
19 guidelines based on these studies. But just about the
20 time the guidelines were issued, the economic studies
21 on which they were based were being substantially
22 discredited. As a result, the agencies over time
23 raised the concentration levels at which mergers were
24 seen as problematic.

25 A more recent example where developments in

1 economics increased the level of successful merger
2 enforcement involves hospitals. In the 1990s, the
3 Government lost a large number of hospital merger
4 cases in a row and the agencies considered whether to
5 give up on hospital merger enforcement. Fortunately,
6 we did not. Instead, we engaged in empirical economic
7 studies that demonstrated the anticompetitive effects
8 of hospital mergers and we revitalized our hospital
9 merger enforcement program.

10 So the developments in economics can
11 suggest, depending on the circumstances, that our
12 enforcement has been either too aggressive or too lax.
13 This episode involving hospital merger enforcement
14 really drove this point home for me personally. The
15 use of economics should not be thought of as a one-way
16 ratchet only driving down the level of antitrust
17 enforcement. Good economics might point us towards
18 more or less enforcement depending on the facts and
19 the analysis in front of us at the time.

20 In my view, basing antitrust policy and
21 enforcement decisions on an ideological viewpoint
22 whether from the left or right is a mistake. Whether
23 or not we expand antitrust beyond the consumer welfare
24 standard, I would rather make policy and enforcement
25 decisions based on the best evidence and analysis,

1 including, in particular, empirically-grounded
2 economic analysis that enables the analyst to weigh
3 the cost and benefits broadly defined to help
4 determine the best approach. My hope is that these
5 hearings will significantly improve our ability to do
6 so and help to bring about a new and improved
7 consensus among our antitrust stakeholders.

8 But we are not focused solely on competition
9 issues today or throughout the hearings. The strength
10 and direction of the agency's consumer protection
11 mission is also something that we are going to explore
12 at some length at these hearings. Today, our most
13 significant and difficult consumer protection issues
14 often revolve around the use and abuse of
15 technological capabilities not likely imagined during
16 Bob Pitofsky's chairmanship. As a result, we will be
17 having multiple sessions on data security issues. And
18 our upcoming hearings on platforms, big data, and
19 artificial intelligence will address consumer
20 protection issues, including privacy, as well as
21 competition issues.

22 Before closing, I want to thank not only the
23 participants in these sessions but the many groups and
24 individuals who have filed comments in response to our
25 initial hearings notice. We have received over 500

1 nonduplicative comments, many of very substantial
2 length and thoughtfulness. We are reading them and
3 considering them carefully. We expect more comments
4 as we proceed, and I encourage those interested to
5 comment on what you hear today and throughout the
6 hearings.

7 I also want to thank our cosponsor and host,
8 the team at Georgetown University Law Center for
9 helping us pull this initial effort together. I also
10 want to recognize the staff of the FTC for their
11 efforts in both preparing for the substance of the
12 event and undertaking all the logistics to bring this
13 together.

14 I and all of the Commissioners are grateful
15 for the work of so many people within the FTC and
16 outside the FTC, who are engaged in making this a
17 successful effort.

18 Thank you for attending, and I hope you
19 enjoy the hearings.

20 (Applause.)

21 CHAIRMAN SIMONS: And I will turn it over to
22 Bilal.

23 (Welcome and introductory remarks
24 concluded.)

25

1 PANEL 1: THE CURRENT LANDSCAPE OF COMPETITION AND
2 CONSUMER PROTECTION LAW AND POLICY

3 MR. SAYYED: Okay. So I will just take a
4 few minutes to introduce the panelists and then try to
5 get out of the way.

6 In no particular order or maybe some
7 particular order, Jason Furman will speak first.
8 Jason is presently a professor at the Kennedy School
9 at Harvard University and was formerly the Chair of
10 the Council of Economic Advisors.

11 Tim Muris, just to Jason's left, is
12 presently a senior counsel at Sidley Austin, but was
13 also Chairman of the FTC from 2001 to 2004, and
14 previously directors of both the Bureau of Competition
15 and the Bureau of Consumer Protection, but not, of
16 course, not at the same time.

17 Just to the left of Tim is Alysa Hutnik.
18 She is a partner at Kelley Drye and really an expert
19 in consumer protection law.

20 Immediately to my left is Jim Rill. Jim is
21 senior counsel at Baker Botts presently, but was head
22 of the Antitrust Division from about 1989 to 1992.

23 And then we also have Jan McDavid, who was
24 not head of either agency, but certainly is one who
25 has been considered to head either -- maybe even both

1 agencies, in the past. Jan is a partner at Hogan
2 Lovells.

3 Finally, but no means least, Professor
4 Vladeck, who served as director of the Bureau of
5 Consumer Protection just a few short years ago and, of
6 course, is a professor here at Georgetown.

7 So with that, I am going to turn it over to
8 Jason and just remind everybody if they have
9 questions, raise your hand, pass your questions over
10 to some of my colleagues who are collecting question
11 cards.

12 MR. FURMAN: Thank you so much. And I
13 thought Chairman Simons' remarks were perfect in three
14 respects. One is you want somebody to be open-minded
15 coming to this question because thinking really is
16 evolving very rapidly. Second, he had a really
17 excellent capsule history of antitrust and thinking.
18 And third, I think he made it clear that he was
19 deferring completely to economists in how he was
20 proceeding on this matter.

21 I am a little bit of an interloper on this
22 panel. I think I am one of the only economists.
23 Anyone that knows any economics would know I am even
24 more of an interloper than that because my main focus
25 has been on macroeconomic issues, labor market issues,

1 inequality, not on industrial organization and
2 antitrust, narrowly defined.

3 When I was chairing the Council of Economic
4 Advisors, I came to this issue partly out of what I
5 will now admit was paranoia. There was a crime that
6 had been committed and we were looking for suspects.
7 The crime was low productivity growth and high
8 inequality, something clearly going wrong in the
9 economy, productivity growth being about a percentage
10 point lower over the last decade than it had been
11 previously. At the same time, high levels of
12 inequality continued to move higher. And those were
13 the two factors that were underlying the slowdown of
14 the growth in income for the typical families that I
15 think is the central challenge for economic policy.

16 So what can you do to raise productivity
17 growth to reduce inequality? And we are looking
18 around at a lot of different suspects. Just to be
19 clear, there is more than one cause of this set of
20 phenomenon. But one thing we alighted on was this
21 area. Part of what motivated it was a few sub-facts
22 under those two big ones. And let me list a few of
23 them.

24 One, a number of economists had documented
25 that throughout the economy, there was less churn and

1 dynamism; fewer businesses being created; older
2 businesses, larger businesses increasingly dominating
3 the economy; fewer people moving from job to job, so a
4 little bit more of a sclerosis than we would like to
5 think is the case for the U.S. economy.

6 There was on terms of -- I am sorry,
7 reduction in investment, a trend down in investment.
8 Partly that is a shift to intangibles, but not
9 completely, and trying to understand that. On the
10 inequality side, there was a fall in the reduction --
11 I am sorry, a fall in the share of income going to
12 labor and, finally, an increase in markups and a rise
13 in the rate of return to capital relative to the safe
14 rate of return and an increasingly skewed rate of
15 return to capital with some very successful companies
16 having persistently very high returns much higher than
17 the median -- relative to the median than they had
18 before. So this was a fact pattern about aggregate
19 data that made us look beneath the aggregates in terms
20 of what was going on at the firm and the industry
21 level.

22 Now, one way to look at what is going on at
23 the firm and industry level is to use aggregate
24 industrial data and to divide up the economy into 10
25 industries, into 800 industries, and look within each

1 one of those at what is going on in concentration --
2 and a number of people did that, Greyon, et al.,
3 Altar, et al. We did it at the Council of Economic
4 Advisors and you saw it in the press as well in places
5 like the economists -- and would generally find that
6 in about 75 percent of industries defined in this way
7 concentration increased.

8 Now, as the antitrust community was quick to
9 point out, there is some dispute as to whether it was
10 35 years ago people realized this was an idiotic
11 procedure or 50 years ago that people realized this
12 was an idiotic procedure, but that these are not
13 antitrust markets. Now, the people that put this
14 forward from the beginning, including ourselves,
15 understood that. No one would bring an antitrust case
16 based on these types of aggregate data. Everything
17 has pluses and minuses. But we are trying to look at
18 economy-wide phenomenon and really needed to use
19 economy-wide data because the type of relevant
20 antitrust market analysis we have for some parts of
21 the economy -- and I will talk about it in a moment --
22 but we do not have it for all of them and cannot
23 really aggregate up, synthesize, and add it all
24 together.

25 When looking at this macro data, I think the

1 question is not ex ante what do we think about it. Of
2 course these are not the relevant markets for
3 antitrust. It is, does it work? Does it help explain
4 some of what we are trying to explain? And subsequent
5 research by Gutierrez and Philippon, among others, has
6 found actually that at this aggregate level increases
7 in concentration are tied to reduction in business
8 investment, are tied to reductions in R&D by business,
9 and also are associated with rising markups in those
10 industries and rising rates of profit in those
11 industries. So you see that these different measures
12 seem to, in a broad sense, work and explain some of
13 what we are interested in.

14 The next set of measures that one could look
15 at are not the aggregate macro data, but are doing
16 what you would do in an antitrust case, which is
17 looking at a particular relevant market, properly
18 defined, and asking is the level of concentration
19 high, has the level of concentration increased.

20 There have been a range of studies --
21 some done by the FTC; a number done by economists
22 -- for a lot of markets, ad services, health
23 insurers, hospitals, refrigerators, airlines,
24 telecommunications, beer, all of which have
25 consistently found very high levels of concentration,

1 and in many cases rising levels of concentration, well
2 in excess of the levels that would trigger a review if
3 there was a merger under the merger guidelines.

4 Moreover, a new trend of research, one that
5 is still very new, I would not necessarily go and make
6 policy on it with certainty tomorrow, but one that so
7 far is turning out to be empirically more convincing
8 than, frankly, I would have expected on common
9 ownership finds that when the same few companies own
10 all of the airlines and own all of the banks that that
11 increases concentration above and beyond what you
12 would measure if you thought that American Airlines,
13 United Airlines and Delta were three different
14 companies when you realize they are all owned by the
15 same companies. And you see that in a variety of
16 data, including, remarkably, at sort of a root-by-root
17 level in terms of the pricing. So there is a wealth
18 of microeconomic, more traditional antitrust evidence
19 for this.

20 So the question now is, why have we seen
21 this increase in concentration and what are its
22 consequences? I do not think there is any single
23 answer to the why question. In some cases, the
24 increase in concentration may be for good reasons and
25 reflect increases in efficiency, increases in

1 competition that weed out some of the less effective
2 firms, globalization and the like. This is an
3 explanation that has been stressed by economists,
4 including David Autor, et al.

5 That is a story that probably works pretty
6 well in the retail sector where it was not that there
7 were a few big mergers; it was not that there was some
8 collusive common ownership, but a company, Walmart,
9 figured out how to have better supply chain management
10 and grew, and then Amazon did the same online, and as
11 a result there is more concentration in that sector
12 and it reflects that increase in efficiency.

13 For a lot of the economy, though, the story
14 is much less benign than that one and it gets to --
15 has its roots in what Chairman Simons described as a
16 large change in the way we thought about antitrust.
17 Kwoka has documented, for example, the FTC's oversight
18 -- challenge -- you know, looking into mergers, used
19 to look at, you know, six to five, now would never
20 look at something like that. So you have changes in
21 antitrust enforcement. Some of it may be grounded in
22 other parts of the economy.

23 We should be looking also at things like
24 regulations and rent seeking that allow companies to,
25 you know, create rules that benefit themselves at the

1 expense of others, certainly in questions like
2 intellectual property. And I think a lot of these
3 competition issues are about antitrust, but they go
4 more broadly.

5 And then if you look at labor markets, you
6 want to look at occupational licensing, something the
7 FTC has been at the forefront of for a long time, land
8 use restrictions and a bunch of ways that reduce
9 competition in the economy.

10 So I think you have this combination of good
11 reasons, bad, and then you have some that are, you
12 know, ambiguous. If you look at something like the
13 tech sector, you have seen a lot of innovation, but
14 you also have platforms with network effects that lend
15 themselves to scale, that might say that it is
16 efficient to have a single producer at scale. It is
17 also efficient to have a single municipal water
18 company, but that does not mean we would want to let
19 it go off and charge whatever it wanted to charge.

20 I am not saying that we want to regulate
21 technology the same way we regulate municipal water.
22 It is much more complicated and it is an issue that I
23 am currently looking at as head of an expert panel for
24 the U.K. Government reviewing digital competition.
25 But try and understand the combination of good reasons

1 that you have seen companies grow with innovation and
2 competition and bad.

3 I want to talk about why we care about this.
4 Traditionally, in economics, this is just about prices
5 and it is about prices being higher. I think that
6 issue matters. Airline prices and cell phone bills
7 are higher in the United States than they are in
8 Europe because European competition enforcers have
9 been more vigorous; they have more players in those
10 industries than we do. So I think the price issue
11 matters.

12 The price issue may be a lot smaller than
13 some of the others I talked about. One is innovation.
14 What this does to the incentives for business
15 investment, for R&D, for productivity growth. There
16 is a longstanding debate between a view of Arrow and
17 Schumpeter in economics about the impact of
18 competition on innovation, but there is a number of
19 ways in which it could be deleterious.

20 And then, finally, inequality. And there
21 has been -- at the same time that there has been this
22 increased thinking about these types of macro issues
23 in competition, there also has been in labor markets,
24 as well. And that is grounded in the observation that
25 every employment relationship has a bit of monopoly

1 power and a bit of rent that is being divided between
2 the two because there is a cost of finding a new job
3 and shifting a job. So market power matters a lot.

4 If you have one hospital in town, it is a
5 lot harder for a nurse to threaten to move to another
6 hospital to get a pay raise. If you have two
7 hospitals in town, it is much easier for the two of
8 them to collude tacitly or even illegally to hold down
9 the pay of nurses. Even in the fast food industry,
10 there is evidence that anti-poaching and noncompete
11 agreements have a deleterious impact on workers'
12 bargaining power, help to hold down wages, and have
13 been part of the reason that the labor share has been
14 reduced.

15 In summary, I think this evidence is coming
16 from a variety of different places and a variety of
17 different perspectives. If you are trying to ask a
18 question about the economy as a whole, you are not
19 going to have one definitive data source or one
20 definitive study that is going to answer that
21 question. You have to take a collage of views, and I
22 think that collage involves looking at the pattern of
23 what we have seen in the data that I have talked about
24 in terms of falling labor share, falling investment,
25 rising markups.

1 Looking at the industry level and seeing
2 whether those phenomenon are industry by industry tied
3 to concentration, and they are. Looking in a deeper,
4 more careful way where we can, and we can and we have
5 done that in a lot of different industries. And then
6 no single story comes out of this, but on balance and
7 on average, this does seem to add up to a reduction in
8 competition, a reduction in dynamism and one that I
9 think that we need to be concerned about and think
10 about ways we need to update our policies to address
11 if we want to have more investment, more dynamism,
12 more productivity growth, less inequality, in
13 addition, of course, to the traditional focus on lower
14 prices for consumers.

15 Thank you.

16 (Applause.)

17 MR. SAYYED: Well, thank you, Jason.

18 We are going to turn to Tim Muris now.

19 I will note that although Jason is the only
20 economist on the panel, we have, if I count correctly,
21 five economists, 100 percent of the panel, on our
22 second panel in the afternoon. So we are trying to
23 balance just about everything in these hearings.

24 MR. MURIS: Well, thank you, Bilal.

25 I am honored to be here, once again,

1 following in the giant steps of my friend and
2 predecessor, Robert Pitofsky. We first met in 1976.
3 But it was 1988, working on the second Kirkpatrick
4 Commission, that we realized we shared a vision for
5 the FTC. Not that Bob and I always agreed, of course.
6 Minutes after being sworn in as Chair, I announced to
7 a somewhat nervous reaction that there was indeed a
8 new majority. I said there was no longer a majority
9 of New York Yankee fans on the Commission.

10 (Laughter.)

11 MR. MURIS: The FTC has enjoyed great
12 success for decades, and I address a few topics here.
13 First, what durable success means for an agency like
14 the FTC; then the vision that Bob and I shared that
15 has led to the agency's success. Next, I consider
16 recent challenges from two Ps, paternalism and
17 consumer protection and populism and antitrust.
18 Because both of these "isms" once dominated FTC work,
19 particularly in the 1970s, I discuss history. I lived
20 through the '70s and the decade was disastrous for the
21 FTC. Nostalgia expressed in recent literature is
22 misplaced. I have no desire to relive those years and
23 neither should you.

24 I am submitting a longer paper with lots of
25 footnotes, like lawyers do, and I will make a lot of

1 assertions for what the footnotes provide support.
2 But starting with success, it has to be built on
3 something more ephemeral than headlines. A definition
4 that is less ephemeral starts with recognition that an
5 agency needs a clear understanding of and support for
6 its core mission among its constituents. Second, this
7 core must derive from a vision clearly shared, not
8 just today, but enduring through electoral cycles.
9 Over time, perhaps decades, stakeholders adjudge
10 favorably the core mission of successful agencies.

11 Finally, a successful public institution
12 needs a coherent strategy. The positive agenda must
13 direct the institution at all levels, from the staff
14 to the managers to agency leaders. Without a general
15 strategy and positive agenda, an agency merely reacts.
16 The FTC has such an agenda, the heart of which is to
17 attack practices that harm consumers by hampering the
18 competitive process and violating the basic rules of
19 exchange. The FTC's success, in large part, reflects
20 the shared vision.

21 Take antitrust first. Until recently,
22 antitrust reflected bipartisan cooperation.
23 Disagreements existed in close cases, but there was
24 widespread agreement that antitrust should protect
25 consumers, that economic analysis should guide case

1 selection, and that horizontal cases were central to
2 enforcement.

3 Regarding cases, Robert Bork once remarked
4 that firms either make war on each other or they make
5 peace. This framework reflects the consensus that the
6 most harmful practices occur when firms stop competing
7 vigorously, making peace to hurt consumers.
8 Horizontal mergers with likely anticompetitive effects
9 are one fertile area for firms to make peace.

10 Firms also make peace through nonmerger
11 conduct. As with mergers, of course, collaboration is
12 not itself sufficient to assess consumer welfare.
13 Many collaborations are beneficial and the peacemaking
14 of most concern lacks offsetting efficiencies, what
15 antitrust lawyers call naked horizontal agreements.
16 The FTC has pioneered development of the law here,
17 especially among professions, generic drugs, and the
18 process to analyze collaboration.

19 In rare instances, a single firm with market
20 power can exclude competition to harm consumers. The
21 2001 Microsoft case, probably the most famous recent
22 example, is -- those kind of cases are important to
23 any antitrust program. A particularly fruitful
24 category of troubling single-firm conduct involves
25 misleading the Government. Misuse of courts and

1 government agencies is an effective way, this rent-
2 seeking, to stifle competition. Such strategies are
3 not limited to single firms, of course. They are the
4 cheap exclusion, which is a felicitous phrase that
5 people at the FTC have invented. Two antitrust
6 immunities help protect this rent-seeking, Noerr and
7 state action.

8 Some courts have broadly interpreted these
9 immunities for decades, 40 years, in fact. The FTC
10 has sought to circumscribe both with three Supreme
11 Court victories in state action. On Noerr, the agency
12 saved consumers billions of dollars at the gas pump in
13 Unocal and provided large benefits for pharmaceutical
14 consumers in Bristol-Myers Squibb, among many other
15 successes.

16 The vision for consumer protection is
17 identical to that in antitrust. When competition
18 alone cannot defer dishonesty, private legal rights
19 help. There is government-developed common law. When
20 the market forces are insufficient and common law is
21 ineffective, there is a role for a public agency, and
22 consumer protection and antitrust naturally compliment
23 each other. Under the FTC's positive agenda, robust
24 competition, is the first and most important way to
25 protect consumers. And the FTC's role is crucial, but

1 it is a referee, not the star player.

2 The foundation and core of consumer
3 protection is the systematic attack on fraud begun in
4 1981, and the FTC has continued to expanded in each
5 administration, the fraud program.

6 The Commission has long evaluated
7 advertising by legitimate businesses, and in this
8 century, has expanded into privacy and -- with many
9 successes, the National Do Not Call Registry being one
10 of the most popular government initiatives in history.
11 But yesterday's success has become today's challenge
12 with robo calls clogging our phones. In terms of robo
13 calls, the FTC has been aggressive and ingenious.
14 But, ultimately, robo calls are like spam. Spam was -
15 - ultimately, the most effective way to deal with spam
16 was when the ISPs developed tools to be able to screen
17 out the majority of spam. And in the same way robo
18 calls, I think, will be best dealt with when those who
19 deliver phone services and others develop the legal
20 and technical tools to block unwanted calls.

21 Now, I have written, with Howard Beales,
22 that -- we criticized the Obama FTC on occasion. But
23 compared to the paternalism of the CFPB, to which I
24 turn next, the FTC has been a paragon of virtue.

25 Let me turn to those two Ps and their

1 contrary vision for the FTC. The first is the return
2 of the paternalism of the '70s. The FTC of that era
3 sought to become the second most powerful legislature.
4 In one 15-month stretch, the FTC issued over a rule a
5 month seeking to transform entire industries along the
6 vision of the then very young people in charge of the
7 Bureau of Consumer Protection. As proposed, most of
8 these rules were market-supplanting with adverse
9 consequences.

10 There was an exchange in the 1972 National
11 Commission of Consumer Finance, which is illustrative
12 -- and I am not making this up -- there was a debate
13 about whether poor and middle class people should
14 borrow money to buy color televisions with some people
15 saying they should not do it because they did not need
16 such luxuries and other people defending their right
17 to buy on credit color televisions. That,
18 unfortunately, was illustrative.

19 This paternalism has returned with a
20 vengeance in the CFPB. And by "this," I mean the
21 Obama CFPB. Whatever one thinks about what is going
22 on, the powers of the CFPB are there. They have not
23 been touched. When President Warren comes in in a few
24 years, if she or someone like her comes in, the
25 incredible power of the CFPB, which is insulated from

1 any effective control, will still be there.

2 Substantively, the CFPB has broad undefined
3 powers to regulate. It adds the word "abuse" to the
4 more-defined FTC terms of "deceptive" and
5 "unfairness." And "abuse" is akin to the FTC use of
6 "unfairness" in the 1970s. And like the FTC, the
7 CFPB -- like the FTC in those days, the CFPB prefers
8 to use its discretion as opposed to a definition.

9 You can look at the effects of the CFPB on
10 consumer credit, and they have been significant. In
11 the paper, I discuss the qualified mortgage rule and
12 the criticism of the Federal Reserve on that rule in
13 slowing the return of the housing market and the
14 adverse effect, particularly on minorities.

15 Now, those who defend the CFPB sometimes
16 raise behavioral economics, which is a recent
17 challenge to the benefits of markets. In its extreme
18 version, it is based on the idea that errors that --
19 and people obviously sometimes make mistakes, but the
20 idea is that those errors are systematically
21 irrational.

22 Now, some people will tell you that normal
23 economics assumes that consumers have perfect
24 knowledge and are economic calculators. Well, I was
25 schooled by those normal economists and I learned

1 about transaction costs and imperfect information from
2 those individuals. So I think that parody of
3 economics is simply inaccurate.

4 Moreover, there are numerous problems with
5 using behavioral economics. For one thing, the
6 behavioralists do not agree on which biases they talk
7 about are relevant. For another thing, there is not
8 empirical evidence to support what they want to do.
9 For yet another problem is that consumers invest in
10 various ways to improve decision-making.

11 Now, I am not saying there are not important
12 papers and empirical work here to be done. I cite an
13 example in the paper of the credit card market where
14 people do choose accurately and are learning from
15 their mistakes. There are lots of papers like that in
16 the health care market -- I mean, in the credit
17 market. In the health care market, on the other hand,
18 Fiona Scott-Morton has written a very good paper where
19 there are systematic mistakes. Now, I believe that
20 health care markets are different, but I would hope
21 these hearings and the FTC pay attention to those
22 empirical issues.

23 The second P, populism, is reflected in
24 calls -- and Chairman Simons mentioned this -- on the
25 left and the right, to use antitrust to dismantle the

1 highly successful companies or at least -- the
2 so-called tech companies -- or at least regulate them
3 as public utilities. These are misguided calls. For
4 one thing, what a tech or digital company is is hard
5 to know. We have new technologies, but they are being
6 diffused through the economy. Moreover, these
7 companies have different positions in the market.
8 Some have big market shares; some do not.

9 Equally important, we have been down the
10 populist road before with disastrous consequences.
11 Jon Neuchterlein and I discussed some of this history
12 in a new paper that Jon will discuss in detail later,
13 and let me talk about the highlights.

14 Before Walmart and Amazon, another company
15 used the same kind of tools to become the largest
16 retailer in the United States for over 40 years. This
17 company was so important -- the company was the Great
18 Atlantic and Pacific Tea Company -- that Jon Updike,
19 the young Jon Updike, used the company as the title
20 and the setting for his iconic short story which
21 everyone in my generation had to read in high school
22 and the -- what happened was A&P success triggered a
23 backlash and the Government went after A&P for two
24 decades.

25 First, they passed the Robinson-Patman Act,

1 which embarrassed the antitrust world for much longer
2 than two decades and took a long time for the
3 antitrust world from which to recover. This new
4 legislation was not enough. First, the Government
5 prosecuted the A&P successfully criminally. They
6 still were not done. They sued to break the A&P up.
7 Finally, a new administration came in, the Eisenhower
8 Administration, and settled for some vertical
9 divestiture.

10 The problem was this long war of attrition
11 caused the leadership of A&P to focus on fighting the
12 Government, not on its new competition, and today all
13 that is left of the A&P are the coffees, Eight
14 O'Clock. I think it is called Eight O'Clock. And the
15 company itself is gone.

16 Now, it is true that the FTC largely
17 abandoned RP in the '70s, but there are two vestiges
18 of populism that were strong at the FTC in the '70s
19 and the first was predatory pricing. There were three
20 important cases, probably the most prominent of which
21 was the coffee case. In the mid-70s, Procter &
22 Gamble, then the most feared marketer of consumer
23 goods, had Folgers Coffee. Folgers Coffee expanded
24 into the heartland -- into the east, into the
25 heartland of Maxwell House. Maxwell House, General

1 Foods responded. Massive price war benefitting
2 consumers enormously.

3 How did the FTC respond? It sued General
4 Foods for responding against the best marketer in the
5 world. I am not making that up either. And there
6 were other such cases. And a call for a return to
7 predatory pricing is an important plank of the new
8 populist agenda.

9 Another bulwark of the '70s antitrust was
10 reliance on the Simple Market Concentration Doctrine.
11 And the concentration levels were levels that no one
12 today would regard as significant. The prominent
13 example was four firms with 50 percent share. This
14 theory was sometimes married to a populist animus
15 toward bigness, which led the Commission to seek
16 vertical disintegration of the then very
17 unconcentrated oil industry. And through 1980, the
18 FTC was pursuing deconcentration long after the
19 majority of the economics profession had dominated --
20 or had abandoned extreme versions of the market
21 concentration doctrine.

22 Well, let me conclude. With the creation of
23 the CFPB, the FTC has another federal agency
24 performing each mission. The original CFPB model,
25 mirroring the 1970s FTC, contrasts to the modern FTC.

1 Perhaps the regulatory world runs in cycles, but one
2 hopes that the FTC will not be in a future Groundhog
3 Day where it awakes each morning to 1975.

4 In contrast, consider the current -- in
5 antitrust, I am sorry, consider the impact of the
6 current reformers who wish to return antitrust to
7 focus less on consumers and more on protecting less
8 efficient businesses. Imagine how the companies they
9 would now punish would have fared in their desired
10 legal environment. Once the newcomers had grown
11 beyond a certain size, perhaps by the late 1990s,
12 their lawyers would have counseled them to be cautious
13 about expansion, innovation, and price cutting, lest
14 they face antitrust liability for disadvantaging their
15 less efficient rivals.

16 Luckily, because this advice would have
17 badly misstated antitrust law, lawyers did not give
18 it. Let us pray for the sake of American consumers
19 that such advice never becomes sound. Rather than
20 condemn innovation, whether in the 1930s or today, we
21 should applaud. Companies like the so-called tech
22 giants have been built from the ground up in the
23 United States rather than in Europe or China, largely
24 because the U.S. legal environment is stable,
25 predictable, and uniquely hospitable to vigorous

1 paradigm-shattering competition by all businesses.
2 That legal environment is a hallmark of American
3 exceptionalism. Long may it continue. Thank you.

4 (Applause.)

5 MR. SAYYED: Okay. Thank you, Tim.

6 And we will turn to Jim Rill now.

7 MR. RILL: Thank you, Bilal.

8 It is indeed an honor to be here in
9 commemoration of the work that was done by Bob
10 Pitofsky and leadership of the Commission in 1995.
11 And a particular honor to me, I go back in
12 relationships with Bob in 1969, when he was basically
13 the author of the first Kirkpatrick Report on the
14 Federal Trade Commission. And we worked together in
15 the ABA. And in 1992, he was a very important and
16 direct consultant on the 1992 horizontal merger
17 guidelines. So it is, indeed, an honor to be a
18 participant in these programs.

19 I want to talk today about the developments
20 in the antitrust world that is created by the
21 globalization of antitrust, which I think is one of
22 the most significant developments in the competition
23 world in the last decade since the first Pitofsky
24 hearings. I think the most important thing we can see
25 is there has been a cascade, a tsunami of antitrust

1 agencies across the world. In 1995, there was a
2 handful of agencies that had antitrust and some
3 agencies that had an antitrust law -- Japan, a gift of
4 1946 -- that really did not enforce it. Now, we see
5 something like 130 or more agencies with an antitrust
6 regime. And those agencies that have had an antitrust
7 regime are increasingly engaged in enforcement, often
8 with very controversial, very controversial results.

9 So what we need to think about and what I
10 think needs to be thought about at the Commission and
11 the other antitrust agencies is what is the response
12 of the antitrust agencies to this global tsunami of
13 antitrust agencies around the world? And I do not
14 want to suggest that that is a bad thing. I think it
15 is a good thing properly founded, properly principled,
16 properly directed, because I think a sound competition
17 policy is essential to the operation of a market
18 economy.

19 So what have the agencies done and what is
20 the challenge facing them in the future? The agencies
21 were responsible, I think particularly the FTC and the
22 Department of Justice, in the formation of the
23 International Competition Network. In 2001, following
24 on the report of the Department of Justice
25 International Competition Policy Advisory Committee,

1 the ICPAC, that was put together in 1997 and issued
2 its report in 2000, the International Competition
3 Network was founded on the platform of the Fordham
4 Program in 1991 with 12 members. Tim Muris was very
5 instrumental in putting that together.

6 Now, we have well over 100 members, 100
7 agencies that are members of the International
8 Competition Network. The ICN has been extremely
9 important in producing guidance that is based on
10 market economics and due process for its member
11 countries and for other countries around the world,
12 essentially soft guidance, but nonetheless effective
13 and responsible guidance.

14 The ICN has produced merger notification and
15 procedure guidelines, has put out, through its
16 unilateral conduct working group, guidelines on
17 predatory pricing, guidelines on dominance. Most
18 interestingly, I think, are the work that the ICN has
19 done in the area of procedural due process and the
20 antitrust -- the working group on agency
21 effectiveness, which was headed -- a task force headed
22 by the Federal Trade Commission. The work of Randy
23 Tritell and Paul O'Brien has been extremely effective
24 in putting out guidelines on due process, guiding
25 principles, annotated guidance and similar documents.

1 These are extremely important contributions that are
2 made towards convergence, if not harmonization, in the
3 antitrust world.

4 Similarly, the OECD, again, under U.S.
5 leadership, has put out a protocol on hardcore
6 competition; also, documents on the merger
7 notification and procedure, really anticipating ahead
8 of time the ICN's work in that area. The OECD has
9 also issued a very monumental report on -- under the
10 leadership of then Chairman -- then Assistant
11 Attorney General Varney on due process and procedural
12 fairness.

13 Most recently in 2017, the Department of
14 Justice and the Federal Trade Commission issued
15 revised guidance for international enforcement. This
16 guidance document, I think, broke some new ground in
17 providing for the Government's involvement in advocacy
18 across the globe; that it would attempt to foment
19 adherence to sound principles of not only process but
20 substance, and would advocate positions as the
21 occasion arose in particular situations.

22 It extolled the benefit of bilateral
23 agreements, which the United States antitrust agencies
24 have several, calling for cooperation in particular
25 cases. It set forth principles of comity and

1 established a principle that criticized
2 extraterritorial reach of antitrust enforcement where
3 that extraterritorial reach was not based on immediate
4 impact, substantial, reasonably foreseeable direct,
5 immediate impact on the host nation, consistent with
6 our legal principles in that particular area.

7 On the question of its advocacy, what we
8 have is a fairly general statement; however, not one
9 that gets into the specificity of when and how that
10 advocacy might be best advanced and effective and
11 implemented. And I think that is a challenge, as we
12 will indicate going ahead.

13 The ICN, the International Competition
14 Network, is continuing its effort towards promoting
15 convergence in substance and procedure through
16 workshops and similar efforts to bring about
17 convergence and harmonization and sound principles.
18 Nongovernmental agencies, as well, since the last time
19 of this, since the 1995 hearings, increased their
20 efforts. The U.S. Chamber of Commerce has issued a
21 so-called expert report. I say so-called because I
22 was on it, so therefore I have to be modest.

23 (Laughter.)

24 MR. RILL: An expert report on due process
25 and the way forward, somewhat controversial in that it

1 advocated the establishment of a cabinet-level
2 coordinating committee for dealing with international
3 antitrust. I think one issue that I personally have
4 some -- although I was on the report, I have some
5 skepticism as to its efficacy, although there should
6 be more coordination among the agencies of the Federal
7 Government. The American Bar Association has had
8 several task forces, several reports in this area, a
9 due process report, and currently, a program going
10 forward soon to be, I think, finalized on sort of a --
11 if you will, not a report card, but an analysis of the
12 implementation of due process, a task force headed by
13 my partner, Jon Taladay, and Melanie Aiken.

14 Also, the ABA is soon to present a paper on
15 the use of public policy issues in antitrust globally.
16 That is the extent to which non-antitrust factors,
17 flying under the flag of antitrust, tend to adulterate
18 -- that is my pejorative, not theirs, I expect -- tend
19 to adulterate the efficacy and substantial foundation
20 for antitrust enforcement. The IIC, International
21 Chamber of Commerce, has issued a report in this area
22 that is of significance and extols, again, the need
23 for global consensus of fair procedures. So the
24 private sector is active. Is it enough active? No.
25 But increasingly active in this particular area.

1 So what are the challenges going forward?
2 There are limits, I think, to the efficacy of soft
3 guidance, of soft convergence. It is necessary,
4 essential, but is it enough? Is it sufficient? My
5 answer to that is I think you need to go beyond it.
6 There is no structured mechanism right now for
7 establishing, if you will, a basis for evaluating the
8 extent to which the guidance of the various
9 international organizations and national organizations
10 that I have referenced are being actually implemented
11 and followed in the nations around the world,
12 including sometimes, I might say, the United States.

13 We see the actions in China involving a
14 merger by Coca-Cola, which, I think, has questionable
15 economic foundation; the denial of a transaction
16 involving NXP, which had been approved by every other
17 agency in the world on grounds that are difficult to
18 discern any kind of link to sound antitrust. We see
19 in Korea an expanded reach for extraterritoriality in
20 an area where there may be no effect whatever on
21 consumer welfare in Korea. We see in Taiwan
22 enforcement actions with no printed, published, and
23 maybe not even any practiced sound standards for due
24 process. All of these issues, I think, are a
25 challenge, a huge challenge to global antitrust

1 including the United States going forward.

2 And sometimes, frankly, the United States
3 has been criticized for its use of CFIUS -- criticized
4 overseas by its overuse of CFIUS to, in effect,
5 undermine sound antitrust analysis and engage in
6 national championship work. I am not sure I agree. I
7 do not agree with that in many respects, but I know it
8 has been criticized overseas. And recently, in a
9 speech, former Director General -- former Commissioner
10 for Competition of the European Union Mario Monti said
11 that Europe has much sounder antitrust leadership,
12 foundation, correctness than the United States. We
13 have to be aware of that and be sensitive to it.

14 So what should be the response going
15 forward? And I do not pretend to have any particular
16 wisdom here, but throw out some ideas and actions that
17 I have seen. First, there is an increasing, I think,
18 demand, interest for the United States agencies to
19 become directly involved in individual enforcement
20 actions overseas where the effect is on important
21 interests to the United States, not to protect the
22 U.S. champion, but where there is an important
23 interest to the United States that bears on effective
24 competition policy.

25 We have, in our agreements and in other

1 international principles, mechanisms for cooperation,
2 notification, and transparency. These, I suggest,
3 should be implemented. They have been implemented by
4 the United States in Boeing/McDonnell Douglas, for
5 example. The U.S. was very much involved in
6 attempting to, I think, say, put on the right track
7 the European Commission's analysis of that
8 transaction, even to the point where this guy who was
9 an antitrust professor at Arkansas, I think his name
10 was William Clinton, got involved in lobbying before
11 the European Commission on that transaction.

12 The actions of the Federal Trade Commission
13 in certain circumstances have been salutary. I think
14 in discussing the matter involving Intel in Japan, it
15 was an effective outcome. Press reports indicate
16 there was an effective outcome involved in U.S.
17 involvement with the Qualcomm principal issue in
18 China. And of course, the -- I am not sure how
19 effective -- well, I think it was, I guess, effective
20 because it brought about greater convergence and
21 understanding and consultation, the U.S. criticism of
22 the European Commission's action in GE/Honeywell.

23 We must respect foreign agencies'
24 interpretation of their own law. We do not
25 necessarily need to surrender to it in our efforts to

1 converge, to consult. I think the decision by my
2 classmate, Ruth Bader Ginsburg, in the vitamin C case,
3 sets a good principle for the question of respect, but
4 not total deference to foreign law. So I think what
5 we need to do going forward, what I would suggest
6 would be an appropriate role for the Federal Trade
7 Commission to consider the really excellent work it
8 has done and the recent work that the Department of
9 Justice has done. I think the Federal Trade
10 Commission under the guidance of Randy Tritell has
11 made great strides in this area, but the question is
12 testing the implementation.

13 And I would like to close with reference to
14 the initiative that is recently been announced and
15 promoted by Assistant Attorney General Makan Delrahim
16 to establish a multilateral framework for procedure in
17 antitrust cases. He recently spoke at the Fordham
18 Conference indicating that there is significant
19 progress in that area, that some 12-or-so countries
20 are signing on. We have not seen what they are
21 signing on to in detail yet, but signing on to the
22 principle is a major first step by a national
23 antitrust agency to attempt to persuade other
24 countries that there needs to be some system, joint
25 system, for assisting in the implementation and

1 review, not a scorecard, but a review of the extent to
2 which the guidance documents, the so-called soft
3 guidance, is actually adopted and fomented in the
4 international arena.

5 I think that is the challenge going forward
6 to the FTC, to the Department of Justice, and I think
7 it is a challenge of enormous importance for
8 international antitrust and international competition
9 policy.

10 And so with that, thank you very much.

11 (Applause.)

12 MR. SAYYED: All right. Thank you, Jim.

13 Alysa, your convenience -- and I would note
14 that I am very envious of the ICPAC, that they had
15 apparently three or four years to do their report.

16 (Laughter.)

17 MR. RILL: It has legs.

18 MS. HUTNIK: So switching gears to consumer
19 protection and privacy -- and like most consumer
20 protection lawyers, I have pictures.

21 (Laughter.)

22 MS. HUTNIK: So I do want to, first,
23 strongly support the Commission's objectives for these
24 hearings. I am a firm believer in that there is value
25 in self-examination and being willing to both solicit

1 and consider constructive feedback from constituents
2 and practitioners inside and out. And, indeed, from a
3 similar process, the 1995 hearings positively shaped
4 subsequent FTC policy and approach, and one would
5 expect similar outcomes from these hearings.

6 So taking the time machine -- let's see if
7 we can get there -- back to the '90s -- and while some
8 of us might have had Mariah Carey on the radio,
9 hopefully nobody is going to raise their hands on
10 that, here at the FTC, the 1995 hearings had
11 technology front and center in the focus. And there,
12 the focus was innovative changes and convergence
13 happening with the online marketplace, television,
14 cyberspace, even radical new technology issues such as
15 purchasing compact disks over your telephone and,
16 notably, even then the FTC was already anticipating
17 issues with the amount and the type of data collected
18 online. Who is accessing that data? How many people
19 were accessing that data? Cybersecurity issues with
20 the data and the associated other consumer protection
21 considerations.

22 The resulting Pitofsky report from those
23 hearings provided an effective roadmap for consumer
24 protection business guidance and policy for over 20
25 years. Tim Muris mentioned durability. This policy

1 has been extremely durable.

2 That report centered on several key tenets.

3 One, consumer sovereignty. This is a point that has
4 been echoed in the 1980 FTC policy on fairness and in
5 decades before and in adjudications and business
6 guidance. The idea that we would give consumers
7 access to material information and allow them to make
8 their own choice without regulatory intervention, to
9 do it conveniently.

10 Two, the agency would prioritize enforcement
11 to fight fraud and deception and unfair business
12 practices that caused consumers harm. The agency also
13 would support industry self-regulation as a way to
14 make limited agency resources go further and to
15 provide businesses with greater clarity on compliance
16 expectations. And, finally, the Commission would
17 provide consumer education to empower consumers to
18 navigate through emerging marketplaces.

19 And while some might argue that the
20 application of these concepts has ebbed and flowed
21 over the years, they are viewed by many as the
22 successful foundation to the FTC's approach in
23 consumer protection. It is an approach that is
24 largely consensus-based. It is not largely political.
25 It is measured and it intentionally considers

1 competition concerns with those of consumer
2 protection.

3 It is also a framework that supports our
4 nation of innovation. We are experiencing and
5 witnessing a technology revolution that has no end in
6 sight in a robust marketplace that provides feedback
7 when a line has been crossed through both consumer
8 choice, a vibrant press, and government enforcement.

9 And while there may be growing pains from
10 time to time, and sometimes criticisms that the FTC
11 does not act fast enough to prevent unlawful business
12 conduct, it is the flexible nature of the FTC's
13 Section 5 authority that is such a critical part of
14 our country's economic success. But like any balanced
15 framework, we should continue to ask tough questions
16 to determine if and what changes may be warranted so
17 that the agency's consumer protection mission can
18 continue to be fulfilled for the next 20 years.

19 And in looking at the comments filed in
20 response to these hearings, they certainly raise
21 several themes. One of the main themes that Chairman
22 Simons started out with was the concept of technology,
23 whether the technology marketplace of today and
24 tomorrow requires a change to the FTC's organizational
25 structure and allocation of resources. And just as

1 the 1996 Pitofsky report following those hearings
2 observed that there would be challenges to the
3 agency's consumer protection mission with the evolving
4 technology marketplace, today's cyberthreats and
5 technology changes and innovations will absolutely
6 test the FTC's expertise and its resources.

7 Technology plays an integral part of the
8 consumer experience whether at work, at home, in
9 educational settings, health care, facilitates the way
10 we interact with each other and with the world around
11 us. So it is no surprise then that technology should
12 play such a key role in most of the FTC's consumer
13 protection enforcement cases. And given the
14 technology emphasis of commerce today and tomorrow,
15 does the current FTC's organizational structure and
16 investment of resources and technology expertise
17 reflect the present and foreseeable needs in order to
18 fulfill the consumer protection mission?

19 One of the second themes, and many might
20 call it a pain point, reflected in the comments is the
21 ever-growing patchwork of consumer protection and
22 privacy laws around the globe and here in the United
23 States. The 1996 Pitofsky report recognized the
24 obstacles that a multitude of conflicting laws would
25 pose for commerce, particularly for small and

1 medium-size businesses and new entrants.

2 Today, these compliance obstacles have only
3 grown, particularly in the area of privacy where there
4 appears to be a race to become the most comprehensive
5 in regulating data practices. And given the examples
6 that we are seeing in Europe, California, and
7 elsewhere, it remains an open question on whether the
8 Commission's risk-based approach will have to yield to
9 a national and uniform approach to privacy.

10 That may be easier said than done with
11 respect to passing federal legislation, particularly
12 in an election year. So in the near term and in the
13 absence of a uniform federal standard, what type of
14 guidance and policy leadership can the agency provide
15 that could be helpful to the national and global
16 discussion on the costs and the benefits of more
17 prescriptively regulating business practices.

18 And the third theme from the comments
19 underscored a point that this agency has always faced:
20 Where to focus its enforcement efforts, what shall be
21 the priorities given finite and limited resources.
22 And with lots of shiny objects and headlines to choose
23 from, the agency has most advanced its consumer
24 protection mission when it has focused on business
25 practices causing real harm.

1 Financial and physical harm have rightly had
2 the agency's attention, but importantly, given the
3 role of technology in our lives, the agency, under
4 then acting Chairman Ohlhausen, has also explored how
5 informational injury can cause real harm and how the
6 agency can measure such harm and seek to deter and to
7 remedy unlawful business practices with such results.

8 Doing more with less also might involve all
9 aspects of the Commission's in-house expertise with
10 more visible collaboration with the Bureaus of
11 Competition and Economics. Indeed, the unfairness
12 prong of Section 5 requires that competition be taken
13 into account, and more transparency on this
14 involvement and the competition analysis and consumer
15 protection cases would provide helpful guidance to
16 businesses which, in turn, will help consumers.

17 The last theme that was raised, and that I
18 will touch on, by the comments and which played an
19 important role in the Pitofsky report as well is how
20 important the FTC supporting and incentivizing company
21 participation and meaningful self-regulatory programs
22 is. They are not a substitute for government
23 oversight, but they can enhance the agency's consumer
24 protection mission with a lot less cost.

25 History has shown that self-regulation is

1 more nimble and able to move more quickly to address
2 innovation and technology changes. And when the FTC
3 promotes the use of self-regulation and incentivizes
4 companies to embrace such standards, industry responds
5 time and time again and consumers benefit directly
6 from this carrot rather than stick approach,
7 incentivizing rather than purely focusing on punitive
8 deterrents.

9 So I will keep my comments shorter. This
10 leads me to concluding remarks that with the rapid
11 changes that were happening and all the discussion
12 around technology, we are largely discussing many of
13 the same types of issues that were discussed in some
14 form at the last set of hearings in 1995. And as we
15 hear from many voices during these hearings, I can say
16 from my personal experience, working with startups,
17 working with large companies, new entrants, those that
18 have been around for decades, most companies are
19 motivated to do the right thing while also remaining
20 competitively viable.

21 Straightforward laws that do not pick
22 winners or losers, clear regulatory guidance, and
23 vigorous support of self-regulation enables companies
24 to achieve those goals without unnecessarily fencing
25 in opportunity or innovation. And for the fraudsters

1 and companies that are bent on causing consumer harm,
2 the FTC has its tools, existing tools to address that.

3 Thank you.

4 (Applause.)

5 MR. SAYYED: Okay. Well, Alysa, thank you.
6 And thank you for getting us almost back on schedule.
7 As my friends know, being off schedule just a few
8 minutes would be a major achievement in my life.

9 (Laughter.)

10 MR. SAYYED: So anyway, we are going to take
11 about a ten-minute break. So let's come back here
12 just a little slightly after 10:30. And we will start
13 up again.

14 (Brief break taken.)

15 MR. SAYYED: Okay, thank you. I just want
16 to remind everybody that we do have some of my FTC
17 colleagues collecting question cards. So if you have
18 a question for the panel members, just write it on the
19 card, raise your hand, we will pick it up, and we will
20 try to get to it.

21 But before we turn to both sort of a panel
22 Q&A and audience Q&A, we are going to ask separately,
23 both Jan McDavid and David Vladeck to both comment on
24 what they have heard and, honestly, comment on
25 whatever they would like to comment on. But I am sure

1 it will be germane.

2 So I will first turn it over to Jan and then
3 I will turn it over to David when Jan is complete.

4 MS. MCDAVID: Thank you, Bilal.

5 I want to applaud the Federal Trade
6 Commission for again using its statutory authority to
7 consider whether changes in our economy require
8 adjustments in the FTC's enforcement priorities. Such
9 hearings were part of the FTC's original statutory
10 mandate and have been used very effectively throughout
11 its history, most notably in the Pitofsky hearings
12 that were discussed extensively this morning.

13 I am honored to participate again as I did
14 in the Pitofsky hearings, and I am returning to my
15 antitrust roots here at Georgetown because my
16 antitrust career started my final semester in law
17 school at Georgetown when I studied antitrust law with
18 Bob Pitofsky.

19 Hearings provide the FTC an opportunity to
20 step back and consider broad philosophical issues
21 without the pressure of facts and time deadlines
22 arising out of particular proceedings. That is a real
23 luxury that most agencies do not have, and the FTC
24 does. That kind of introspection allows the FTC to
25 identify opportunities for improvement. It also

1 offers an opportunity for democratic participation,
2 which is one of the objectives recently outlined by
3 Commissioner Chopra in his paper last week.

4 I speak here as a practitioner who advises
5 clients every day on antitrust issues. And I share
6 the FTC's view that competition produces the best,
7 most innovative, lowest-priced products and services
8 for consumers.

9 Most antitrust enforcement actually takes
10 place in conference rooms in law firms and boardrooms
11 in corporations where people like me advise our
12 clients on where the lines are and how they can
13 achieve their business objectives without crossing
14 those lines. Our ability to do that effectively is
15 significantly enhanced if our clients know that the
16 antitrust cop is on the beat.

17 That was true in the Bush, Clinton, and
18 Obama Administrations because antitrust has always
19 enjoyed bipartisan support. And based on early
20 impressions, it is also true with the current Federal
21 Trade Commission and Antitrust Division.

22 I have always viewed the antitrust laws as
23 sufficiently flexible to adapt to changing market
24 conditions, such as those involving the growth of
25 technologies or foreign competitors. It also has been

1 sufficiently flexible to be applied across a broad
2 range of industries involving defense, health care,
3 consumer goods or technologies, which do not
4 particularly have anything in common. The antitrust
5 statutes, as they have been interpreted by the
6 agencies and the courts in recent years, in the last
7 30 years or so, provide a framework that knowledgeable
8 counsel can apply as we consider the unique facts
9 brought to us by our clients. And, of course, we also
10 bring to bear the economic concepts that are so
11 important to underlying antitrust analysis today.

12 Over the course of my career, I have seen
13 the development of sound antitrust doctrine rooted in
14 a principled analysis and, above all, the positive
15 role that economic analysis played starting really
16 with the Supreme Court's decision in General Dynamics,
17 which was decided just before my final law school exam
18 by Bob, and the GTE Sylvania decisions, and leading to
19 iterations, for example, of the merger guidelines.

20 In contrast, one of my mentors, former FTC
21 Commissioner Tom Leary, said that during his early
22 career, when they would be defending a merger before
23 the agents, they would say, God forbid it would
24 achieve any efficiencies, because that was suspect in
25 the '60s and early '70s.

1 As I was trying to do economic -- or
2 antitrust research as a young lawyer and as a law
3 student, I had a very hard time discerning any
4 consistent thread through the cases I was reading and
5 that made it really hard to advise clients. That is
6 not true anymore because we have a framework that
7 lawyers and even our clients understand.

8 During my career, antitrust analysis has
9 been grounded in fundamental principles and focused on
10 consumer welfare. Contrary to the concerns expressed
11 by some, prices are not the only touchpoint in our
12 analysis. We have handled many matters in which
13 issues like innovation and product quality were much
14 more central than price. And in my experience, the
15 agencies have done a very good job of identifying
16 those issues and resolving them in the matters. The
17 way they have done so has also made it possible for
18 advisers like me to tell our clients where the
19 antitrust lines are.

20 I am a progressive Democrat. So you might
21 expect that I would be applauding the development of
22 populist antitrust theories. But I think that
23 including populist antitrust concepts would make the
24 task that I undertake for my clients much more
25 difficult. Instead of well established principles,

1 grounded in consumer welfare and sound economic
2 analysis, we would be applying amorphous concepts of
3 bigness and fairness, some of which turn traditional
4 principles on their heads, such as lower prices that
5 do not have the underpinnings of a predatory pricing
6 analysis or penalizing large successful technology
7 companies simply for being successful because they
8 created new products and services that consumers
9 generally desired.

10 This could return us to the era of Von's
11 Grocery where the dissent lamented, "The Court grounds
12 its conclusion solely on the impressionistic assertion
13 that the Los Angeles retail food industry is becoming
14 concentrated because the number of single store
15 concerns have declined." This led Justice Stewart to
16 complain that "The sole consistency I can find in
17 antitrust laws is that the government always wins."

18 But even that would not be true in a
19 populist system because ultimately we do not have an
20 administrative system in the United States. We have a
21 system of enforcement. And the agencies and private
22 plaintiffs bear the burden of proof. In Europe and
23 many other countries, the government can simply say
24 no. Here, they have to go to court. And they do so
25 grounded in facts and economic analysis that supports

1 their case but with a framework that everyone
2 understands.

3 Where there are legitimate concerns about
4 fairness or employment effects, for example, those
5 issues should be addressed under different regimes as
6 is done today with the CFIUS, unless, as in the case,
7 for example, of the no-poach cases, there is a
8 legitimate antitrust concern directly affecting
9 employment and arising out of particular conduct.

10 Antitrust is a well-calibrated tool to
11 achieve competition and consumer welfare. But it is
12 poorly designed to tackle social issues that are more
13 appropriately addressed under other kinds of
14 legislation. We should respect the limitations of
15 antitrust.

16 And, finally, antitrust analysis that
17 includes amorphous concepts of bigness and fairness
18 could lend itself to politically motivated
19 enforcement, which we certainly should eschew,
20 especially now in the current political environment.

21 Thank you.

22 (Applause.)

23 MR. SAYYED: David, we will turn to David
24 now.

25 MR. VLADECK: Okay, thank you. Let me start

1 by thanking Chairman Simons for holding these
2 hearings. I think this is the right way for the
3 Commission -- for a new Commission to get its bearings
4 and to figure out what its priorities are going to be
5 and what its agenda should be.

6 I also think it is right to honor Bob
7 Pitofsky. His legacy still loomed large at the FTC
8 when I was there; I am sure it still does. The
9 influence he has had not simply on the antitrust side
10 of the agency but on the consumer protection side is
11 enormous, and it is only fitting to do this here at
12 Georgetown Law School.

13 So I generally agree with Alysa and I am
14 going to try not to repeat the points that she made.
15 What I would like to talk about are what I think are
16 three main challenges the Commission faces going
17 forward. In the first -- and this I think Alysa
18 brought up -- is tech, tech, tech. Virtually
19 everything the agency does today has some connection
20 with emerging technologies.

21 When Chairman Leibowitz and I got to the
22 FTC, we did not have a tech infrastructure. We did
23 not have a single technician on staff. To the extent
24 we needed to engage in forensic analysis, we had to
25 outsource it. Today, because each of the successive

1 Chairs has built upon the tech infrastructure that we
2 started to build, the agency has more technology
3 capacity than ever, but I still wonder whether it is
4 sufficient.

5 The agency needs deep expertise in things
6 like artificial intelligence. It needs the forensic
7 ability to conduct investigations and data breaches
8 and other kinds of consumer injuries. We need better
9 forensics, better tools. And so one challenge I think
10 the agency faces going forward is to make sure that
11 its infrastructure, its resources match the challenges
12 that the agency faces. So I think that is one.

13 One of my former colleagues, Professor Lori
14 Cranor, suggested that maybe it was time that the FTC
15 added a new bureau, a bureau of technology. I do not
16 know whether that is the right way to address the
17 technology deficits that the FTC faces, but that is
18 something that ought to be considered.

19 Second, the challenges of protecting
20 consumers in a digital economy. Now, the FTC, in
21 2012, issued a report that tries to set out a
22 framework about how consumer protection matches the
23 FTC mandate. And I think there is a lot of very
24 valuable advice in that report. I would urge the new
25 Commissioners to dust it off and take a look, because

1 it provides, I think, a blueprint at least for dealing
2 with some of the difficult questions the Commission is
3 going to face.

4 For example, automated decision-making. I
5 am not necessarily a foe of artificial intelligence.
6 After all, we all know that human decision-making, eh,
7 it is not necessarily great. Right? But it provides
8 all sorts of challenges for regulators. It is a black
9 box system. You cannot interrogate an algorithm. And
10 it can be a breeding ground for disparate treatment
11 that is based on impermissible factors. And rooting
12 out those kinds of problems is very difficult for the
13 agency.

14 Data-driven offers in pricing. The
15 marketplace is full of variable pricing and variable
16 offers. I mean, there have been challenges about
17 Facebook's ads for housing and so forth. These are
18 very difficult challenges the agency faces to ensure
19 fairness in the marketplace.

20 And the lack of transparency in the
21 algorithmic decision-making process runs a real risk
22 that at least some consumers are going to face tyranny
23 by algorithm. The Commission needs to figure out how
24 it can be an effective regulator in this space.

25 It faces enforcement challenges. Yesterday,

1 there was a New York Times article about the New
2 Mexico Attorney General bringing a COPPA case and
3 criticizing the FTC for not beating his office to the
4 punch. Well, COPPA enforcement has been a thorn in
5 the side of the agency since apps were developed. The
6 app market -- you know, the app developer market is
7 highly diffuse. There are thousands of people making
8 apps, some in their parents' basement, and it is very
9 hard -- unless you are going to carpet-bomb the
10 industry, to have an enforcement regime that really
11 works well. And now the agency has brought many, many
12 COPPA cases and it has done so against high-profile
13 violators. But that is a problem.

14 And, you know, Alysa talked about the
15 usefulness of self-regulation. This is an area where
16 we have encouraged self-regulation. We actually
17 detailed a lawyer to work out of our San Francisco
18 office to be an outreach person to the app development
19 community, encouraging some type of self-regulatory
20 body. We did not succeed. So there are some
21 enforcement challenges the agency faces as well that
22 are magnified by outdated statutes that the agency has
23 to enforce.

24 Neither FCRA or Gramm-Leach-Bliley nor some
25 of the other statutes that were enacted, before anyone

1 could envision a digital economy like this, need to be
2 updated, and I would hope that the Commission can work
3 with Congress to do so.

4 I think the lack of civil penalties in
5 Section 5 cases has been a serious lack for the
6 agency, particularly in data breach cases. The RAND
7 Institute has done a number of studies making clear
8 that the economic incentives particularly for box
9 stores and other kinds of consumer-facing companies do
10 not push hard enough to ensure robust security
11 defenses. That is, it is economically rational to
12 risk a data breach because the cost of strengthening
13 one's defenses may outweigh it. I think civil penalty
14 availability in those kinds of cases would add a
15 necessary deterrent and might help stem the tide of
16 rampant ID theft.

17 I think we need to update the unfairness
18 doctrine. You know, it is interesting because the
19 unfairness doctrine seems to at least be interpreted
20 by some to require some form of economic or
21 economic-like harm. But the statutory mandate of the
22 FTC is to prevent unfair and deceptive practices, not
23 try to remediate them when they take place. And there
24 are many harms that are just not actually well
25 remediated by money.

1 I mean, for example, the Ashley Madison data
2 breach. You know, this was a secret dating site.
3 Well, marriages broke up. People committed suicide.
4 These are serious harms that ought to be prevented.
5 There is at least an argument that the unfairness
6 statement as it is currently constituted does not
7 really take into account some of these reputational
8 injuries that have been, you know, made possible by a
9 digital economy.

10 My last point is the regulation of big data.
11 There is now pervasive data collection. It is
12 ubiquitous. In fact, the last bastion of privacy, our
13 homes, is now yet another site of data collection.
14 People have always on/always off devices. The
15 internet of things are going to put sensors in
16 people's homes. All of this, you know, is -- they
17 serve useful purposes. But they involve enormous data
18 collection. And we need to figure out how to protect
19 consumers in this area of ubiquitous data collection.

20 We do not have laws that really deal with
21 this. The aggregation of data is a real sort of
22 enticement to data thieves. So Paul Ohm, who worked
23 at the FTC when Jon and I were there, wrote a law
24 review article about ten years ago where he forecast
25 there might become a time where there would be

1 databases of ruin. That is, that the data collection
2 would be so ubiquitous that whatever fact that you
3 would be mortified to have revealed to the public or
4 to other people, that those facts will be in a
5 database.

6 Well, given the ability of data-sharing,
7 data lakes, the ubiquitous movement of data, there
8 really is no answer to those questions now. And those
9 are questions that the FTC has to address. When I was
10 at the FTC, we did a 6(b) on, you know, data
11 collection by data brokers. And I think that was a
12 good start.

13 And I think one of the things that I would
14 urge the Commission to think about is using its 6(b)
15 authority to get a better handle on basically just how
16 consumer data flows. Where does it go? Who has
17 access to it? What kinds of constraints, if any,
18 ought to be imposed?

19 So I think the -- I commend the FTC for
20 holding these hearings. I think this is going to be a
21 challenging but interesting time. And I urge that the
22 Commission think about these things.

23 Thank you so much.

24 (Applause.)

25 MR. SAYYED: So, thank you, David.

1 What I would like to do now is -- you know,
2 I have a series of questions and, in frankness, we
3 have shared them with the group in advance. But, of
4 course, they were prepared before I knew what anybody
5 would say.

6 What I would like to do is first ask the
7 panelists maybe to ask questions of each other or
8 comment on what others have said. And because he has
9 to leave at 11:30 and, in fact, squeezed us in to do
10 this panel, I would like to ask Jason if he has some
11 thoughts on what he has heard, particularly because he
12 comes from a different perspective or different
13 background than the rest of us. And then I will ask
14 folks maybe to put some questions to Jason.

15 MR. FURMAN: Yeah. I guess we have heard
16 two references to populist antitrust, and I am not
17 sure whether I agree or disagree with those comments.
18 If those comments are saying you should replace the
19 current disciplined approach with a sort of
20 woolly-headed, if you do not like the company and you
21 want to promote democracy and ground your approach in
22 something big and cosmic like that, then I certainly
23 agree with you.

24 If what you are saying is that there were
25 certain papers written decades ago and those papers

1 are still 100 percent correct and we should base all
2 of everything on these tablets that were handed down
3 and any change would be populist and barbarian, then I
4 think I quite disagree with that.

5 In fact, even some of the assumptions and
6 arguments that people like Bork and Posner and others
7 made, you know, economists in IO have long known that
8 they were quite fragile and based on very specific
9 assumptions that were not very robust, that the
10 world was much more complicated. As you said, Janet,
11 people do take into account a broader sense of
12 considerations. But to some degree, economists need
13 to do a better job of understanding those broader set
14 of considerations, too.

15 So I think this is an evolving area as the
16 Chairman said at the very beginning of the remarks. I
17 think that continued evolution is important. I think
18 that if some of the macro evidence data and
19 motivations that I said lends more impetus to that, I
20 think that would be a welcome development and an
21 important one. But I still would then use that to
22 motivate using micro market-by-market techniques to
23 think about cases, not some of those types of
24 macrodata. But I do not think that is irrelevant in
25 motivating us to push further and think harder about

1 ways that -- and, frankly, enforcement has gotten more
2 lax and that has had deleterious consequences for the
3 economy.

4 MR. SAYYED: Tim, it looks like you want to
5 react.

6 MR. MURIS: Sure. Let me address the
7 Chicago point about the sacred texts. Bruce Kobayashi
8 and I published a paper subtitled, Time to let go of
9 the 20th century. And --

10 MR. FURMAN: When did you publish that?

11 MR. MURIS: 2014.

12 (Laughter.)

13 MR. MURIS: I think Bilal sent it to you.

14 And what we said there essentially -- look,
15 the way to think about Chicago is the way to think
16 about the American revolutionaries. There was this
17 revolutionary band of brothers, but what they were --
18 they were opposed to the old order. And the old order
19 was overthrown. But once it came to running a
20 government, you know, they split like Adams and
21 Jefferson.

22 If you take, you know, a list and we put
23 this in the paper, Baxter, Bork, Bowman, Posner and
24 Stigler, they either had not thought of or they
25 disagreed radically on how to approach antitrust

1 policy. Mergers, for example, those guys were all
2 over the lot from the most aggressive, Posner, to the
3 most restrictive, Bork. And the point was they just
4 had not thought about it. And when they did, they
5 disagreed.

6 And so this idea, which is ripe in this
7 populist literature, that there is this economic cult
8 from the University of Chicago, which dominates
9 antitrust thinking, is simply inaccurate.

10 MR. SAYYED: Any other reaction or anybody
11 would like to put questions to --

12 MS. MCDAVID: I agree with Tim, but I also
13 agree, Jason, that this has to be evolutionary and it
14 is not -- we do not regard them as the tablets that
15 came down with Moses.

16 Economic theory has evolved. We have had
17 three iterations in the merger guidelines, and the
18 ones we have in place now actually reflect how the
19 agencies have been analyzing mergers for quite a long
20 time, and they introduced new concepts such as
21 unilateral effects analysis that were not in the
22 original versions.

23 So we do evolve, but I am very concerned
24 about the inability to discern the consistent thread
25 that I found when I was a young lawyer and very

1 worried about how clients are going to have to handle
2 this stuff.

3 MR. SAYYED: Well, Jan, since you have
4 touched on merger guidelines, let me ask a question
5 that I have asked people to think about. And this is
6 not meant to reflect on a particular administration or
7 not, but in 2010, the previous administration revised
8 the horizontal merger guidelines and changed --
9 whatever you want to call it -- safety thresholds or
10 presumption thresholds from an HHI of 1800 -- post-
11 merger HHI of 1800 being, under some conditions,
12 presumed anticompetitive to an HHI level of 2400.

13 And I will say also in fairness, I think Tim
14 Muris and I wrote an article suggesting that some
15 change was appropriate and we may have landed it
16 around 2400.

17 But let me put that out there. I mean, do
18 people think the thresholds in the merger guidelines
19 should be adjusted downward?

20 MS. MCDAVID: Well, I deal with the
21 guidelines all the time. And my view of the HHIs is
22 that they are useful as an initial screen to identify
23 the deals that need additional scrutiny. And then
24 they show up in the complaint if the agency challenges
25 the deal as part of the basis for why they are doing

1 so. And in between, we do not talk about them very
2 much because we talk about competitive effects
3 analysis.

4 Where is the real competition that takes
5 place? And having numbers attach to it and squaring
6 market shares creates a sense of precision about this
7 process that simply does not exist in reality or in
8 the way the guidelines are applied.

9 So I do not think it is necessary. I mean,
10 I have clients who come to me and say, well, as I read
11 in the HHIs, we have an 1800. And then I discovered
12 that they have defined the market in a way that the
13 agencies would never agree with, and therefore, the
14 client has assumed something will be fine when, in
15 fact, they are going to run into a real buzzsaw.

16 MR. MURIS: Look, the guidelines do tell you
17 something significant if you forget the HHIs and think
18 about it. I heard Jon Baker give a good talk on this
19 Friday after our retrospective analysis came out, when
20 I was Chairman.

21 Think about it in terms of the number of
22 significant competitors. Bill Baxter, we argued with
23 him when he put the guidelines out in '82. Six to
24 five was his marginal case, and we wanted to make it
25 five to four. But Bill was a structuralist, much more

1 than modern people are, and he thought that was not
2 very many competitors, six or five.

3 Jim Rill, essentially when he put out his
4 guidelines, made it much more the focus that Jan was
5 talking about. But when they did the guidelines in
6 2010, they were relying on data that said four to
7 three was the marginal case. And, in fact, Jon Kwoka,
8 among others, had published papers out of the FTC's
9 line of business data that showed the importance of a
10 strong number three to ensuring competition. But it
11 is the marginal case. There are lots of four to
12 threes challenged and occasionally higher.

13 But it does turn on a lot of factors. But
14 the number of -- if you want very simple tests, the
15 number of significant competitors and how consumers
16 react, if they are significant business consumers,
17 those -- the answer to those two questions predicts a
18 fair number of the results.

19 MS. MCDAVID: And on the point of number of
20 effective competitors, the FTC has done a number of
21 reports looking back at its data, about the deals it
22 challenged, the deals that it did not challenge, and
23 what the factors were. And those papers, which talk
24 about how many competitors there were in deals that
25 were challenged, whether there were customer

1 complaints, whether there were bad documents, a range
2 of other things, they are really useful guidance.

3 And it is terrific work that the FTC has
4 done. I wish the Division would join in doing that
5 kind of analysis.

6 MR. FURMAN: I mean, just briefly on the
7 previous point. I thought, Tim, you were much more
8 modest about the Chicago School in this discussion
9 than you were in your remarks. In your remarks, you
10 actually claimed that they had accomplished quite a
11 lot in terms of changing the way antitrust was. And I
12 think that is right. That was the Chairman's remarks.

13 MR. MURIS: Well, they overthrew the old
14 order.

15 MR. FURMAN: Right.

16 MR. MURIS: But that was 40 years ago.

17 MR. FURMAN: Right. But, anyway, I do not
18 think we need to -- so I think sort of everyone treats
19 them that way. I do not think one needs to relitigate
20 that. I think the question is, do we need to make
21 some changes?

22 On the HHI, I would just do the average of
23 whatever Fiona and Jon think it should be.

24 (Laughter.)

25 MR. FURMAN: But I think the argument for

1 raising them also involved focusing and making sure
2 you are refocusing and being vigorous above them in
3 terms of the screen and everything else you are taking
4 into account. So I think it is not just the number,
5 but a whole bunch of other things.

6 And some of that is also, frankly, dependent
7 on the courts when you are bringing hospital cases and
8 you are still losing hospital cases, even when you
9 have, I think, a unanimous Commission voting for them.
10 That means there is a set of thinking, some of which
11 was shaped in the past and is -- you know, that needs
12 to probably be modernized and updated to deal with
13 changing research, including issues like wages, which
14 I think is an important one when thinking about
15 hospitals.

16 MR. MURIS: Well, but the FTC is mostly
17 winning, as the Chairman said, mostly winning hospital
18 mergers. The problem was there was this silly belief
19 in the Elzinga-Hogarty test. And we got Ken -- I went
20 to Ken and Ken testified he had two very simple
21 propositions. He said, I cannot believe anybody would
22 apply that test to hospitals. And, second, I cannot
23 believe anybody would pay me to say anything so
24 obvious. And those two propositions, believe it or
25 not, helped carry the day. And two circuit courts

1 very recently blessed the FTC's opinion.

2 But, Jason, you are right in the sense
3 because these cases are decided out there by
4 individual district court judges. The FTC actually
5 had to overturn some of the district court judges in
6 circuits. But I think the FTC's way of looking at it
7 is correct and it mostly wins. But, obviously, in the
8 world of individual judges, you can get some variance.

9 MR. SAYYED: Jim has some comments.

10 MR. RILL: Just real quickly. I think what
11 probably was not recognized very much in the change
12 from the '82 guidelines to the '92 guidelines is the
13 treatment of the structural paradigm. You recall in
14 the '82 guidelines that at the certain concentration
15 level that the guidelines provided, there would be a
16 likelihood of challenge. In the '92 guidelines, we
17 said this is a presumption that is carried on with
18 further analysis, and went into then the other factor,
19 including entry and competitive effects, competitive
20 nature of the marketplace, which I think was a major
21 change from the '82 to the '92 guidelines.

22 I think one of the interesting things about
23 the 2010 guidelines -- very creative, and a revision
24 was probably in order -- is the distinction between
25 the analytical framework of the guidelines and the

1 analytical framework when the Commission goes to
2 court.

3 The 2010 guidelines are very, very -- and I
4 daresay critical, but somewhat almost dismissive of
5 market definition issues as a proxy for the base for
6 the analysis. Shortly after those guidelines were
7 analyzed, the Commission went to court. If you look
8 at its brief in the Polypore case, it does not appear
9 that the 2010 guidelines existed. There is very much
10 the traditional analysis approach, '82, '92 approach.

11 So I think there is a distinction that one
12 has to draw between what the agencies do and their
13 analysis which is obviously extremely important if you
14 do not want to go to court and the practice that the
15 agencies put into their court pleadings, which are
16 more traditional because I think judges have become
17 comfortable in accepting the analytical framework of
18 the '82 and '92 guideline approach. So I think there
19 is a distinction there that we have to be aware of.

20 MR. MURIS: Bilal, if I could, I do not want
21 to forget the other mission. The FTC is a bigger
22 consumer protection agency in both dollars and people
23 than it is antitrust. If you ever go out as an
24 official -- and we have some here -- and do an
25 interview, unless there is a big antitrust case in the

1 press, the questions are overwhelmingly going to be
2 about consumer protection.

3 I think David is 100 percent right about
4 strictly nonmonetary protection. As a young scholar,
5 I wrote a couple papers about how contract law
6 protects subjective value. I am not sure you need to
7 revise the unfairness guideline. I think another
8 speech would be useful because the FTC has protected
9 that, you know, nonmonetary as David mentioned.

10 The first security breach case that we
11 brought -- and it was when I was Chairman -- involved
12 Eli Lilly where what happened was a nonentrant, not
13 just poorly trained, an employee who was not trained
14 at all, managed to send out a list to the world of --
15 I think it was 600 people who were taking Prozac.
16 And, you know, e-mail addresses are very easily
17 identifiable. A lot of people have their names,
18 certainly their last names. And, obviously, we
19 thought that was private information that ought to be
20 protected. And you could spin a case of, you know,
21 monetary loss.

22 But utility functions, when I talked about
23 those economists who trained me, Gary Becker was one
24 of them, and he was one of the first to put other
25 things in utility functions. And that is the way the

1 FTC thinks. David is right, that the Commission ought
2 to stress that. I think you can read that in the
3 unfairness statement now. But, certainly, statements
4 to that effect would be useful.

5 MR. VALDECK: Yeah, and to Tim's credit, Tim
6 and Howard published an article that is a classic. I
7 think a classic in the Mark Twain sense. Something
8 that everybody talks about, but no one has ever read.

9 (Laughter.)

10 MR. VALDECK: But I did read it. And in it,
11 Tim makes exactly that point, which is that the
12 unfairness statement ought to be construed to cover
13 the kinds of behavior that we would think of as
14 invasion of privacy work. But, in fact, oftentimes,
15 when a bureau director brings a case like that to the
16 Commission, there is real pushback. And not every
17 commissioner, unfortunately, is quite as enlightened
18 as Tim is on this matter.

19 So I think that going forward some clarity
20 needs to be injected into the process either through a
21 revision of the unfairness statement or some
22 declaration by the Commission or at large that these
23 kinds of harms are subsumed in the unfairness
24 statement. Because there are some cases that Tim
25 actually raises questions about in that article, and

1 the result was, I think, you said was sort of hard to
2 reconcile. The order was hard to reconcile with the
3 complaint language. Cases like DesignerWare, Aaron's.
4 And that is because there was friction within the
5 Commission.

6 So we need some resolution of this issue
7 because, increasingly, the harms that are caused
8 through data breach and other forms of revelation of
9 privacy information are not necessarily economic in
10 nature. And the unfairness statement should simply
11 make that clear or the Commission should make it clear
12 in some other way. So I do not disagree.

13 MR. MURIS: Well, I appreciate the fact that
14 we had at least one reader. But I think maybe the
15 solution is the next time the Commission brings a case
16 like that is just to issue a public statement that
17 interprets the unfairness doctrine.

18 MS. MCDAVID: Or perhaps in these hearings
19 and the report that comes out.

20 MR. MURIS: Sure, sure, another good
21 suggestion.

22 MR. SAYYED: Let me ask Alysa, who I think
23 on this panel counsels clients the most directly on
24 these issues, if she has some thoughts on this area.

25 MS. HUTNIK: Well, one of the things that we

1 hear from clients a lot are what is the law and what
2 is the best practice. And in counseling clients, you
3 know, it is the interpretation of the cases and really
4 focusing on those fundamental policy statements. So
5 where you have a statement on deception and a
6 statement on unfairness from 1980 and '83, which are
7 helpful and we continually go back to that, I think to
8 David's point, modernizing them, even with current
9 examples rather than adding kind of the 75th, the 77th
10 document that you need to put in an email to the
11 client on what they have to address, I think with
12 current types of challenges, both in advertising and
13 data practices and et cetera.

14 MR. SAYYED: Well, that leads right into a
15 broader question. You know, the Commission takes -- I
16 think, takes seriously its obligation to provide clear
17 guidance, business guidance in consumer education. So
18 I wonder if folks up here think there are other areas
19 where, you know, new or updated policy statements or
20 materials are needed. I think that ties in as well to
21 the idea of a self-regulatory model, as well.

22 I would put that open maybe to David and
23 Alysa initially. But, of course that is just as
24 potentially true on the antitrust side of it.

25 MR. VALDECK: Yeah. Let me just make a

1 quick comment, which is the agency spends an enormous
2 amount of time on guidance documents. When I was
3 there, the endorsement guides came out, the Green
4 Guides, 300 pages of narrative. These are really
5 important documents. We understand why regulated
6 parties need the kind of guidance that the agency can
7 provide.

8 But doing a good guidance document is an enormous
9 undertaking. And there are areas where I think the
10 guidance needs to be updated. Native advertising, I
11 think, is an issue the agency is going to have to
12 continue to grapple with.

13 The Green Guides left a lot of questions
14 unanswered simply because there was no real consensus
15 about what certain words mean like "renewable." So I
16 think one core part of the agency's mission is
17 providing the kind of guidance that Alysa is talking
18 about that her clients need. It is quite a formidable
19 undertaking, but I do think it is part of the
20 Commission's core mission.

21 MS. HUTNIK: I would just say that while the
22 reports are well read by private practitioners, it is
23 the business guides that the clients use, the TSR
24 business guidance, you know, the Green Guides. Every
25 one of those, I have some of those sections memorized,

1 as do some of my clients.

2 So I think taking concepts like the 2012
3 privacy report and taking the unfairness statement and
4 really bringing it up to date, that would be relevant
5 for the clients, the innovative clients that are
6 thinking of how to use machine learning and using AI
7 and using facial recognition and having it
8 consolidated in some ways where the topics overlap so
9 that they can use that and not feel like they are
10 targeted with "gotcha" enforcement down the line when
11 they are trying to interpret necessarily flexible
12 standards and to do the right thing.

13 MR. VALDECK: Well, and this goes back to
14 the 6(b) question, which is in order to issue some of
15 these guidance documents, for example, the use of
16 biometrics in the marketplace, I think the Commission
17 might do well to commission a study to get a sense of
18 how widespread these practices are, where companies
19 are going, what the immediate future looks like,
20 because this is a topography that the Commission needs
21 to understand, but I do not know whether it has the
22 knowledge base today to issue a guidance document on
23 these issues.

24 MR. MURIS: I completely agree about
25 guidance. The best guidance the Commission gives is

1 in merger, and an area that is badly in need of
2 guidance on the consumer side is data security.
3 There are enough investigations and cases -- there is
4 over, I think, 50 cases and probably at least half
5 that many serious investigations -- to do maybe not a
6 merger guide, but at least a commentary on -- which
7 the agencies did in the, I don't know, 2006-07 time
8 frame.

9 And something that would be important would
10 be to talk about as examples -- and the parties can be
11 disguised -- when the agency did not act. That is
12 really important information. Because the complaints
13 have tended to be vaguer and vaguer over time. Data
14 security guidance, I think, is badly needed.

15 MR. SAYYED: Okay. Well, let me ask if
16 there is any reaction to that. If not, I would turn
17 to another topic.

18 Well, this ties into a question we got from
19 the audience. I will raise it in two ways. And I
20 think this -- first, there is a common critique that
21 the U.S. has lost or is losing its leadership role in
22 antitrust policy globally; that what we see developing
23 outside the U.S. is a model predicated on the
24 framework of the European Union or European countries;
25 and that this is being adopted by some of the newer

1 agencies and newer countries.

2 I would make the same point -- well, maybe
3 slightly differently, as a question, what can we learn
4 from the -- and is there a divergence between the U.S.
5 and other agencies on the consumer protection side?
6 So a two-part question, right? Have we lost our
7 leadership and why and then what can we learn from
8 other agencies, both on the competition and consumer
9 protection side?

10 MR. RILL: Let me start out with the
11 competition side because I do not think I have done
12 much consumer protection work since we put Joe Camel
13 out to stud.

14 (Laughter.)

15 MR. RILL: There is a challenge here in the
16 global framework of a competition agency. I mentioned
17 in my earlier remarks in a recent speech by Mario
18 Monti, in effect claiming that the European methods of
19 antitrust, the European foundations for antitrust were
20 far superior to those in the United States. That
21 challenge has been there a long time.

22 I think there is a concern that there is a
23 divergence of enforcement principles and due process
24 principles, procedure and substantive, around the
25 world and one that is increasingly being affected. I

1 think that the U.S. has not lost its attempt, its
2 leadership in the sense of the work its done within
3 the ICN. It is largely the U.S. pressure, for
4 example, that put out the U.S. initiative, that put
5 out the guidance documents on due process through the
6 agency effectiveness working group, U.S. leadership of
7 the working party on endocrine cooperation in the
8 OECD. This has a profound effect and produced a major
9 report on due process.

10 So I think we are not running up the white
11 flag any time soon. I think it is the responsibility
12 of the U.S. in two areas to preserve, I think,
13 leadership not only for -- you know, it is not America
14 first. America first sometimes can be American, you
15 know, not there. I think it is America trying to
16 present some of the principles that have underlied
17 antitrust enforcement in our country and are juris
18 prudential-based to try and put those across.

19 I think two areas where this can be done is
20 continuing the guidance through the international
21 organizations, and I think that further attention
22 should be given to the -- if you will, the moral
23 suasion, the publicity effort that I think underlies
24 initiatives such as Assistant Attorney General's
25 Delrahim's multilayer framework for antitrust

1 procedure deserve attention. I think the increasing
2 use of bilateral agreements on competition policy,
3 bilateral memoranda of understanding, is a good way to
4 go about it.

5 And I think also that the agencies need to
6 be perhaps attuned more, as they have somewhat in the
7 past, to actually engage in consultation and advocacy,
8 if you will, in particular, instances where the
9 foreign agency seems to be departing from a globally
10 accepted principle, procedure, or substance and, in
11 effect, engage in consultation as provided for in a
12 number of instruments of cooperation. I think those
13 are important.

14 I think the final point that the agencies
15 need to be concerned about, that the United States
16 needs to be concerned about is the problems sometimes
17 of an agency action being misused by a foreign agency
18 to say, well, you are doing it so we can do it. There
19 is a lot of copycat misuse of U.S. agencies. U.S.
20 agencies need to be conscious of the risk of that
21 copycat. A recent article by Koren Wong-Ervin and
22 Josh Wright, lists a number of areas where that has
23 happened following up on actually some consents being
24 used as an expression of law, Bosch, for example,
25 Motorola Mobility -- Google/Motorola Mobility, by

1 foreign agencies as well. This is an expression of
2 U.S. law. They misused that and have that as a
3 copycat for the misapplication of antitrust law.

4 MR. MURIS: I wanted to take that and ask
5 Jason a question. I know he is doing a lot of work on
6 artificial intelligence and I assume big data is a
7 part of that.

8 Jason, is what is going on overseas, is that
9 important for the U.S. and what should the FTC do
10 about those issues?

11 MR. FURMAN: I can tell you the answer in
12 like six months.

13 (Laughter.)

14 MR. FURMAN: But, for now, I think a lot of
15 the issues around big data -- I think the big
16 empirical question that I do not know the answer to, I
17 was just talking about before, is if you think there
18 is diminishing returns to data then you are a lot less
19 worried about it then if you think there is some
20 region of increasing returns. There is some people
21 that deal with computer science that say, with machine
22 learning, when you get past a certain point you get to
23 this place where you can, you know, do the AI in a
24 certain way that you could not do before you get to
25 that scale.

1 If you have that, then I think you do have
2 to start worrying about data becoming a barrier to
3 entry; that there will be some large economy to scale
4 in the machine learning AI space; and that you have to
5 try to look at issues about, you know, who owns data,
6 for example, and something that consumers may overlook
7 and not fully understand and have the property rights
8 defined more properly.

9 On the other side of the argument, in a
10 world where you think it is intangible capital
11 producing things rather than tangible capital, it
12 makes it easier to enter and anyone can come up with
13 their little computer algorithm and enter the market.

14 So I think this question of, is it just a
15 really cheap -- you know, the AlphaGo reinforcement
16 learning, the latest iteration of it that DeepMind did
17 is not that long or complicated a program. It does
18 not actually use any data. It just plays itself and
19 generates the data. Anyone in this room could have
20 done it, although none of you did.

21 (Laughter.)

22 MR. FURMAN: So if technology is like that,
23 then I think we do not need to be that worried. Any
24 one in a garage can do it. If technology is this
25 increasing returns to data, then I think we do need to

1 be more worried. And I do not know which, so I
2 apologize.

3 MR. MURIS: Thank you.

4 MR. SAYYED: I will use that as a plug. We
5 are doing two days on big data at American
6 University's Washington College of Law in early
7 November and two days on AI, artificial intelligence
8 and algorithms, at Howard University's School of Law
9 in the middle of November. So maybe you can come
10 back. That would be great.

11 MR. FURMAN: Let me just be clear,
12 algorithmic collusion is a whole different issue from
13 big data one and --

14 MR. SAYYED: Yes, exactly, although we are
15 having some difficulty separating out the people that
16 do one or the other.

17 (Laughter.)

18 MR. SAYYED: But, anyway, no, we are going
19 to devote a lot of time to it. That was a key -- one
20 of the things the Pitofsky report did was just sort of
21 think about things that were going to come up over the
22 next 5, 10, 15, 20 years, and that is part of what we
23 are doing in that space.

24 Jason, because you have to leave, I hope
25 this does not put you on the spot, but I wanted to

1 raise it since you are doing some platform-related
2 work, since you mentioned you are doing some platform-
3 related work.

4 To go back to merger law -- and you may have
5 less familiarity with the doctrine, but to get your
6 thoughts on this -- how should we think about
7 acquisitions of new technologies by established
8 players? Sometimes we use the term nascent
9 competition or nascent competitors. But it is
10 something that we are going to spend an afternoon on.
11 And maybe while you are here you have thoughts, you
12 have some thoughts.

13 MR. FURMAN: Yeah, no, absolutely. You are
14 creating a real incentive to leave panels early.

15 (Laughter.)

16 MR. FURMAN: I think I am going to do it
17 from now. It is working out really well for me.

18 I think that is a really important issue. I
19 think there is a longstanding view that everything in
20 technology is evolving so quickly that there is no
21 point enforcing anything because by the time you do,
22 it has changed and there is some new competitor and
23 MySpace has disappeared or Internet Explorer has been
24 dethroned or whatever else.

25 I think there is something to that. I think

1 there is a lot of irreversibility, too, though. It is
2 easier to stop an acquisition now and change your mind
3 five years from now and allow it than it is to take a
4 company that is already acquired and split it up. The
5 second is basically impossible. The first, the cost
6 of making an error and not allowing the acquisition
7 may not be that high if you can change it later. So
8 there is a little bit under uncertainty in literature
9 and economics, there is an option value of waiting
10 when you are making irreversible decisions, and
11 allowing a merger is one.

12 I think you have to figure out how to think
13 not just about market share, but about the ecosystem
14 as a whole. If you are buying up something that could
15 be a competitor later, then I think you are affecting
16 the ecosystem and something that prices, especially if
17 there are no headline prices, is not a useful guide to
18 market share, is not a useful guide to -- but it is
19 competition for creating a type of market in an
20 ecosystem. So I think that does require new thinking,
21 and probably under that option value of waiting, the
22 uncertainty is an argument for more, not for less in
23 those cases.

24 MR. SAYYED: Okay. Let me ask you if anyone
25 has a reaction to that. We are going to have a whole

1 afternoon of reaction to that.

2 Okay. Well, not to kick Jason off, but I
3 want to thank Jason for coming. He made a special
4 effort to get here.

5 (Applause.)

6 MR. SAYYED: Unless members on the panel
7 want to ask each other some questions, we have a
8 number of questions from the audience. I do not want
9 to be too selective because we did ask for questions
10 and I would like to get to them. So if people are
11 ready, we will do it.

12 And Jason did leave at just the right time,
13 but maybe others can think about this, either narrowly
14 or more broadly. Here's the question: How do we
15 analyze the harm to small businesses who rely on large
16 platforms to reach new customers in ways that they
17 never could before? That may touch on too specific a
18 topic.

19 MR. MURIS: Yeah, that sounds like a
20 benefit, not a harm, if they are using these platforms
21 to reach people that they never did before.

22 Look, obviously there is a whole set of
23 rules, disclosures, consumer protection rules. It is
24 important that the -- just from a simple contract law
25 standpoint, that the contracts not be devised

1 unilaterally as they sometimes can be, which is an
2 obvious problem under contract law.

3 One of the things I am surprised with is the
4 number of times people bring me antitrust issues that
5 are really contract law issues. I used to teach
6 contract law.

7 I do not think in the big picture sense that
8 the so-called platform issues need to be analyzed any
9 differently. The tool kit we have is perfectly
10 adequate and, you know, it goes back decades when the
11 new industries were evolving. We are talking about
12 going back to the 1990s.

13 MR. SAYYED: I took a little bit of this
14 question. We focused on the use of antitrust to
15 protect small businesses. I wonder if other folks
16 have some additional comment on that question. Is
17 that a proper role for antitrust or is it just too
18 hard for us to measure that particular factor in our
19 analysis?

20 MS. MCDAVID: I share Tim's criticisms of
21 the Robinson-Patman Act. I try to give those
22 questions when they come up to someone else in the
23 office. Or I tell my clients that whatever the right
24 answer is, the Robinson-Patman answer is the other
25 side of it.

1 MR. VALDECK: Well, let me just add one
2 thing. You know, dealing with platforms is an issue
3 that rises on both sides of the building. For
4 example, I mean, one of the ironies in the Google
5 investigation were the companies that were complaining
6 about anticompetitive conduct were the very companies
7 that would not have existed but for Google. You know,
8 that interaction becomes very challenging.

9 Also, you know, some of the platforms raise
10 serious consumer protection issues, because they are
11 essentially bazaars selling multiple products on the
12 same page. So questions about deception, who is
13 responsible for the deception, arise with some
14 frequency. So I think one sort of unmet challenge on
15 both sides of the building is what do we do about
16 platforms. You know, we do have -- there are certain
17 immunities for based on content, but that does not
18 really resolve some of the consumer protection
19 problems and some of the antitrust issues that arose,
20 for example, in the Google investigation.

21 MS. HUTNIK: I would just add on the
22 consumer protection side, when we are talking about
23 platforms and responsibilities -- and, David, I heard
24 you earlier in terms of talking about the limited
25 resources for enforcement -- some of the things that

1 we have seen is deputizing platforms to be responsible
2 for those that they let into the bazaar. And that may
3 be all well and good, but there is a lot of
4 interpretation and a lack of guidance on what is
5 reasonable oversight and monitoring, what is
6 scaleable, and not doing a gotcha on that.

7 MR. VALDECK: All fair questions.

8 MS. HUTNIK: So if we go towards that point,
9 what I would strongly encourage thoughtfulness over is
10 what are the standards to avoid third-party
11 monitoring, whether it is safe harbor, whether it is
12 other types of incentivizing, but clarity on those
13 points.

14 MR. SAYYED: Okay. Any other comments on
15 that?

16 Let me turn to a question that is -- I think
17 I will direct it to everybody. It is a similar
18 question. So the question says that former Chairman
19 Muris mentioned imperfect information in contrast to
20 behavioral economics. But in standard economic
21 models, imperfect information causes transactions not
22 to happen. It does not cause buyers to be fooled.

23 So I think here is the question: Aren't
24 buyers sometimes simply fooled and should they be
25 protected from being fooled? I think that is both a

1 consumer protection and in some ways a competition
2 question. But I will turn it over to David first.

3 MR. VALDECK: I think the answer is yes.
4 The Commission has struggled with what is a reasonable
5 consumer and what percentage of consumers must be
6 deceived by a message. But the mission of the
7 Commission is to prevent deception in the marketplace.
8 Tim and I may disagree at the margins about this, but
9 I agree with Tim's fundamental point that the core
10 mission of the agency is to protect against fraud.

11 The statute does not really use the word
12 "fraud;" it uses "deception." In my view, that has
13 always been the core mission of the agency. The first
14 cases the agency brought were consumer deception
15 cases. They were the sale of silk, which was really
16 cotton and it was sold C-I-L-K. Those were literally
17 the first enforcement cases the Commission brought.
18 So, historically, that has been at the center of the
19 agency's mission.

20 MS. HUTNIK: I would also just add to that
21 we have to reconcile what is a reasonable consumer and
22 the gullible consumer standards. And one of the other
23 parts of the FTC's mission is consumer education.
24 And, particularly, as we go through the emerging
25 marketplaces and people are learning even about those

1 marketplaces, consumer education plays a key role in
2 that, so that we do not dilute the reasonable person
3 standard.

4 MR. MURIS: I agree with both of those
5 points. Let me take the economic modeling part of
6 that. It is almost 60 years since Ronald Coase's
7 famous article, and the applications of that are all
8 about transaction costs. Shortly thereafter, George
9 Stigler won his Nobel Prize in significant part for
10 discussing that advertising was an extremely powerful
11 tool for the elimination of ignorance. Well,
12 obviously, if there is ignorance, we are talking about
13 a world with transaction costs and that is the world
14 in which you need an FTC enforcement, as I was talking
15 about.

16 And so the whole -- this straw man that you
17 hear -- in the popular press that, you know,
18 economists talk about these, you know, automatons who
19 only react -- consumers with perfect knowledge who
20 only react to price, that just has not been true in
21 any sensible economic application to what the FTC does
22 for decades.

23 MR. SAYYED: Okay, well, thank you. Let me
24 follow up on a point David made as well about a Bureau
25 of Technology in the FTC. I am going to depart a

1 little bit from the question, but ask, you know,
2 first, what do the other panelists think about that?
3 Is it something that is relevant on both the antitrust
4 side of the house as well as the consumer protection
5 side of the house? And what might it look like?

6 I raise that -- maybe it is a little unfair
7 because I did not raise it earlier. But David was a
8 bureau director; Tim, as well as being Chairman, was a
9 bureau director. How do you set up these things for
10 success really? That is maybe my question.

11 MR. VALDECK: I defer to someone who was a
12 Chairman. I think that would be the Chairman's
13 mission not -- I mean, I think it would be important
14 to retain some of the technology infrastructure in the
15 bureaus. I mean, much of what the Bureau of Consumer
16 Protection uses technologists for are forensics for
17 investigations. But there is a lot of value to having
18 access to skilled technicians for the policy issues
19 that the agency is going to have to confront moving
20 forward. Biometric identification, things like that,
21 these are difficult technical questions.

22 MR. MURIS: Look, the bureaus are
23 complementary. They are not substitutes. As the only
24 person ever to head both of them, they are
25 significantly different, they are different in their

1 personalities, they are different in their career
2 paths. They are, in many ways, autonomous.

3 It is important -- let me give you an
4 anecdote. I wanted the Bureau of Consumer Protection
5 to do more in working with criminal authorities. And
6 I, unfortunately, insulted them and told them that
7 they were too self-satisfied. Those were not the
8 words I used. And I regrouped and after about a year,
9 they decided it was their idea. And they now have a
10 very successful criminal liaison unit, which, of
11 course, they take complete 100 percent credit for,
12 which is fine with me. And it was a mistake on my
13 part to criticize them in the first place.

14 But it is a wonderful organization. It
15 reminds me of working in OMB in the old days where you
16 have people who it is their career. It is not as
17 transitory as the Bureau of Competition. But
18 embedding in the bureau, like David says, would be a
19 very sensible way to go.

20 MR. SAYYED: Anybody else?

21 Okay. I will answer one of the questions.
22 There is a reference in that question to the Office of
23 Technology Research and Investigation, what we call
24 OTech, which does sit in BCP. The question is, why is
25 this unit insufficient to get the job done now?

1 Without commenting too much on whether it is
2 insufficient or what job they are focused on, it is a
3 very small group and more resources would probably be
4 appreciated by the Chair and by the Commissioners and
5 even by the Bureau Directors.

6 So maybe I will end with a question that
7 maybe I have. It is a real question given the
8 difficulty of managing agencies. Do you think the FTC
9 should have more resources to do its mission and maybe
10 if you were to allocate the resources, how would you
11 allocate them? So I have no particular -- I would
12 like the private perspective as well as the -- the
13 folks who have not been at the agency as well as folks
14 who have been at the agency to maybe give some
15 thoughts on that.

16 MR. RILL: I think a question like that to
17 be addressed by me is like asking a Protestant
18 minister of what he thought about the latest Papal
19 encyclical.

20 (Laughter.)

21 MR. RILL: But when I was at the division,
22 one of our major, major efforts was to enhance the
23 workforce at the division, both from the standpoint of
24 law and economics. And it was short-handed when I got
25 there and we were able to build it up and I think

1 increase the efficacy of the agency with more
2 resources.

3 It is difficult to get those kinds of
4 resources with all the other budgetary demands. We
5 ran into a number of problems, partly solved by the
6 filing fee issue. But I think the agencies do need --
7 certainly, the division needed more resources at the
8 time, sensibly used and sensibly coordinated. For the
9 Commission, I leave it to the people who worked there.

10 MR. VALDECK: Tim?

11 MR. MURIS: Well, I have a long-running view
12 about this. In '81, when we came in, we were asked to
13 reduce resources. The way to think about it as FTE,
14 we put the agency on a path from 1800 to 1200. That
15 is where it was in the mid '80s.

16 When I came back in 2001, I asked for a
17 comparison with the mid '80s, and Bob had had about
18 1,000. It turned out in professionals, 1,000 and
19 1,200 were about the same, a very small difference.
20 What had happened, there was a lot of outsourcing and
21 a lot of productivity improvements. Technology had
22 had a significant effect.

23 I think the agency is up to 1,150, something
24 like that.

25 MR. SAYYED: That is right, that is right.

1 MR. MURIS: And I do not know how that
2 compares with 2001. I suspect there have been more
3 productivity improvements, probably not as dramatic as
4 in the '90s. But, you know, Bob did a hell of a job
5 with 1,000.

6 I think we are headed for another
7 retrenchment era. So I think it is probably wishful
8 thinking to ask for significantly more resources and
9 -- besides the people, there is -- BCP, for example,
10 has a significant infrastructure burden that we
11 managed to satisfy with the money from Do Not Call,
12 which we used for building up the infrastructure for
13 Do Not Call, which was very helpful for the rest of
14 the agency.

15 But I think the present rate strikes me as
16 significantly more. We ended up about 1060, and I
17 thought we did a lot. I thought Bob did a lot. So I
18 do not think more resources are in the cards. I think
19 they are doing a lot with what they have.

20 MS. HUTNIK: This is not from an internal
21 perspective, but I think it is all about the
22 priorities. Where do you want to focus the resources
23 that you have? Some of the themes from today were, we
24 have Division of Enforcement and we need more manpower
25 in terms of business guidance. And I think to not get

1 distracted by calls for regulation, which would take a
2 whole bunch of people off of doing some of those
3 things now, that may not be as productive.

4 MS. MCDAVID: Speaking only on the
5 competition side, the lawyers and economists with whom
6 I work regularly at the Commission are incredibly
7 dedicated and hard-working. The general populous has
8 a view of government employees that is deprecating and
9 it is not fair. They do yeoman's work. They work
10 weekends; they work nights.

11 A lot of the competition mission is consumed
12 with things they cannot predict. What is the merger
13 wait going to be, all of which are time-sensitive. So
14 they have to at least retain the kinds of resources
15 they have because you will burn them out.

16 MR. VALDECK: Yeah, I would argue for more
17 resources. I understand Tim's argument, and I realize
18 this is probably swimming against the tide. But since
19 2001 or 1981, Congress has added considerable workload
20 to the agency. Changes in the marketplace have
21 required the agency to do more work.

22 The Bureau of Consumer Protection, at its
23 height when I was there -- and I do not think we have
24 added any resources to it -- had fewer than 450
25 people, including most of the people in the regions.

1 People work extremely hard. They are
2 incredibly dedicated. But there are lots of people
3 with their fingers in the dykes and the water is just
4 coming over the transom. So I would urge the
5 Commission to think about asking for an increase in
6 resources. Of course, most of it should go to BCP.

7 (Laughter.)

8 MR. VALDECK: But I think the agency could
9 well use a couple hundred more FTEs.

10 MR. SAYYED: Okay. Well, I think we will
11 conclude right there. We were on target for 11:45 and
12 I think that is where we are.

13 Before we conclude, I would like to thank a
14 bunch of people. First, I would like to thank the
15 panelists, including Jason who had to leave, very much
16 for devoting some time and effort to this.

17 I would like to thank my colleagues in the
18 Office of Policy Planning, who have been working very
19 hard on what will probably be about 20 days of
20 sessions. This is only 5 percent of the way through
21 once we are done today. Just a wonderful crew to work
22 with. I am very proud to work with them. And I think
23 I have the best job at the Commission.

24 (Laughter.)

25 MR. SAYYED: And, finally, thank also the

1 staff of the executive director for helping put this
2 thing together. You will see more of it this
3 afternoon. I will not be on stage and I wanted to put
4 that out there.

5 Thank everybody for showing up and paying
6 attention. We will be back here at 1:30. So if you
7 can come here slightly before, that would be great.

8 There is a cafeteria across the courtyard if
9 people want to eat law school food. But, but, but,
10 but, but, but it is good. It is better than I
11 remember. So hope to see you back here slightly
12 before 1:30.

13 (Applause.)

14 (Panel 1 concluded.)

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1 PANEL 2: HAS THE US ECONOMY BECOME MORE CONCENTRATED
2 AND LESS COMPETITIVE: A REVIEW OF THE DATA

3 MR. SAYYED: Okay. I am just going to say
4 welcome back and remind people in the audience or new
5 people that that two of my colleagues, maybe more, are
6 collecting questions that you make right on the
7 question card, and they will be brought to the panel
8 near the end of the panel for some audience Q&A.

9 So with that, I am going to turn this over
10 to Greg Werden from the Antitrust Division. He is
11 going to discuss with the panel whether the U.S.
12 economy has become more concentrated and less
13 competitive.

14 MR. WERDEN: Thank you. I am not a fan of
15 introductions, so I will not introduce the speakers.
16 They can introduce themselves if they want to spend
17 their time that way. They have total control over
18 their time.

19 The way we are going to organize this is Jon
20 is going to give a long side presentation, and then
21 each of our panelists will give much shorter
22 presentations, and they will go to a series of
23 questions that I pose and then, finally, questions
24 from the audience.

25 So, Jon?

1 MR. BAKER: Thank you. Thank you for having
2 me. It is nice to see all of my co-panelists. Thank
3 you, Bilal, and the FTC for inviting me. I was
4 involved in the hearings in 1995, and I am delighted
5 to be back for these today.

6 So the FTC hearings two decades ago were
7 spurred by two challenges for antitrust policy.
8 Markets were becoming increasingly global and
9 innovation competition was becoming increasingly
10 important. And, today, we have an additional
11 challenge for antitrust policy. Economic evidence has
12 been accumulating since the 1995 hearings, and much of
13 it from the past five years or so, that shows that
14 market power has been growing for decades. I think of
15 what we are seeing as today's antitrust paradox,
16 conjunction of substantial and widening market power
17 with well established and extensive antitrust
18 institutions.

19 In my presentation, I will sketch the
20 evidence that market power has been growing over the
21 past quarter century and has become substantial in the
22 United States. I am going to go through nine reasons.
23 None of them is individually decisive. There are ways
24 to question or push back on each, but their weaknesses
25 are different. So when you take them collectively,

1 they paint a compelling picture of growing market
2 power.

3 I am also going to explain why the recent
4 economic trends I point to reflect growing market
5 power, not solely increased scale economies and
6 temporary rents to early adopters of new technologies
7 in competitive markets.

8 To fit my presentation into the allotted
9 time, I will say less about most of the reasons that
10 will appear on the slides. And the very last slide
11 will reference my forthcoming book, the first chapter
12 of which goes into more detail on this topic,
13 including full cites for the research that is
14 referenced on the slides. It will also mention
15 criticisms of the research that I do not have time to
16 bring up in the presentation, although I would be
17 happy to talk about them during our discussion later.

18 Before I get into the nine reasons, I want
19 to make clear what I mean when I use the term "market
20 power." Firms exercise market power in their output
21 markets as sellers by raising prices or by altering
22 other terms of trade adversely to buyers, relative to
23 what would prevail in a competitive market.

24 Market power is not just about prices. It
25 can be exercised on other competitive dimensions, too.

1 Market power can be exercised in input markets,
2 exercised by buyers, and that is defined analogously.

3 The first of the nine reasons to think that
4 market power has been growing is that we
5 insufficiently deter anticompetitive coordinated
6 conduct. The Justice Department keeps uncovering
7 cartels year after year. They seem to form at the
8 same rate that we catch them, and that suggests under-
9 deterrence because the penalties are probably too low
10 to deter collusion and there is no reason to think
11 that the threat of penalties chills procompetitive
12 conduct or leads to excessive compliance expenditures.
13 Under-deterred express cartels are probably the tip of
14 an iceberg because tacit collusion is probably even
15 harder to deter.

16 We also insufficiently deter anticompetitive
17 mergers, and there are several empirical studies that
18 support this conclusion.

19 The third reason is insufficient deterrence
20 of anticompetitive exclusion. Since the late 1970s,
21 the courts have targeted rules governing exclusionary
22 conduct for extensive relaxation. And in some cases,
23 the new rules conferred de facto legality on such
24 conduct.

25 The empirical evidence that exclusion is

1 under-deterred is about the competitive effects of
2 vertical practices. Now, vertical conduct and
3 exclusionary conduct are not the same thing, but they
4 are correlated and the evidence shows that vertical
5 restraints often support collusion. There are a
6 number of examples of competitive harm from vertical
7 restraints and vertical integration.

8 Now, that interpretation of the literature
9 on vertical conduct may surprise some of you. So I
10 want to make an important methodological point. Most
11 empirical studies about the effects of vertical
12 restraints are looking in the wrong place to learn
13 about whether stronger antitrust enforcement would be
14 beneficial. If you want to know whether oligopolists
15 can use vertical restraints to harm competition, you
16 will not learn much by looking at markets with
17 competitive structures or in markets where the firms
18 could be deterred from anticompetitive conduct with a
19 threat of antitrust enforcement.

20 Looking in those kind of markets lets you
21 learn about potential procompetitive consequences and
22 about ways that firms can craft their vertical
23 arrangements to limit the inefficiencies and costs
24 that they may impose.

25 Now, you might see some instances in which

1 vertical restraints harm competition, but the markets
2 are not randomly selected. You would expect, in
3 general, the studies would not often find harm to
4 competition, even if the conduct could be harmful in
5 other settings that are not being studied where one
6 might want to think about antitrust enforcement.

7 And you are not going to learn much about
8 whether relaxing antitrust constraints has or would
9 lead to greater competitive harm. If you want to
10 identify the effects of antitrust enforcement in the
11 econometric sense, you have to compare outcomes with
12 and without antitrust complaints.

13 And there is a MacKay & Smith study that is
14 in the small print on the slide about resale price
15 maintenance. That is a rare example of a study of
16 vertical restraints that addresses this identification
17 problem. It finds that on the whole, competition was
18 harmed when the antitrust constraints on resale price
19 maintenance were relaxed.

20 Fourth, market power is durable. Markets
21 are not invariably self-correcting. Cartels and
22 monopolies often last a long time. The eight-year
23 lower bound on the length of the average cartel
24 compares favorably with the time it takes to correct
25 erroneous judicial precedents, even Supreme Court

1 decisions, you know, through later court decisions
2 that overrule them or narrow them procedurally or
3 substantively or through lower court decisions that
4 distinguish or limit them or through legislative
5 abrogation.

6 Fifth, the increased equity ownership of
7 rival firms by diversified financial investors is
8 another reason to worry about growing market power.
9 Rival airlines or banks or pharmacy chains or other
10 competing firms increasingly have overlapping
11 ownership by financial firms, like Blackrock, State
12 Street, Fidelity and Vanguard. The initial studies
13 have found that common ownership leads to higher
14 prices. This is an active research area where we are
15 likely to learn more soon.

16 Sixth, increased governmental restraints on
17 competition. Over the past few decades, the U.S. has
18 broadened patent scopes substantially and granted too
19 many patents after inadequate review. This trend may
20 have halted, but it has not really been reversed. And
21 other examples of governmental restraints that may be
22 on the rise include occupational licensing and
23 lobbying to limit rivalry.

24 The seventh is the rise of dominant
25 information technology platforms. Now, the empirical

1 evidence suggests that price-cost margins have been
2 growing economy-wide since 1990, in the United States.
3 The trend seems clear, although the magnitude of the
4 margin increases has not been measured. Growing
5 price-cost margins are probably tied to investments in
6 information technology. Dominant information
7 technology and internet platforms are not the only
8 firms making those investments or likely exercising
9 some market power as a result. But the platforms are
10 an important part of the story because they are likely
11 insulated from competition in some of their major
12 markets.

13 So eighth, oligopolies are common and
14 concentration is increasing in many industries. The
15 best evidence that increasing concentration allows
16 firms to exercise more market power comes from studies
17 of particular industries, like airlines, brewing, and
18 hospitals. The economy-wide evidence on concentration
19 suggests only modest increases in concentration and
20 many industries with rising concentration remain
21 unconcentrated.

22 But the economy-wide evidence is less
23 reliable than industry-specific studies. That is
24 because the economy-wide studies often use broad
25 product markets when it would be better to look for

1 competitive products in more narrow markets, and they
2 often use national markets when it would be better to
3 look at regional or local markets.

4 Now, some of the evidence involving broad
5 national aggregates is consistent with rising overall
6 concentration but could instead reflect increased
7 multi-market contact. But that could equally raise
8 competitive concerns about coordination. And there
9 are recent studies that also find concentration is
10 high and possibly growing in many labor markets,
11 potentially making it more possible for businesses to
12 express monopsony power to depress wages.

13 The final reason to think that market power
14 has been increasing is a decline in economic dynamism.
15 And Jason Furman highlighted this reason this morning.
16 Growing market power is a leading explanation or a
17 plausible contributing explanation for a range of
18 economic trends: a secular slowdown in business;
19 rising profits of a share of U.S. GDP; a slowed rate
20 at which firms expand when they become more
21 productive; a declining rate of startups; a shift in
22 growth and productivity gains from entrants to
23 incumbents; and a growing gap in accounting
24 profitability between the most and the least
25 profitable firms.

1 So I have interpreted the evidence in these
2 nine categories that I highlighted as indicating
3 growing market power. I want to explain now why I
4 think that is a better interpretation than the most
5 plausible alternative, namely increased scale
6 economies and temporary returns to the first firms to
7 adopt new information technologies in competitive
8 markets.

9 Now, the benign alternative has an initial
10 plausibility because the efficient size of firms has
11 likely grown overtime in many industries as a result
12 of the high fixed costs of investments in information
13 technology, network effects, and an increased scope of
14 geographic markets. That means firms could grow
15 larger and concentration could rise and price-cost
16 margins could increase even if markets are
17 competitive. In addition, the first firms to invest
18 in new information technologies might earn substantial
19 rents, which should be temporary if those investments
20 do not confer market powers and their rivals follow
21 suit with investments of their own.

22 The first six reasons I gave for thinking
23 market power is substantial and widening in the U.S.
24 cannot be reconciled with the benign alternative.
25 Anticompetitive coordination, mergers and exclusion

1 are under-deterred, market power is durable, and
2 increased equity ownership of rivals by financial
3 investors can soften competition, and governmental
4 restraints on competition have grown.

5 Also, market power is a better
6 interpretation than the benign alternative for the
7 other three reasons. The growth of dominant platforms
8 probably does owe a lot to scale economies and first
9 mover advantages, but those platforms may still have
10 the ability to exercise market power by excluding
11 rivals. Scale economy and rents to early adopters of
12 new technologies probably did contribute to rising
13 concentration in various industries. But there is
14 often independent evidence that the firms in those
15 concentrated markets exercise market power, which is
16 not surprising because the same fixed expenditures
17 that make scale economies and rents to first movers
18 possible can deter entry and soften competition.

19 Now, some of the evidence for the loss of
20 economic dynamism could be consistent with the benign
21 alternative of growing scale economies and returns to
22 early adoption of new technologies in competitive
23 markets, as well as consistent with increasing market
24 power. And that might include the rising profit share
25 of GDP and the growing gap in accounting profitability

1 between the most and the least profitable firms.

2 But other aspects of declining dynamism
3 cannot be reconciled with the benign alternative. The
4 benign interpretation assumes that profits rise
5 because markets are increasingly dynamic with higher
6 rates of entry, investment, and business failure. In
7 competitive markets, growing scale economies yield
8 higher profits because entrants have a greater risk of
9 failure when fewer firms can succeed. Earlier
10 adopters of new technologies would earn profits, but
11 they would be temporary, competed away by new or
12 expanding rivals making their own investments.

13 But the benign interpretation is
14 inconsistent with the evidence showing the reverse, a
15 slowing rate of new entry, a declining rate of
16 expansion when firms and plants grow more productive,
17 and a secular slowdown in business investment. And in
18 addition, the financial markets appear to view
19 corporate profit streams as less risky than in the
20 past and, yet, if markets are increasingly dynamic, as
21 the benign alternative supposes, those streams would
22 be viewed as riskier.

23 The bottom line is that growing market power
24 is a better explanation for declining dynamism and for
25 all nine reasons taken as a whole than the alternative

1 of increasing scale economics and early adopter rents
2 in competitive markets. The benign alternative may
3 well be a partial explanation, but increasing market
4 power is likely an important part of the story, too.

5 Now, I do not need to spend much time with
6 this audience explaining what is wrong with market
7 power. The harms within markets are described on the
8 slide from a partial equilibrium perspective, you
9 know, within an industry, within a market. The harms,
10 they can arise regardless of whether market power is
11 exercised by sellers or buyers. Market power can also
12 harm the economy as a whole by slowing economic growth
13 and increasing inequality. And the adverse economic
14 consequences of the exercise of market power could be
15 reinforced if firms and industries can use their
16 market power to secure political power and use their
17 political power to protect or extend their economic
18 advantages.

19 So just to summarize, the evidence I
20 presented shows that market power has been growing in
21 the U.S. economy for decades. From an error cost
22 point of view, we have learned that we are deterring
23 anticompetitive conduct less than we thought we were
24 in 1995 when the FTC last held hearings. That means
25 we should take steps now to strengthen our antitrust

1 rules, institutions, and enforcement.

2 And, Greg, I think I will reserve the
3 remainder of my time for rebuttal.

4 MR. WERDEN: Sorry, you have to check in
5 with the clerk before you start talking.

6 MR. BAKER: It's a tough court here.

7 MR. WERDEN: If you have ever argued at the
8 Court of Appeals, that is the rule.

9 (Laughter.)

10 MR. WERDEN: Okay, go ahead, Steve.

11 MR. BERRY: Okay. I want to give a talk,
12 only about six minutes, that I think is complementary
13 to what Jonathan is talking about, and I want to talk
14 about what kind of evidence we should weigh more or
15 less as we are looking at this debate. And in
16 particular, I think that Jonathan's mix of evidence
17 was quite different than the evidence you often see in
18 presentations in the press by macroeconomists and by
19 other nonspecialists. I wanted to indicate what some
20 of those distinctions are so that we can think about
21 what evidence is the most convincing and also what
22 kind of things we would like to look forward to in the
23 future.

24 So I am going to divide things a little bit
25 starkly into good and bad. And to talk about the

1 relative bad, I want to go all the way back to the
2 year 1989. In the year 1989, there were two, I think,
3 magisterial chapters that were published in the
4 handbook of IO, one by Dick Schmalensee and one by Tim
5 Bresnahan. And Dick Schmalensee was a participant in
6 and a sympathetic observer of decades' worth of work
7 that did something like what people are doing today,
8 which is try to look at the correlation of various
9 outcomes, like prices and markups, with measures of
10 concentration, like the Herfindahl Index.

11 And his chapter laid out a whole host of
12 problems with that, but I want to emphasize
13 particularly one. The Herfindahl Index in particular
14 is probably better thought of as the cause of market
15 competition, an interesting summary statistic of what
16 is going on rather than as an effect that causes
17 outcomes. The Herfindahl Index, itself, is a function
18 of market shares, which are a function of outputs,
19 which are co-determined simultaneously with price.

20 The most famous example that people used in
21 those days is that differences in firm heterogeneity,
22 cost heterogeneity where you had some firms with very
23 low prices; those low marginal costs would feed into
24 their market shares; their market shares feed into the
25 Herfindahl Index. But their low marginal costs also

1 flow into markups and you would see a positive
2 correlation between markups and concentration that has
3 to do with efficiency rather than with competition.

4 That is the problem of simultaneity, the
5 problem that, in this case, correlation is not
6 causation, and we should be very skeptical, I think,
7 of these studies that in some ways naively regress an
8 outcome on a Herfindahl Index.

9 Now, some people in this literature, I
10 think, are actually quite aware of this and they think
11 of this as a problem with the Herfindahl Index itself,
12 is correlated with other things, is endogenous. They
13 look for purely statistical ways of dealing with that
14 endogeneity. They look for what's called an
15 instrumental variable or just a more plausible
16 exogenous variation of market structure.

17 And that brings me to the second of those
18 great handbook chapters written by Tim Bresnahan. And
19 what he pointed out is that even if we grant that you
20 have discovered the true causal effect, say, of the
21 number of firms on price, you have not established
22 anything about the role of markups either on the
23 output side or on the input side.

24 Let me just give you one example of that.
25 I teach freshmen micro, and on the third day, we teach

1 them that supply slopes up and there are a bunch of
2 shifters. Among them are the number of firms that
3 shift supply back and forth. That is because of the
4 upward sloping marginal cost curves of the individual
5 firms. Demand slopes down. As you move the number of
6 firms, the supply curve moves against that demand
7 curve and it shows that as the number of firms goes
8 up, supply shifts out, prices fall.

9 In the perfectly competitive output market,
10 decrease in concentration drops prices. But there are
11 no markups. You have not found evidence of markups.
12 You may have found evidence of increasing marginal
13 costs.

14 The same thing happens on the input side.
15 It is an implication of the perfectly competitive
16 model of wage determination that an increase in the
17 number of firms will drive wages up. That is not
18 evidence of monopsony power. What Bresnahan said is
19 that we actually have to separately consider demand
20 and cost and competition and we cannot do that in one
21 equation or one correlation.

22 I think that kind of evidence with -- by the
23 way, did not feature greatly in Jonathan's discussion
24 -- should be downweighted a lot, right? We thought it
25 died with the publication of these two chapters 25

1 years ago. Some of us woke up and were a little
2 startled to see it suddenly outside of our window
3 looking in, and that is trouble.

4 I want to talk for just two minutes about
5 possible alternatives. One is just to look directly
6 at the effects of policy that have changed and what
7 effect did they have. We can learn about policy that
8 way.

9 Let me skip a couple of slides, though.
10 Another thing, though, is to back away for one minute,
11 to back away for one minute from causation and just
12 think about measurement. What has happened to
13 markups? We heard about these papers just a minute
14 ago. I think they do show that regardless of cause,
15 our best evidence is that markups are going up. It is
16 sensitive to measurement, like whether you include
17 certain intangibles and fixed costs in that or not.
18 But that kind of simple, descriptive, cross-industry
19 measurement is very valuable for telling us what has
20 happened, but not why. Not why.

21 So I think, ultimately, we are going to have
22 to do what Jonathan suggested. We are going to have
23 to do studies of individual important industries and
24 ask what is going on. So here is an example a
25 graduate student of mine did as part of his thesis.

1 He looked at the wholesale sector. That is pretty
2 important. That is a pretty important sector, right?

3 And what does he find? Concentration is up.
4 Ah-ha, concentration is up. On the other hand, output
5 is up. That does not sound like monopolization, does
6 it? Output is up. The product itself has changed.
7 Multi-warehouse wholesalers are locating closer to
8 their customers. They are investing in IT for
9 logistics. They are dual-sourcing goods. You can
10 shop between China and the United States with one stop
11 at a wholesaler. The nature of the good is changing.

12 And when you put this through a Bresnahan-
13 like series of models, you see that markups are going
14 up in the industry, just like in the cross-industry
15 analysis, but for a mix of all of the reasons that
16 Jonathan mentioned, not for one or the other, but for
17 all of them. Product quality is going up. That is
18 pushing price up. That pushes margin up.

19 The marginal cost is going down as firms get
20 better logistics and locate closer to their customers.
21 Marginal cost is falling. That is efficiency. But
22 markups go up. Competition is really going down and
23 that also contributes to the markup effect.

24 Why don't we see the entry that Jonathan
25 talked about? Implicitly, there must be fixed costs

1 or some costs that are preventing new entrants from
2 somehow competing away these profits. It is costly to
3 build all of those plants near your rivals and that is
4 a sunk cost and it is very hard for that to be
5 competed away. This is a complicated story.

6 And what I want to finish with is a
7 substantive hypothesis. What if this is true in
8 broader sections of the economy? What if it is
9 happening in broader sections, not just wholesale,
10 maybe IT, maybe other parts of retail, maybe broad
11 sectors of the economy, that firms for endogenous
12 reasons are changing their production methods and the
13 quality of products so that marginal cost is falling
14 and fixed cost is rising? Markups are going up.
15 Concentration is going up.

16 If that is happening in a broad-scale way,
17 it does not seem just that big is bad, but we are way
18 also -- we are way far from the theory of perfect
19 competition as well. We are in this very complex
20 setting where there are some good and bad things
21 happening. Like Jonathan, it is not just economies of
22 scale. There are other things, too. There are
23 competitive effects, as well. We cannot just wave our
24 hands and say it is all fine.

25 I also do not think we can just simply say

1 big is bad. I think it is these better kinds of
2 evidence, these descriptive studies at the broad level
3 and causal studies that are within industry level that
4 we ought to emphasize. And I think they are the ones
5 that are going to eventually tell us what the correct
6 policy path forward is. And these guys are better
7 policy experts than I am, so I am mostly going to
8 listen for the rest of the time.

9 MR. WERDEN: Thanks very much, Steve.

10 (Applause.)

11 MR. WERDEN: I am not sure who is going
12 next, but why don't you do it.

13 MR. WRIGHT: Okay. There are a few of my
14 students in the audience who are laughing at the idea
15 that I am going to do anything in six minutes. But
16 let's give it a shot nonetheless.

17 I think sort of extending the discussion
18 from Jon and Steve to move on, I would probably start
19 in the same place as Steve, which is I went to grad
20 school in economics and studied IO in the early 2000s,
21 and those handbook chapters were sort of taken as the
22 starting point for learning empirical IOs. We did not
23 read studies that attempted to infer causation from
24 changes to HHI on -- the effect on the price, we read
25 Steve's stuff.

1 I think the fundamental challenge in this
2 area -- and then I will dive into the data -- is that
3 while it is probably true that zombie IO economics has
4 died in economics departments a long time ago, I think
5 the fundamental challenge in part is making sure we do
6 not get antitrust policy that adopts zombie IO. I
7 think that is a challenge for the agencies; I think
8 it is a challenge for IO economists because the punch
9 line for some of this is going to be on the real
10 questions that matter for designing policy.

11 My interpretation of the evidence is that we
12 know a lot less and probably need to know a lot more
13 before we start playing much with policy. So I will
14 spend the rest of my time talking about that.

15 For starters, I think it is important to
16 separate -- we are going to talk about testable
17 hypotheses and testing with empirical data. I think
18 it is really important for these discussions,
19 especially if we are going to attach any policy
20 relevance to them, to separate claims.

21 One of the claims around is that we have
22 got a rise in concentration at the aggregate, sort
23 of nonmarket level, sort of really aggregated
24 industry sector, stuff made with metal not necessarily
25 just capturing firms that are competing against each

1 other.

2 There is a second set of claims that try to
3 do the relationship between what is happening in
4 markets, changes in concentration in markets, and
5 relate those to price or output or markets. Are we
6 getting more or less competition?

7 And I think there is a third set of claims
8 that is, is any of this caused by lax antitrust
9 enforcement? I will spend most of my time talking
10 about why it is so important for a discussion of
11 antitrust policy that we focus on markets and not sort
12 of broad aggregated sectors. That does not mean that
13 the sector-based research is not incredibly useful.
14 It is. We learn things like, at a rough level, what
15 is happening to markups over time? That is
16 interesting as a descriptive matter.

17 We do not -- and, often, these studies are
18 used to sort of glom on causation and make claims
19 about whether antitrust is doing too much or too
20 little. The reason that we care fundamentally about
21 markets and not sectors in antitrust is because the
22 fundamental lesson of those IO handbook chapters, and
23 I think most of modern IO in this area is that
24 competition and concentration are different things.

25 Concentration can be caused by more

1 competition, it can be caused by less competition. I
2 think Steve had this as the Chicago critique on his
3 slides. I am a UCLA guy. I am going to call it the
4 Demsetz critique or else I will lose my Bruin lunch
5 card.

6 So but the fundamental idea that we grapple
7 with and what makes antitrust hard is that changes in
8 concentration can be the outcome of more or less
9 competition. That makes identification difficult. It
10 makes broad claims about whether we have too much or
11 too little or sort of Goldilocks just right levels of
12 concentration really difficult to do and probably
13 outside the scope of the ability of modern IO. That
14 really was the lesson of sort of the big empirical
15 revolution of OI in the '70s and '80s.

16 So the punch line for me is I think a lot of
17 the evidence that we see are attempts to do sort of
18 this broad industry sector stuff where we do exactly
19 what we learned not to do in the '70s. We regressed
20 markups or price or profit on really broad aggregated
21 industry data. And then the policy world sort of
22 jumps on and makes causal claims and sort of we are
23 off and running. I think that is a dangerous place to
24 be in.

25 There are attempts to do better work. There

1 are attempts to do sort of more sophisticated merger
2 retrospectives and trade off sort of broad general
3 insights for learning about one case and maybe, I
4 think, in discussion, we will talk a little bit more
5 about that.

6 But my read of the evidence is at the
7 aggregated -- sort of relationship between aggregated
8 concentration and competition outputs, we do not know
9 much that is relevant to formation of antitrust
10 policy. I think there are interesting questions. I
11 think it is important for modern sort of IO economists
12 and for the agencies, for the FTC and the DOJ, who
13 have great collections of IO economists inside those
14 buildings, to engage in answering those questions.

15 I would say it is great that we all get up
16 here and engage in those questions. But I am hopeful
17 that the economists inside the agency, who are experts
18 and have access to data, things like agency
19 predictions and individual cases that they can test
20 against data, that they are also an active participant
21 in that discussion.

22 So I think the real challenge moving forward
23 is if you have data that is not what you need to have
24 the type of discussion that you want to have about
25 whether it is desirable to move policy one way or

1 another, whether it is mergers or something else, the
2 challenge I think both for the academy and for the
3 agencies is to invest in producing those data,
4 producing tools, producing studies to move the ball
5 forward in that literature, because I certainly agree
6 there are interesting questions here that require
7 investment and are sort of worth the time. I will
8 stop there.

9 MR. WERDEN: Thank you.

10 Fiona?

11 MS. SCOTT-MORTON: Great. Hello, everybody,
12 and thanks to the FTC very much for being invited to
13 contribute to this panel.

14 I agree with both Jon and Steve on the IO
15 research here. It seems very easy to run the wrong
16 regression. To someone without a PhD, it looks
17 tempting. We need to resist that temptation because
18 it is, in fact, just wrong.

19 But we need to find another way to answer
20 the question. That is not an excuse for not answering
21 the question. And as Josh said, concentration and
22 competition are not the same thing. It is not
23 actually, I think, very informative to learn about
24 aggregate concentration in the United States. I would
25 like to know about competition in the United States.

1 And I think, as Steve said, the markups are a good way
2 to get there.

3 I think the real reason that there is
4 consensus among a large fraction of the people who do
5 this work for a living and people who read the
6 newspaper, that we have a competition problem in the
7 United States, comes not from papers published in
8 academic journals, but from two main sources.

9 One is from people who work in this area,
10 the actual experience of litigating. So it took 23
11 years from the time the FTC first found a pay-for-
12 delay agreement in the record to getting the Supreme
13 Court to say, yes, under certain conditions, those
14 could be anticompetitive. Twenty-three years. And a
15 pay-for-delay is when a branded monopolist pays the
16 generic to stay out of its market. That is pretty
17 straightforward. It is exclusionary conduct. It
18 harms consumers. It keeps prices very high. Why did
19 we have to wait a quarter of a century to get that
20 practice banned, or never mind banned, actually, to
21 get that practice scrutinized properly?

22 The American Express opinion by the Supreme
23 Court completely misses the locus of competition
24 between American Express and Discover. It is all
25 about American Express' consumers versus the retailers

1 and so on, and gives a complete miss to the issue of
2 competition, which is what the antitrust laws are
3 supposed to protect.

4 So when you look at litigation and you look
5 at what the agencies are trying to prove in the
6 courts, it is a really heavy lift. And as Bill Baer
7 said when he was at the DOJ, why are some of the
8 mergers we are reviewing even getting out of the
9 boardroom. They are just obviously anticompetitive
10 and, yet, we have to litigate them anyway. So I think
11 that is one big area that we look to for evidence as
12 to why there are anticompetitive effects.

13 A second one is our experience as consumers.
14 Look around at hospitals, airlines, beer, media, big
15 tech. I think people in the economy walk around
16 buying things and the experience they have is of less
17 competition. And I think also consumers can get
18 easily confused between what is regulated and what is
19 not. So, for instance, pharmaceutical prices and
20 cable prices are not fundamentally something that
21 antitrust can do a lot about and, yet, those things
22 are exhibiting less competition. Also, for the reason
23 that Jonathan covered in his talk about lobbying to
24 get government protection.

25 So what is my response to this merging

1 consensus? We need to revisit the economics. And I
2 will say this slowly because it is worth saying 25
3 times and I do not have that long. So I will say it
4 once slowly. Economic analysis is not the same thing
5 as less enforcement. Chairman Simons said it exactly
6 right this morning. Economics is a tool. If you feed
7 a set of facts into the economic analysis box, you can
8 come out this merger is competitive or this merger is
9 anticompetitive. It works beautifully.

10 But what happened in 1975 is we applied
11 economics to antitrust and we got the pendulum
12 swinging down. But arguably we had too much
13 disorganized enforcement. The pendulum swung down and
14 now we have these things as sacred texts and the
15 answer is always if you believe in the sacred texts of
16 Chicago to enforce less. Obviously, if you enforce
17 less for 30 or 40 years in a row, you are eventually
18 going to pass the optimum. And that is what we have
19 done, I think.

20 And we need to recognize -- I luckily was
21 too young to be part of that project and so it is
22 perhaps easier for me to see that we well overshoot the
23 optimum and that we need to go back and look at the
24 economics fresh and try to get the right answer. Let
25 me remind you all there is a big drumbeat of dollars

1 in favor of keeping those sacred texts because the
2 parties that have monopoly profit would like to keep
3 the monopoly profit and they will spend their monopoly
4 profit to fund people who say that less enforcement is
5 always better.

6 So it is going to be difficult to achieve
7 progress in this area because the parties that have
8 financially gained from less competition are going to
9 work hard to keep their status. So I just want to
10 alert all of you in the media and the enforcement
11 community to be battling courageously for the
12 consumer.

13 But I think that the bottom line is that we
14 have the tools and we have the ability to get the
15 right answer, and we should use them and we should not
16 be trapped in paradigms from 30 years ago because
17 those are really outdated to the extent that they were
18 even correct 30 years ago, which I would not stipulate
19 to.

20 All right, that is all.

21 MR. WERDEN: Thank you. We are going to
22 turn now to a series of questions that I will pose to
23 our panelists. They have gotten the questions in
24 advance and actually done some negotiating. There is
25 a designated first answerer on each of the questions.

1 But after that, it is up to them to work it out.

2 So the first question, which is directed
3 initially to Josh, goes like this: Jon's basic point
4 is that we have more market power than we used to and
5 that is bad. Assuming that we do have more market
6 power than we used to and that it is a significant
7 increase in market power, my question is, do you agree
8 that it is necessarily bad and do you think something
9 ought to be done about it?

10 MR. WRIGHT: First, no one ever told me
11 there was negotiating. I always get left out.

12 (Laughter.)

13 MR. WRIGHT: So let me spend ten seconds
14 fighting the premise and then I will give up an
15 answer. The question is sort of assuming arguendo the
16 increase in market power that then sort of is that a
17 bad thing. I think my ten seconds is almost up. But
18 I will say I am not sure that premise has been
19 established.

20 But assuming per the question that it is,
21 again, I think we get back to the fundamental point
22 and, you know, some of these old Chicago texts are
23 pretty good, including Demsetz on the point about
24 identification, which I still think is very relevant
25 to our discussions about concentration and price. I

1 have a feeling you meant a different one.

2 But I think here we do not know, ex ante --
3 and this is the fundamental problem -- whether -- we
4 in antitrust want to care about changes in market
5 power that are attributable to reductions in
6 competition. That is not all of the ways in which
7 market power can be increased. If we want to do
8 antitrust that is sort of consistent with IO, if we
9 want to get the economics right, we need to have a set
10 of tools that enables us to distinguish between those
11 propositions.

12 So what do I think can or should be done?
13 There are simple answers floated around. We could
14 have -- we could sort of go back -- I do not think
15 anyone here wants to do that. We could go back to
16 really simple structural rules that equate competition
17 and concentration. We could pull dust off the 1968
18 merger guidelines, do antitrust with our fingers,
19 count the firms, and pretend as if we can make causal
20 inferences from changes from concentration to
21 competition.

22 We could have bright line rules that have
23 presumptions of liability if mergers are above X share
24 or above X dollars. We have one of those in the
25 Supreme Court. I would count that as one of the bad

1 cases we ought to get rid of. But there is pending
2 legislation that does something like this. None of
3 that, I think, is based in sound economics.

4 So I think what we are left doing if we
5 properly reject those ideas is making a serious
6 investment both in the academy and in the agencies to
7 improving our tools and being able to answer better
8 some of the questions that we struggle with now with
9 identification. I think we are starting that with
10 merger retrospectives.

11 I think if you look at the evolution of the
12 way inside the agency empirical analysis of mergers
13 happens now versus ten years ago, much less 20 years
14 ago, the improvement is remarkable. But I think it is
15 a burden on the agencies and on the academy in these
16 areas. You know, like to publish journal papers and
17 whatnot, but sort of engage on these questions, both
18 to fight against oversimplified fixes that will
19 probably do more harm than good, but also to subsidize
20 investment in more knowledge to do a better job
21 designing and calibrating policy with these questions.

22 MR. WERDEN: Anybody else?

23 MS. SCOTT-MORTON: Yes, I would disagree. I
24 think we have the tools. I do not think we need to
25 spend ten years developing new tools. I think we

1 could start now. There is not anything wrong with our
2 existing standards or economic analysis. I think the
3 problem comes when you try to apply it. So if you are
4 in court and, you know, the judge is taking the view
5 of recent cases that we have seen, which is either
6 ignoring the facts or ignoring the economic principles
7 or not applying the horizontal merger guidelines, for
8 example, in terms of are efficiencies merger-specific,
9 are they verifiable? Are they cognizable?

10 I think that is where the problem comes in.
11 And, of course, if an agency is confronted with, at
12 the end of the day, they disagree with the firms and
13 they have to go to court, that is the outside option.
14 And if you have a very weak hand when you go to court,
15 then there is not much you can get as a settlement.

16 So I do not actually think we have a problem
17 with the economics. I think we are ready to go there.

18 MR. WRIGHT: Greg, I do not know the rules
19 on like random intervention, so I am going to make one
20 in the absence of a rule. So the thing that I have in
21 mind in terms of getting the -- I think we are all for
22 getting the economics right. But, for example, some
23 of these errors go the other way. So it is not a
24 Chicago text, but in 1968, Oliver Williamson wrote a
25 pretty well known paper on efficiencies and mergers.

1 Fifty years later, there is not a single
2 federal court decision. No merging parties have
3 prevailed on an efficiencies defense. Fifty years is
4 a heck of a good winning streak. I agree parties
5 sometimes do a bad job presenting efficiencies. I
6 have been inside an agency. But I think there are
7 places where we could do better. That is one that
8 comes to mind that sort of cuts the other direction.

9 MR. BAKER: Just on the last point, I just
10 want to observe that if the overall overriding problem
11 is we are worrying about growing market power, sure
12 there might be good government reasons to think about
13 ways in which we could do reforms that avoid, you
14 know, chilling, less beneficial conduct. But the real
15 problem is to strengthen the antitrust enforcement and
16 that should be the overriding focus at the moment.

17 MR. WERDEN: All right. Let's move to the
18 second question. You have heard from a number of our
19 speakers today about the evidence of or related to
20 increased corporate profits. This evidence seems
21 fairly clear. The trend is worldwide, but it is more
22 pronounced in the United States than elsewhere. Here,
23 the profits are highly concentrated in relatively few
24 hugely successful companies.

25 My question for the panel is -- and Jon is

1 going to go first on this one -- does the presence of
2 a relatively small number of hugely successful
3 technology companies in any way suggest a failure of
4 antitrust?

5 MR. BAKER: The answer is not per se. I
6 mean, a large and profitable firm's size and success
7 alone does not mean antitrust has failed. Firms can
8 and do grow large and become successful by providing
9 customers with valuable products and services, and
10 that includes large technology companies.

11 We want to encourage firms to grow
12 successful and profitable by offering better and
13 cheaper products and services. But we should also be
14 concerned if firms, including large and successful
15 ones, exercise market power, and some of their major
16 markets are threatened to do that through exclusionary
17 conduct or collusive conduct or merger.

18 Now, I pointed to the growth of dominant
19 information technology platforms as a reason for
20 concern about increasing market power because I think
21 their high margins probably reflect market power in
22 part, not because of their success, per se.

23 MR. BERRY: Yes, so I think I would combine
24 my answer a little bit to these last two questions,
25 which is that -- and the IT example is good. I think

1 they have high markups; they have high profits. For
2 many good reasons, they have high markups. I would
3 say slightly opposite from Jon. It is not just market
4 power. It is a combination of market power and doing
5 things that people want and gaining efficiencies.

6 So as I said before, it is not bad, per se.
7 But I do think it has implications for antitrust even
8 if it is not bad, per se. Take two of these firms,
9 take two of my big wholesaling firms that have an
10 overlapping set of locations. If the markups are
11 already very high, the stakes for a merger become that
12 much more severe because they are already operating on
13 inelastic parts of their demand curve.

14 So I think in many cases, we can sort of
15 litigate whether it was bad whether we got here or
16 not, and I personally think we are going to figure out
17 it is a mix of things and we are going to see some bad
18 and some good. I think what I am more interested in
19 is the forward-looking discussion of what are the
20 implications. Now that we are here, is there
21 something different that we should be doing? Is there
22 a kind of scrutiny that we should be offering that we
23 have not offered before. I would really like to hear
24 from my closer-to-practitioner colleagues what those
25 things might be.

1 MR. WERDEN: Do either of you want in on
2 this?

3 MS. SCOTT-MORTON: I will answer it as an
4 answer to the next question you are about to ask me.
5 How about that?

6 MR. WERDEN: Okay. That is fine.

7 Next question, Steve sketched a scenario in
8 which technology is changing in a way that increases
9 the sunk costs and decreases the marginal costs of
10 companies. That scenario rings true even if lots of
11 other forces are at work.

12 I would like to hear from the panelists on
13 what they think likely accounts for the empirical
14 observation of increased markups over the past four
15 decades.

16 MS. SCOTT-MORTON: Okay. So I am going to
17 take the first half of the question and then Steve's
18 question on what do you do enforcement-wise.

19 I think what we need to do is adjust our
20 enforcement analytics to fit the market structure as
21 Steve suggested. So let's take, for example, the
22 presence of network effects. Network effects are when
23 the value of the product rises in the number of users.
24 So a social media platform is more valuable to me the
25 more other people are on it. What do we get when we

1 have network effects? We get concentrated market
2 structures. Everybody wants to be on the same network
3 because all their friends are there.

4 So we get market shares that go 99 percent
5 and 1 percent, or a few little epsilons. We do not
6 see market structures of 70/30 or 50/50 in a world
7 with network effects. So we are necessarily going to
8 see concentrated markets. Is that a problem? No. As
9 we have said already that is, per se, just that fact,
10 that is not a problem. But we need to recognize that
11 the locus of competition has shifted.

12 Competition in that market does not display
13 itself in the market. The 30 is not competing with
14 the 70. No, it is competition for the market. Who is
15 going to be the winner-take-all? Who is going to get
16 to be the 99? There are some firms that start out
17 together and one of them gets ahead and the market
18 tips and that winner gets the 99 percent.

19 Okay. So now that we know that the locus of
20 competition is for the market not in the market, how
21 would we do antitrust? We would care an awful lot
22 about entry. We would care an awful lot about
23 potential competition. We would care an awful lot
24 about acquisitions by the 99 percent of a teeny little
25 epsilon percent. Why? Because that epsilon percent

1 does not have a lot of share, but that is where the
2 competition is coming from. That 99 percent guy is
3 afraid the epsilon is going to become one and attract
4 all the teenagers and there is going to be a flip.

5 So we care a lot about that epsilon and that
6 is where the competition is coming from. And we need
7 to dust off our theories of harm when it comes to
8 potential competition. We need to stop investing so
9 much importance in market share. The market share of
10 the little guy is not big, and when you calculate the
11 Herfindahls, nothing is going to happen when you
12 analyze this merger.

13 Does that mean there was no competitive
14 significance to the little player? Quite the
15 contrary. All those little players are the only ones
16 that are making the 99 percent pedal faster and work
17 harder to keep consumers because they are all
18 potentially able to overthrow the incumbent.

19 So that is a way in which we have standards
20 lessening competition and so on that work perfectly
21 well in an internet platform or a network effects
22 market. But we need to think about focusing our
23 enforcement efforts at the place where the competition
24 is, which is a little bit different in some of these
25 markets than it would be historically in, say,

1 automobiles.

2 So I think there are big implications for
3 antitrust enforcement and I would point people in that
4 kind of direction.

5 MR. WERDEN: Do you want to weigh in, Josh?

6 MR. WRIGHT: I think I agree with probably
7 everything in that in terms of the description of that
8 and other contexts being appropriate to worry less
9 about the shares and worry more about the competitive
10 constraint imposed by the rival. I think that is sort
11 of a common theme, focusing on the competitive
12 constraint directly rather than using shares as a
13 proxy that probably holds across a bunch of areas.

14 I will make the observation that it is --
15 with respect to Steve's explanation with sort of
16 increasing sunk costs and reducing marginal costs --
17 that one of the implications -- and I think this is a
18 hearing for another day. But one of the implications
19 is that a lot of those industries are industries that
20 are intellectual property-intensive and one of the
21 potential tensions that arises.

22 And I think the agencies have to engage with
23 and be thinking about, as do academics who are
24 thinking about these things, is the idea that we sort
25 of are chasing markups leading us into those

1 industries invite a risk of having antitrust and IP
2 sort of go back to the '60s and '70s there. That is
3 where they ran directly into each other.

4 I think a lot of work has been done to try
5 to get antitrust and IP to serve as complements in the
6 direction of competition innovation rather than
7 substitutes. And there needs to be in those areas --
8 if that indeed is the right story, I think there needs
9 to be sort of significant thinking about how to make
10 sure that complementary relationship stays intact.

11 MR. WERDEN: Let's move on to the next
12 question which concerns dynamism. You have heard
13 quite a lot about that today, as well. Jon refers to
14 some evidence on dynamism as one of the major reasons
15 for rejecting a benign explanation for some of the
16 trends that have been observed. But I will point out
17 to our panelists and our audience that the databases
18 on which economists rely may be missing a lot.

19 The broadest database that I am familiar
20 with is the Census Bureau's business dynamic
21 statistics, which is a very high-quality longitudinal
22 database that includes every business in the United
23 States with at least one employee. But it does not
24 include any of the businesses with zero employees.
25 And you say, well, how big of a deal can that be?

1 Well, the answer is a presentation done by
2 Census economists a few years ago revealed that
3 between 1997 and 2010, 75 million startups in the
4 United States had zero employees while only 7.6
5 million had one or more employees. So over 90 percent
6 of the startups in the United States are being missed
7 in the data that shows entry rates going down.

8 So my question is, what data, if any, is
9 telling on dynamism? And Steve is going first on this
10 one.

11 MR. BERRY: Okay. So I will start off
12 confessing my confusion a little bit. When we talk
13 about market power, I know what we are talking about.
14 We are talking about the ability to hold price above
15 marginal costs. When we talk about dynamism, a few
16 things come to mind and they seem different.

17 One is a simply descriptive question which
18 we might want an answer to, which is has turnover in
19 some sense changed? Are the rates of entry and exit
20 from various industries fundamentally changed. I
21 think one of the things Greg is asking how good is the
22 data on that. I do not actually have a great
23 independent opinion on how good is the data on that.

24 But there is another thing that I think
25 Jonathan suggested, which is it is not a descriptive

1 matter of entry and exit. It is a question of whether
2 the economy is delivering important innovations to
3 consumers in the form of lower costs that are actually
4 passed through to lower prices and/or better products.

5 It is possible, as with our last question,
6 that you have a set of really big, great, innovative
7 firms who protect their position by being very
8 innovative. In that sense, we would have a lot of
9 innovation and not much turnover. I do not know if
10 that is dynamism or not.

11 It does makes me think hard, though, about
12 Fiona's point about potential competition. I think
13 maybe this is what Jonathan is getting at. If there
14 are firms who got where they are by being innovative,
15 how do we ensure that the innovation continues?
16 Surely not by seizing their intellectual property, for
17 example. That seems bad.

18 But, you know, do we take more seriously
19 potential competition? Is this data that Jonathan is
20 referring to evidence of a lack of potential
21 competition? I am a little confused by that. It is
22 more on sort of actual entry and exit. But these are
23 always first-order questions. These questions about
24 innovation are always first-order questions.

25 I think if we accept that we have these very

1 large, very profitable, certainly, firms that got
2 where they were by innovating, again, I would sort of
3 say, well, let's start from where we are and ask how
4 we move forward. I do not know that we have
5 dispositive evidence, but it seems like an important
6 question.

7 MS. SCOTT-MORTON: Yes, I would agree with
8 everything Steve just said. And I think then the
9 purpose of antitrust enforcement is to ensure that the
10 large firm that got where it initially got by
11 innovating and serving consumers continues to do that.
12 If there is not effective antitrust enforcement then
13 you have the possibility of entrenchment and monopoly
14 profits and a decline in the kind of innovation and
15 price competition that we would like to see.

16 So it is very important that we have
17 effective antitrust enforcement in this sector. And
18 if we do and we continue to have high concentration,
19 then they are competing hard and we are getting what
20 we want as a society. But if we do not enforce here,
21 then I think we cannot be sure that we will.

22 MR. BAKER: I would like to just respond by
23 reminding you that I talked about six different
24 indicators of declining dynamism. Really only like
25 one or two depend on the data set that Greg is worried

1 about. I was talking about secular slowdown and
2 business investment in rising profits to the share of
3 GDP, and a slowed rate at which firms expand when they
4 become more productive and shifting growth and
5 productivity, gains from entrants to incumbents and
6 the growing gap in accounting profitability between
7 the most and least profitable firms, and then also a
8 declining rates of startups, which is more about the
9 data set that Greg is emphasizing.

10 MR. WRIGHT: One small point on the
11 relationship between business dynamism -- I think for
12 this purpose, however, we defined it and antitrust --
13 is that, of course, there are issues to explore here
14 on potential competition. But a point of agreement
15 with Jon is a public restraint scenario where the FTC
16 has been very active, sort of state or locally imposed
17 barriers to entry that reduce the ability for entry
18 are a big deal here and an area I do not think the FTC
19 needs to be convinced that it is worth spending time
20 on. It has done for a really long time. It has done
21 in a bipartisan and consensus-orientated way for a
22 really long time.

23 My own view is that area is probably -- if
24 we are looking for an area to agree on for more cases
25 to bring, I think those cases have legal issues with

1 state action defense and whatnot. But if you want to
2 target the resources of the agency at stuff you know
3 is anticompetitive, state barriers to entry, including
4 occupational licensing, is pretty good stuff and stuff
5 that I think the agency would be well served. You
6 know, we do lots of competition advocacy, but it used
7 to be an area where we brought a few more cases.

8 MR. WERDEN: Shall we go after the lawyer
9 monopoly first?

10 (Laughter.)

11 MR. WERDEN: I think we can get an agreement
12 right here, that is the one that is really
13 problematic.

14 MR. BAKER: I am in, Greg.

15 MR. WERDEN: Okay.

16 MR. BAKER: You are asking economists that
17 question.

18 (Laughter.)

19 MR. WERDEN: Well, they know.

20 Anyone want to say anything more about
21 dynamism or are we done?

22 Okay, good. So my final prepared question
23 for the panelists is a broad policy question. If the
24 plan is to somehow ramp up antitrust and the solution
25 is not just to spend more money at the agencies,

1 which, of course, is always welcome, what should be
2 done and by whom? Congress, the courts, the agencies?
3 And, in particular, I ask what one change in substance
4 or procedure do you recommend and what one change
5 would you most strongly caution against?

6 I am going to start with Jon.

7 MR. BAKER: So in the book I mentioned that
8 is coming out next spring, I talk about a number of
9 substantive presumptions for ramping up antitrust that
10 I would like courts to adopt. But I do not want to do
11 the equivalent of picking a favorite child. I cannot
12 really describe them all here. So instead, I am going
13 to give you two cautions, rather than one of each.

14 So on substance, I would caution against
15 presuming that vertical conduct is procompetitive, and
16 I think I talked about why in my presentation. And on
17 process, I would caution against introducing direct
18 political influence into antitrust enforcement.

19 MR. WERDEN: So why don't we just go down,
20 Steve next.

21 MR. BERRY: Okay. So I really wanted to
22 hear the practitioners more than I wanted to hear
23 myself talk about it.

24 MR. WERDEN: You can pass if you want.

25 MR. BERRY: But let me just say one quick

1 thing, which is -- follows up on this last point. I
2 think in general the state of the evidence -- and I
3 think this is even consistent with Josh's concerns
4 about the state of the evidence -- is that I think we
5 could use with some flattenings of prior and some less
6 presumptions in general, that I think it is a time
7 when things are changing, when there is a lot of
8 interesting data and we are not sure what it means.

9 The idea that we have very strong
10 presumptions, say about whether it is vertical or
11 potential competition, big being bad, I think a lot of
12 those presumptions should be at question and that we
13 should be acting as though before we do the analysis,
14 before we get the data of the specific situation, we
15 should be, you know more modest and our Bayesian
16 priors should be flatter I think just in general.

17 MS. SCOTT-MORTON: And since current
18 practice is to be extremely worried about over-
19 enforcement and not at all worried about under-
20 enforcement, that would flatten. I agree.

21 I do not have any cautions, so I am going to
22 do three recommendations to make up for Steve's one so
23 we are symmetric. I think it would be -- I am not
24 going to identify who should do this because I am not
25 enough of an expert in the area. But I think it would

1 be helpful if courts were to follow the definition of
2 consumer welfare that is correct and the horizontal
3 merger guidelines, in particular, that efficiencies
4 have to be cognizable and merger-specific and benefit
5 consumers. That would be a big help.

6 A second big help would be if we were
7 explicit about our concern for potential competition
8 and instructing courts to consider that as an
9 important element in the markets where it is proven to
10 be an important element.

11 Third, I would say that there is, as Josh
12 mentioned, I think an increasing use by firms of
13 government processes to protect themselves from
14 competition and to exclude, and I think it would be
15 helpful if someone could figure out a way to adjust
16 Noerr-Pennington and similar kinds of laws to make it
17 less possible for incumbents to keep out potential
18 competitors and entrants. So those would be my three.

19 MR. WRIGHT: Steve and Fiona stole my
20 thunder. But let me say I would, one, cosign Steve's
21 proposal that priors be flattened here and we take
22 sort of hard looks at presumptions that are driving
23 enforcement, whether they are structural presumptions
24 in favor of more enforcement, whether they are
25 presumptions that go the other way. I think

1 flattening priors and reevaluating those is no time
2 like the present to take out zombie presumptions while
3 we are reevaluating the economics.

4 I would say for the agencies that certainly
5 includes -- Congress has such bright-line proposals in
6 front of it and I am sure we would like to hear from
7 the agencies about what they think about those bright-
8 line presumptions. But I would also say in addition
9 to quickly cosigning the reallocation -- I guess I am
10 not allowed to increase the budget -- so reallocation
11 toward public restraints where I think a
12 disproportionate amount of the harm -- you know, you
13 line up 100 economists and 99 are going to agree that
14 that stuff is harmful. We are not going to have sort
15 of big reasonable fights over which way that the
16 welfare effects cut. So I would say reallocation in
17 that direction.

18 And the last one I would say, which is more
19 procedural, is resource allocation inside the agency,
20 because I do think there are a lot of really tough
21 questions facing the agencies and facing IO economics
22 and helping guide through what I think is a really
23 interesting time and how we calibrate antitrust
24 policy.

25 There are 100-some PhD economists between

1 the agencies, and I guess I am not allowed to raise
2 the number to 200 without firing some lawyers, which
3 would not be popular here. But I think there are more
4 ways to more deeply involve economists inside the
5 agency in these discussions. I think the more of
6 that, whether it is through 6(b)s at the FTC, whether
7 it is -- there are a lot of ways to do it. And I
8 think the more of that, the better.

9 MR. BAKER: I would like to comment on
10 something that Josh and Fiona were talking about about
11 the -- I really do not think -- I mean, sure there are
12 public restraints that are harmful and appropriate to
13 be concerned with if you want to enhance competition.
14 But I do not think the idea of reallocating the FTC
15 and DOJ budgets towards public restraints is
16 necessarily a good idea.

17 What I am worried about is that a lot of
18 public restraints -- you know, there are other
19 mechanisms that are outside of the antitrust laws,
20 legislative, for example, for addressing them and
21 probably more effectively, or advocacy in front of
22 other regulatory agencies and the like. But it is the
23 antitrust agencies, you know, and private plaintiffs,
24 too, in the states, but the antitrust agencies are
25 really the most important actors in stopping private

1 anticompetitive conduct, you know, or at least along
2 with other actors. And I am worried about taking
3 enforcement resources away from those important
4 efforts by the antitrust agencies, you know, the way
5 that Josh's proposal would suggest.

6 MR. BERRY: So it is clear we think the
7 budget should go up.

8 MR. WERDEN: You will get no argument from
9 me on that, and you can start with my pay.

10 (Laughter.)

11 MR. WERDEN: We have a bunch of questions
12 from the audience. Two of them are almost identical.
13 So, obviously, there is a consensus that this is the
14 most important issue because we have two who agree.

15 MR. BAKER: I wonder if they were sitting
16 next to each other.

17 MR. WERDEN: The handwriting is almost
18 identical.

19 (Laughter.)

20 MR. WERDEN: I think this is not two
21 independent draws, but what the heck.

22 So I will rephrase. What, if anything,
23 should the antitrust agencies be doing about Amazon?

24 MS. SCOTT-MORTON: About what?

25 MR. WERDEN: Amazon.

1 MR. WRIGHT: Doing the same thing they do in
2 all of the other --

3 (Laughter.)

4 MR. WRIGHT: Analyzing -- I mean, I think
5 the point of the conversation and the reason for the
6 silence is I think we are all believers in the idea
7 that you get the tool kit right and you fight over how
8 to get the tool kit right and you work out how to get
9 the tool kit right and you apply it evenly across the
10 economy. You know, you could take account of
11 differences, but you do not have different tools for
12 different firms.

13 MS. SCOTT-MORTON: You do not pick out a
14 firm and say how do we --

15 MR. WRIGHT: That is what I am saying.

16 MS. SCOTT-MORTON: Yes.

17 MR. WERDEN: So if I rephrase the question,
18 are you aware of any antitrust case that the
19 government should have brought against Amazon, but did
20 not? Would you say no?

21 MS. SCOTT-MORTON: Well, if they should have
22 brought it, then they should have brought it.

23 MR. WERDEN: Are you aware of one?

24 MS. SCOTT-MORTON: Oh, am I aware of one?

25 No. MR. WERDEN: No, okay. Okay, that is

1 enough for Amazon.

2 (Laughter.)

3 MR. WERDEN: We have a question about static
4 versus dynamic view of market power. This came up
5 quite a few times in the conversation. But since I
6 have the question, I will put it again.

7 Because profit is the necessary incentive
8 for innovation and investment, how should we think
9 about many of the things we are observing today, like
10 high margins and network effects, in terms of a
11 dynamic view of how competition works?

12 Fiona, you addressed this quite a bit
13 already. Is there anything you would like to add?

14 MS. SCOTT-MORTON: I mean, this is why Steve
15 and I have been saying, let's look forward and let's
16 try to keep firms honest. You have a good idea. You
17 do something really well. You innovate. You get
18 enormous amounts of revenue. People are very happy.
19 That is excellent. But then it is very easy, if we
20 look at the historical record, for such a firm to find
21 it easier to exclude rivals rather than compete.
22 Competing is hard, it is hard work.

23 So we need to have a tool kit that is up to
24 date and used to make sure that as we move forward a
25 firm that has significant market power is getting it

1 honestly by competing on the merits and delivering
2 innovation and low prices. And if that is what we are
3 getting, that is excellent. But it would be not
4 efficient and not good for consumers to stop enforcing
5 against these firms.

6 MR. BERRY: Yeah, I mean, Fiona mentioned
7 earlier the idea of rivals buying competitors just to
8 remove the potential competition. We have talked
9 about that a bit. I do not think you are blaming the
10 innovative firm or punishing the innovative firm by
11 trying to see if we can stop that from happening. And
12 I have a question, I am not sure whether we should be
13 looking at acquisitions by these firms differently
14 than we would and I do not think that is blaming them
15 or depriving them of the benefits of their innovation.

16 MR. WERDEN: Well, let me slow things down a
17 little. After I ask the question, you can go next.

18 Somebody who has worked in an agency
19 realizes -- and I am sure our panelists do, too --
20 that none of these questions are as simple as they
21 might appear in a panel discussion. So if you get
22 some, let's say, dominant technology platform and it
23 is proposing to buy some nascent competitor that might
24 come up with the next greatest idea or might have it
25 already but has not got it to market, how do you know

1 whether to think, well, this is bad because this
2 threat to the incumbent monopoly is being squelched or
3 this is good because this is the way that this new
4 idea will come to market?

5 MS. SCOTT-MORTON: So here I think we rely
6 on Jon and his error cost framework to think about
7 this. If you do not know whether the acquisition is
8 going to be procompetitive or anticompetitive, you
9 have to think of the harms you are creating by getting
10 it wrong. And if under-enforcement creates tremendous
11 harm because the dominant technology platform has lots
12 of market power and that is going to be a huge
13 problem, then we have to make sure we are weighting
14 that risk appropriately.

15 And it may be that we do not have very much
16 information about or as much as we would like about
17 the potential competitor as we do in markets where we
18 are assessing whether a 15 percent share should be
19 allowed to buy a 20 percent share. There is a lot
20 more information about the products, about the way
21 competition arises, about the prices, and so forth
22 when you have competitors in the marketplace.

23 When it is potential, the problem is much
24 more difficult. Does that mean there is less welfare
25 at stake? Not at all. So just because there is less

1 information does not mean we get a free pass to do
2 nothing about it.

3 MR. BAKER: And I wanted to add, sort of
4 going back to the original question about where they
5 were talking -- which was asking about static and
6 dynamic competition, that some people have the idea
7 that competition is somehow bad for innovation and
8 that when we are acting as antitrust enforcers, if
9 that is who we are, to increase competition, we are
10 just going to -- we are going to benefit the buyers at
11 lower prices which somehow will impede innovation and
12 that there is a trade-off. That is not necessarily
13 right and it probably is not right on average.

14 There is lots of evidence that competition
15 spurs productivity, lots of economic studies. And on
16 innovation particularly, I read the literature as
17 saying the motive that firms have to innovate by
18 escaping competition is probably stronger on average
19 in the data than the motive to innovate that comes
20 from appropriating more returns, you know, on the
21 margin.

22 And it is surprising, you know, because
23 firms that are making major R&D investments usually
24 have a lot of reasons, other than preexisting market
25 power, to appropriate sufficient returns, even if

1 there is some imitation. And successful incumbents
2 may be discouraged from developing new products
3 because that would cannibalize their existing rents
4 and because as Steve and Fiona have been emphasizing,
5 firms with market power can discourage new competition
6 with exclusionary conduct.

7 So there is every reason to think that more
8 competition is good for society, for dynamic
9 innovation-oriented productivity reasons, not just for
10 static price and quality reasons.

11 MR. WRIGHT: So long as we are including the
12 -- maybe the caveat or the definition in Jon's claim
13 that more competition is good, that we are not
14 equating competition to the number of firms. I get
15 nervous about these discussions when they convert to
16 policy because the temptation is when I have a really,
17 really hard policy problem to figure out, like is that
18 acquisition of the nascent or small competitor a good
19 or bad thing on net, on welfare, the trade-offs are
20 really difficult to figure out.

21 And it is sometimes tempting, and I think
22 history teaches us certainly in antitrust, that there
23 is a temptation that is often succumbed to by agencies
24 to sort of cling to those bright-line presumptions
25 because you can do them. And that I think is

1 something that, in that area, we certainly do not
2 have enough empirical evidence or economic theory
3 to do.

4 This may be an area I think Fiona and I
5 disagreed some about whether we have all the tools we
6 need. And I think we probably agree, we have most of
7 what we need, but I think there are areas where we
8 could do better and even if that means -- doing better
9 means learning more about the distribution. Potential
10 competition is one of those areas.

11 MS. SCOTT-MORTON: But here is the problem,
12 Josh. If you say we do not know enough to draw a
13 line, I am fine with that. But that is not the same
14 thing as saying because we do not know anything, we
15 are going to decide all the cases so that it is fine
16 for the big firm to buy the potential competitor.

17 MR. WRIGHT: You certainly did not hear the
18 latter claim out of me. I voted these cases and to
19 bring them.

20 MS. SCOTT-MORTON: Okay, yeah, let's not go
21 there, but yes. Then I agree.

22 (Laughter.)

23 MR. WERDEN: Okay, good. So rephrasing
24 these next two questions. Economists are really on
25 top of how goodly or badly market concentration tells

1 you that there is competition or not competition in an
2 industry. So we do not want to further that
3 conversation. The question is, what else, what would
4 you look at, if you wanted to know how competitive a
5 market sector, the whole economy is?

6 MR. BERRY: Well, it is easier on the
7 sector, right? And the fact of the matter is there
8 are a lot of tools of merger analysis looking at the
9 close substitution of products and differentiated
10 product markets, for example, which I think are well
11 accepted as being much better than concentration
12 measures. And in my understanding, concentration is
13 used largely as a screen -- I am not the practitioner
14 -- and I think some of us may be questioning that a
15 little bit.

16 But in horizontal mergers really I think
17 practice has moved very, very far away from
18 concentration measures and toward the closeness of
19 substitution of merging parties.

20 I think there is less consensus in vertical
21 mergers, but there are a new set of tools that look at
22 changes in bargaining that result as a result of
23 vertical competition. I think those are not as well
24 accepted outside of economics, and I understand some
25 of the legal fights going on right now are not even

1 over the specifics of whether a particular merger
2 should go forward as much they are about whether those
3 economic tools have value.

4 So I think there are, in both horizontal and
5 vertical cases, real tools of economics that focus on
6 I think what is actually at issue in these cases both
7 horizontally and vertically. Horizontally, they are
8 well accepted and maybe less so vertically.

9 MR. WERDEN: When you get to a case you are
10 going to have information that a researcher would not
11 have, a lot of it. It can be very useful and we have
12 tools for analyzing it. I think that where the
13 question was coming from is, as a researcher, you
14 know, as a policymaker, if you are looking at the
15 whole big picture, what is it you should look at.

16 MR. BERRY: So I am such a micro guy, I find
17 it hard to move past the aggregation is the same of
18 its components. I think it is very hard to do at the
19 broad aggregate level. Broad evidence on markups,
20 broad evidence on profits are interesting and they do
21 not particularly get to the whys. I think they are a
22 flag of interest, I would say.

23 MS. SCOTT-MORTON: The field of IO is a
24 micro field, so we are just really bad at answering
25 this question. And if you look at Jon's list of

1 cites,
2 a lot of those people are in finance or macro or
3 labor --

4 MR. BERRY: Labor.

5 MS. SCOTT-MORTON: -- that I have come into
6 this empty space that we generated, which is how do we
7 describe the economy as a whole, because our field
8 does not do that. And so that is partly why we have
9 these conflicting methodologies.

10 MR. WERDEN: Don't you wish we had some
11 occupational licensing here?

12 MR. BERRY: You know, in all honesty, I have
13 said this before, it is actually excellent that those
14 papers are raising these questions. That is an
15 excellent thing that these questions are being raised
16 by those papers, and I think people deserve a
17 response. In the meantime, we do not necessarily
18 believe the causal conclusions of those papers.

19 MR. WERDEN: I was just handed this
20 emergency question. Are there important competition
21 issues that antitrust cannot handle? And I take this
22 to be antitrust enforcement as we know it. So these
23 would be problems that would be addressed in some
24 other way than antitrust cases.

25 MR. BAKER: So sure. Natural monopoly. You

1 have to regulate that. You cannot use antitrust --

2 MR. WERDEN: We did that. We are kind of
3 past that.

4 MS. SCOTT-MORTON: No.

5 MR. BAKER: Well, it is important to --

6 MR. WERDEN: It is almost all gone now.

7 MS. SCOTT-MORTON: Your electricity bill, I
8 am afraid to say, has some regulation in it.

9 MR. WERDEN: A little bit. But I am at the
10 mercy of an unregulated water monopolist.

11 MR. BAKER: And then some of the
12 governmental restraints we were talking about probably
13 have to be dealt with legislatively.

14 MR. WERDEN: Apart from regulating
15 monopolies, which is an old but still good idea, is
16 there anything else you would suggest?

17 MR. BERRY: Well, I mean, I do think when
18 people talk about the tech companies -- and this is a
19 good question for the FTC -- is that people are
20 sometimes talking about data and other forms of social
21 relationships that I think are difficult to handle
22 outside of the existing antitrust framework and may be
23 subject to different kinds of regulation.

24 And I think sometimes when people talk about
25 old-fashioned antitrust they are also talking about,

1 for example, political power, and I think that is way
2 outside the realm of traditional antitrust regulation.
3 I think it should stay there. But it does not mean
4 there should not be some response.

5 MR. BAKER: And then also leader-follower
6 conduct that leads to tacit coordination, that is very
7 hard to address through antitrust laws.

8 MR. WERDEN: Do you think it should be
9 addressed at all?

10 MR. BAKER: Well, you mean do I think some
11 other actor could do a better job than the courts on
12 that?

13 MS. SCOTT-MORTON: So I do not want to --

14 MR. BAKER: They have the same problem that
15 antitrust agencies have.

16 MR. WERDEN: So that would be a no?

17 MR. BAKER: You know, it would be nice to be
18 able to do that, but I am not sure how.

19 MS. SCOTT-MORTON: So I would like to follow
20 up on what Steve said. I mean, there is political
21 power, there are things like privacy, there is
22 misinformation. It is not clear that vigorous
23 competition fixes the problems that people want to see
24 fixed in those domains. And it might be that you want
25 another agency or some other law to do that, if that

1 is what the community would like to see done.

2 So I think there are calls -- you read in
3 the paper about people who would like antitrust to --
4 or perhaps think that antitrust can fix everything,
5 and my view is that that is not going to work, that
6 antitrust is very well geared, it is a set of economic
7 tools, it is very well geared to certain kinds of
8 problems and that we should look elsewhere to other
9 kinds of regulations if we have different kinds of
10 problems to fix.

11 MR. BERRY: But, Greg, let me come back to
12 that. I am completely baffled that you are subject to
13 an unregulated water monopoly. I know we are here and
14 I still am confused by it.

15 MR. WERDEN: It is not my house here.

16 MR. BERRY: Yeah, I just mean there --

17 MR. WERDEN: There are many unregulated
18 monopolies in this country.

19 MR. BERRY: I agree. And why we gave up on
20 so many of them, I am still baffled by.

21 MR. WERDEN: Okay. We are running out of
22 good questions here. So I have to say we are done.
23 But I will give the last five minutes to our panelists
24 to say whatever they choose to say to wrap up.

25 MR. WRIGHT: Remind them about the book,

1 Jon.

2 MS. SCOTT-MORTON: Yeah, there we go.

3 MR. BAKER: My publicist insists --

4 MS. SCOTT-MORTON: Good idea.

5 MR. BAKER: -- that every one of you go out
6 and buy it when it is available next spring.

7 MR. WERDEN: Are you offering a discount?

8 MR. BAKER: You will have to discuss that
9 with my publisher.

10 MR. WERDEN: Hmm. Have you set the price
11 yet?

12 MR. BAKER: I do not think it is even
13 available yet.

14 MR. WERDEN: Okay. It is too soon to talk
15 about the book.

16 MR. BAKER: Yeah.

17 MR. WERDEN: No?

18 MS. SCOTT-MORTON: I think it is great we
19 are having these hearings.

20 MR. WERDEN: Okay. Well, then we are going
21 to take our break now a few minutes early.

22 (Applause.)

23 (Panel 2 concluded.)

24

25

1 PANEL 3: THE REGULATION OF CONSUMER DATA

2 MR. SAYYED: All right. Let's get started.

3 This is the last panel for the day, and as I mentioned
4 at the beginning for those who have not read the
5 website or were not here at the beginning, because at
6 least the potential for weather difficulties, we are
7 going to reschedule tomorrow's sessions to probably
8 sometime late in October.

9 So we turn now from mostly antitrust, but
10 not exclusively, to a consumer protection issue, and
11 James Cooper, now with the FTC, will moderate this
12 panel.

13 MR. COOPER: All right, thanks, Bilal.

14 Welcome, everyone. Good afternoon. I am
15 James Cooper. I am the Deputy Director for Economic
16 Analysis in the Bureau of Consumer Protection here at
17 the FTC and it is my great pleasure to be here and
18 take part in these hearings and moderate this August
19 panel.

20 Before I get started, I have to -- recently,
21 I am on leave from academia so I am not used to doing
22 this, but I am going to try to say zero of substance
23 today. And in the off-chance I do, anything I say is
24 just my opinion only and not necessarily that of the
25 Federal Trade Commission and any individual

1 commissioner, including the one sitting next to me.

2 COMMISSIONER OHLHAUSEN: Most especially
3 not.

4 MR. COOPER: Most especially the one sitting
5 next to me.

6 COMMISSIONER OHLHAUSEN: Just kidding.
7 James and I have worked together many years.

8 MR. COOPER: Yes. All right. So as you
9 probably already heard today, nearly 25 years ago,
10 Chairman Pitofsky, he began the FTC's journey on the
11 path to become the nation's privacy and data security
12 cop. Along the way, much has changed.

13 When this all began, things like the iPhone,
14 Facebook and Google did not even exist. But, today,
15 we find ourselves in a digital economy that lives on
16 consumer data. Clearly, this evolution has provided
17 tremendous value for consumers. We have vast troves
18 of information at our fingertips. Most of us cannot
19 get anywhere without our phones anymore, myself
20 included. And we can connect with millions of people
21 instantaneously, as I am sure many of you are doing
22 right now via Twitter. I could go on.

23 But at the same time, the fact that consumer
24 data is so tightly woven into the fabric of today's
25 economy has presented unique consumer protection

1 challenges. Part of what I think makes these issues
2 so tricky may stem from the fact that there is no
3 agreed upon framework for analysis.

4 As we have heard a lot today, antitrust is
5 married up with microeconomics. It has been for about
6 the past four decades. Privacy and data security,
7 however, have yet to find such similarly suited mates.
8 So the FTC, you know, or clearly economics has an
9 important role in shaping privacy and data security
10 policy.

11 For example, the seminal work of the
12 economics of information that garnered Nobel Prizes
13 for people with names like Akerlof, Spence and
14 Stiglitz teaches us generally that reducing the cost
15 of information flows typically improves market
16 performance because it helps consumers make better
17 choices. But at the same time, privacy and data
18 security policy also involve significant consumer
19 values, such as dignity, the right to be let alone,
20 and autonomy, which are really difficult to balance in
21 a typical benefit-cost framework, though they are
22 equally important. Never one to shy away from a
23 challenge, the FTC has been in the forefront of trying
24 to tackle these complex and weighty matters.

25 As I mentioned before, beginning in 1995,

1 when Chairman Pitofsky convened a series of workshops
2 designed to educate the FTC and the public on consumer
3 protection issues surrounding the online use of
4 consumer data and continuing with the 2012 policy
5 report and subsequent reports and workshops examining
6 issues like big data, the internet of things, data
7 brokers and most recently informational injuries
8 through what former Chairman Bill Kovacic has called
9 policy research and development, the FTC has
10 continually attempted to calibrate its enforcement
11 posture to balance consumer interests and privacy and
12 data security with the remarkable benefits that the
13 digital economy provides, and I think that these
14 hearings will continue that tradition.

15 So this brings me to the subject of our
16 panel today. Today, we appear to be at an inflection
17 point. Many of the same undercurrents that are
18 animating the challenges to the antitrust status quo
19 that were addressed earlier today and that will be
20 addressed in other hearings, coupled with catalysts of
21 high-profile data breaches, the use of social media to
22 attempt to influence the 2016 election, Cambridge
23 Analytica, and the coming online of GDPR, have caused
24 many to question whether the current privacy and data
25 security framework needs a rethink.

1 For example, some have suggested the U.S.
2 should adopt a more European-like approach. And it
3 appears that California has already taken up the
4 mantle. We see legislative proposals in various forms
5 kicking around Congress.

6 So today, we hope to work through some of
7 these thorny issues, examining where we are, where we
8 might go, and what that might mean for both consumer
9 privacy and the digital economy which has provided us
10 with so much.

11 So I am very happy, we should all be happy
12 to have an all-star panel on this journey today. To
13 my immediate left is Maureen Ohlhausen. Maureen is
14 currently a Commissioner of the Federal Trade
15 Commission. She was acting Chairman from January 2017
16 through April 2018. Before that, Commissioner
17 Ohlhausen was a partner at Wilkinson Barker Knauer
18 where she focused on FTC issues, including privacy and
19 data protection. She also served at the FTC for 11
20 years prior to that, where she was the Director of the
21 Office of Policy Planning. And prior to that, she was
22 a clerk for Judge Sentelle on the D.C. Circuit.

23 So next to Commissioner Ohlhausen is Howard
24 Beales. Howard is a Professor of Strategic Management
25 and Public Policy at the George Washington University.

1 Importantly for the purposes of our panel today,
2 Howard, from 2001 to 2004, served as the director of
3 the Bureau of Consumer Protection. In addition, in
4 his earlier stints at the FTC, he helped think about
5 and really develop a lot of the framework today for
6 how we analyze informational issues surrounding
7 consumer protection.

8 Next to Howard is Daniel Solove. He is the
9 Jon Marshall Harlan Research Professor of Law at the
10 George Washington University. Daniel is one of the
11 leading privacy scholars in the country. In addition
12 to writing some of the seminal articles on privacy,
13 he, along with his coauthor Paul Schwartz, is the
14 author of a case book on information privacy law that
15 everyone, including me, uses to teach that subject.

16 He is also the CEO of TeachPrivacy and runs
17 a myriad of privacy programs, which unfortunately for
18 us may mean he has to cut out early -- I don't think
19 he will -- because he has something going on tonight,
20 including his annual privacy forum, privacy salon,
21 things like that.

22 And then, finally, last but definitely not
23 least, David Vladeck is the A.B. Chettle, Jr.,
24 Professor of Law at Georgetown University Law Center.
25 And he, like Howard, was the director of the Bureau of

1 Consumer Protection from 2009 to 2013. And before
2 that, he spent 25 years in public citizen litigation
3 groups.

4 So we are kind of lucky here, I mentioned,
5 to have both Howard and David, because in their time
6 frame with Lydia Parnes and kind of in between as
7 well, really helped usher in the era of the FTC being
8 involved in privacy and data security and really kind
9 of being at the helm of that in large part.

10 So what I want to do with the format today
11 is we are just going to have a discussion. We do not
12 have any presentations, but we want to drill down on
13 some questions and we also will have, if you have
14 questions from the audience, we will be taking
15 notecards to -- I guess there are designated people
16 to take those questions, and we will certainly save
17 some time at the end to address these.

18 So let me get started. The big picture,
19 headline question of this panel is to kind of see and
20 take stock of where we are in the privacy and data
21 security regulation in the U.S. and where we need to
22 go. And I think if we are going to assess that, maybe
23 at sort of a higher level, we should think about what
24 would be the goals of a privacy and data security
25 program. So at a high level, what should a privacy

1 and data security program be concerned with? What
2 sort of values should it be protecting? And how might
3 we think about measuring whether that goal is
4 accomplished?

5 So, Maureen, I want to have you take a first
6 crack at the question, and then invite others to
7 respond or react.

8 COMMISSIONER OHLHAUSEN: Great. Well, thank
9 you, James, and I am delighted to be here. Thank you
10 to the organizers for including me in the panel.

11 This is a topic I have thought a lot about.
12 What are the values that we are trying to protect and
13 pursue in our privacy and data security enforcement in
14 the U.S.?

15 I would say one of the first values --
16 because our authority under the FTC Act, right, is
17 deceptive or unfair acts or practices in or affecting
18 commerce. So, first of all, it is commercial.
19 Everyone forgets that one at the end, but it is in
20 commerce. And then deceptive, that means there was a
21 promise made to a consumer that is not kept, or
22 unfair, which means there was an act or a practice
23 that caused substantial injury to a consumer that the
24 consumer could not reasonably avoid that is not
25 outweighed by countervailing benefits to competition

1 or to consumer protection.

2 Now, of course, the FTC is not the only
3 actor in this case. We already have lots of other or
4 a certain number of other privacy laws. You think
5 about HIPAA, you think about financial privacy, you
6 think about the CPNI rules for communications data.
7 So those are areas where, in a way, if you think about
8 it, we have already, as a society through our
9 political system, decided there are special buckets of
10 information that need special protection. So where
11 does the FTC fit in there?

12 First of all, to talk about deception, I was
13 actually at the FTC back when we brought the first
14 online privacy case. Dan Caprio was there with me as
15 well and some other people in the audience probably,
16 too, under Chairman Pitofsky in the GeoCities case.
17 So they had made a promise about how they would
18 collect or use data and they did not keep that
19 promise, and we have brought lots of privacy cases
20 alleging deception since. And what we are trying to
21 protect there, I think, is twofold.

22 One, it is consumer sovereignty. The
23 consumer made a choice and that choice was not
24 respected. So I think that is the primary thing.
25 There is also a competition element there, because you

1 certainly want to allow the marketplace to operate in
2 an efficient way, where you have someone not getting a
3 competitive advantage because they have lied about
4 what they are doing and they actually are not adhering
5 to it, maybe it is costly.

6 I mean, that was like in the Uber case that
7 we brought. They had initially promised that they
8 were going to do certain things with the data to stop
9 accessing it, and then it turned out to be kind of
10 expensive to keep that promise. So we had to modify
11 our order. So I would say the first thing is consumer
12 sovereignty.

13 But then the second thing I think that we
14 are supposed to be protecting is protecting consumers
15 from substantial injury, and that is captured in our
16 unfairness authority. Now, what is substantial injury
17 is really the question, and you do not always need a
18 promise made to consumers. In fact, unfairness I
19 think works particularly well when there has not been
20 a promise made to the consumer, but there is sort of
21 an expectation that consumers will not be injured
22 through data collection and use.

23 So some of the cases that we have brought in
24 that space involve things like collecting and sharing
25 realtime location data about consumers because that

1 can be abused in a way that can be used for stalking,
2 right? So there is a health or safety risk.

3 Certainly, the collection of financial information or
4 the failure to protect financial information that is
5 sensitive, so it could be used to hurt consumers
6 financially.

7 We mentioned the informational injury
8 workshop, and so one of the things that I tried to do
9 with that is actually come up with a little bit of a
10 taxonomy of the different harms that we have addressed
11 through FTC enforcement. And what I came up with,
12 doing a review of all the cases that we have brought
13 in the privacy area, the first one I have already
14 mentioned, which is the distortion or not respecting
15 consumer sovereignty through deception. Financial
16 harms, health and safety, I mentioned that one
17 already, and unwarranted intrusion.

18 So cases -- we have had some where -- we had
19 the TRENDnet case where there was an internet-enabled
20 camera that had a pretty obvious flaw in its software
21 so that anybody who had the IP address could hack into
22 this camera that was sold to be used for home
23 monitoring and watching your kids. So we think, well,
24 that is intrusion. We also had the rent-to-own, I
25 think it was the Aaron's case. David and I agreed

1 very vigorously on that one.

2 MR. VLADECK: Well, it was the DesignerWare
3 case, the predecessor.

4 COMMISSIONER OHLHAUSEN: DesignerWare,
5 right, right, very good. But where the laptops had a
6 program that could turn on the camera and companies
7 could use that or take screenshots.

8 And then the last one is reputational
9 injury. My view is at the FTC we have never brought a
10 case purely based on reputational injury, but
11 reputational injury has been certainly present in some
12 of the cases that we have brought, such as the Ashley
13 Madison case. So I would say those are the --
14 reputational is a little, I think, more controversial,
15 but, otherwise, I think those are the types of things
16 that the FTC's approach, the authority that we have
17 been given, those are the values that we should be
18 pursuing in privacy enforcement.

19 MR. COOPER: Would anyone else like to weigh
20 in on that, sort of at a high level? Perhaps even
21 leaving aside the FTC's goals, what are some things
22 that -- what would we think of, what should we be
23 thinking of when we think about an enforcement program
24 or a regulatory program to protect privacy, which sort
25 of values should it be protecting? What should we be

1 thinking about?

2 MR. VLADECK: So let me just add to
3 Maureen's point about the DesignerWare, Aaron's kinds
4 of cases. You know, Ashley Madison, I am not sure is
5 a reputational harm case only. And I think part of
6 the struggle -- and I am glad that we have the
7 workshop on informational harms -- is they all sort of
8 fit generally into what we used to think of as an
9 invasion of privacy tort, but they are very hard to
10 label. So in Ashley Madison, marriages were broken up
11 and --

12 COMMISSIONER OHLHAUSEN: People committed
13 suicide.

14 MR. VLADECK: People committed suicide. So
15 labeling that kind of harm, you know, is difficult.
16 But I think partly what we ought to focus on is the
17 nature of the intrusion. So in Ashley Madison, it is
18 intruding into very personal relationships. In
19 DesignerWare and Aaron's, it was intruding into the
20 home. I mean, the real problem in those cases was
21 that cameras can be activated remotely while people
22 were sitting on their couch or doing whatever.

23 And so I agree that it is important to try
24 to see if we can come up with a taxonomy, but a lot of
25 this really just sort of depends on context.

1 MR. COOPER: Since David said taxonomy, I
2 don't know, Daniel, if you would like to jump in.
3 Daniel wrote one of -- A Taxonomy of Privacy, which is
4 kind of a seminal --

5 MR. VLADECK: Right. That was not
6 inadvertent.

7 MR. SOLOVE: Well, I would say there is
8 obviously protection of consumers from harm, which I
9 think is important, and a lot then depends on how we
10 define harm. I tend to define harm broadly to also
11 encompass risk, which I think is a very important
12 concept.

13 There is also the broken promises, that it
14 is very important that if a company makes a promise,
15 that it be held to that promise. Otherwise, the
16 entire self-regulatory regime collapses, because the
17 privacy policies are meaningless then. So it is nice
18 that the FTC has a backstop to that and enforces.

19 I think there is also an important component
20 to an enforcement regime that I think the FTC can and
21 sometimes has gotten involved in, which is consumer
22 expectations. Even if it is not a direct promise,
23 consumers have expectations about how their data is
24 going to be handled and used that are often and
25 sometimes at variance with what is said in a privacy

1 policy or with what companies do.

2 There has been studies about consumer
3 attitudes about privacy and the vast majority of
4 people agreed with the statement that if a company has
5 a privacy policy, it does not share data with third
6 parties. So there is definitely a lot of
7 misinformation out there. Consumers have incorrect
8 expectations.

9 And the FTC can play a very important role
10 in helping to make sure that faulty consumer
11 expectations are not exploited. So companies, you
12 know, knowing that consumers kind of already have this
13 maybe unjustified trust in them, don't exploit that
14 trust, that what companies do that starts becoming at
15 great variance with consumer expectations, that those
16 outliers stop.

17 The Sears case I think is a wonderful
18 example of that where they installed spyware into
19 people's computers, and this was actually disclosed in
20 the fine print in a very lengthy privacy policy. So
21 it was actually there, but it was not very salient.
22 It was not very noticeable. So most people missed it,
23 and the FTC said that it was not sufficiently
24 disclosed and not conspicuous enough.

25 And I think that is great because what we

1 had is a practice that was very unexpected to
2 consumers that caught a lot off guard. So I think it
3 is very important that consumers can use sites and
4 engage in ecommerce and other commerce and know that
5 what they expect generally is going to be the case and
6 there are not going to be unpleasant surprises down
7 the road. And so I think it is very important that
8 the FTC police that, especially because we know from a
9 lot of studies that a very, very small percentage of
10 people actually read the privacy policies or privacy
11 notices, something like less than 1 percent.

12 So we really are in a world that consumers
13 come in with this baggage, these expectations, and I
14 think we have to play in that world and know that that
15 is how people are going to make decisions on how to
16 share their data, and there should be some protection
17 from that being exploited.

18 MR. COOPER: Howard, did you want to jump
19 in? One thing just to -- and maybe it will be
20 completely orthogonal to what you were going to say,
21 but maybe it will be related. It sounds, you know,
22 listening to David and Daniel -- and I do not know if
23 it is -- to what extent should we think about privacy
24 as sort of a right space framework or is it something
25 that needs to be balanced with, you know, other values

1 as well? Is it something that can be balanced or is
2 it just a right? And I don't know, it is something I
3 was just thinking about as David and Daniel were
4 talking.

5 So anyway, Howard, I will let you speak to
6 that or whatever you want to --

7 MR. BEALES: Well, I did want to comment a
8 little on the discussion that has gone on before, but
9 first, I wanted to take you to task for listing the
10 Nobel Prize winners for the economics of information
11 without listing the guy who founded the field which
12 was George Stigler, first and foremost. He was one of
13 my advisors, too, so that --

14 (Laughter.)

15 MR. BEALES: But I will forgive you.

16 MR. COOPER: Okay.

17 MR. BEALES: The attraction to me of the
18 consequences-based approach to thinking about consumer
19 privacy, which is what we developed in the time that I
20 was at the Commission, was that it makes explicit what
21 ought to be there all the time, which is that
22 particularly in the commercial context, this is a
23 balancing issue. There are tremendous benefits that
24 come from the ability to use information, even if it
25 is an unexpected use of the information.

1 And we do not want to sacrifice those
2 benefits because somebody did not think to include
3 that in the list of things that might be done with
4 information in the privacy policy, because it was not
5 thought of at the time that the privacy policy was
6 written. We did not know this was a possible use of
7 the data.

8 Those kinds of benefits -- we have an
9 enormous number of services that are built on exactly
10 those kinds of secondary uses of information that was
11 collected for a different purpose, that may or may not
12 have fit with consumers' expectations.

13 What we want to make sure of is that that
14 information is not being used in ways that are harmful
15 to consumers, that is doing damage to consumers. And
16 that is where privacy regulation and privacy
17 enforcement really ought to focus. If there is not a
18 harm, it is not something that the FTC in particular
19 should be worried about.

20 Now, I also have a reasonably broad concept
21 of harm, perhaps not as broad as some. I certainly
22 think that the kinds of subjective harms that fit
23 within the traditional privacy torts are the kinds of
24 harms that are actionable privacy harms. But I note
25 that the tort standard in virtually all of the privacy

1 torts is highly offensive to a reasonable person. If
2 the intrusion or the putting somebody in a false light
3 is something that would be highly offensive to a
4 reasonable person, that is an essential element of the
5 tort, not just any intrusion, not just any false light
6 that might be held out. But including those kinds of
7 harms I think makes complete sense.

8 We have had two mentions of DesignerWare and
9 Aaron's and there is a part of that case that I
10 completely agree with and that is the "turn on the
11 camera" part of the case. This is a part of it that I
12 have always found really troubling, and that is this
13 is a computer that when somebody stopped paying, you
14 could activate the software and the computer would
15 call home and tell the company that had rented the
16 computer to somebody who was no longer paying for it
17 where it was. That is really useful.

18 The complaint says, well, this is location
19 tracking and location tracking is bad, but the
20 complaint does not say why location tracking is bad
21 and especially when it is every two hours. And the
22 remedy that is in the complaint -- or in the consent
23 order is, well, if you disclose when you first turn
24 this on and track continuously, that will comply with
25 the order. So to fix tracking every two hours, we

1 track continuously. I do not get what harm we thought
2 we were fixing there. And it is that harm that really
3 needs to be the focus.

4 If we cannot articulate why we think this is
5 a problem, we are not going to be able to adopt
6 sensible and low-cost ways to control that problem.
7 We have to think first about what is the harm we are
8 trying to prevent.

9 MR. COOPER: Thanks, Howard.

10 So after hearing kind of a high-level view
11 of what sort of values we should be concerned about
12 when we are thinking about a privacy program or
13 regulatory framework, maybe it is important now to
14 take stock of actually where we are. So I wanted to
15 turn to Daniel, who as I mentioned before has written
16 a seminal textbook on this and lots of articles
17 defining and thinking about what privacy is.

18 So, Daniel, could you just kind of help us
19 characterize the current U.S. system of privacy and
20 data security regulation in about five minutes maybe?

21 MR. SOLOVE: Sure. Well, at the high level,
22 the bird's-eye view, my sophisticated synopsis of it
23 is it is a mess.

24 (Laughter.)

25 MR. SOLOVE: We have a sectoral approach

1 with laws that have arisen in various economic sectors
2 over a very long span of time. Then you have common
3 law torts that have arisen, the privacy torts, plus
4 there is the forgotten breach of confidentiality tort
5 that I would like to mention to you that does not
6 require highly offensive. There are all sorts of
7 other common law torts that could apply in these
8 contexts, such as negligence is making a resurgence in
9 data breach cases.

10 Then you have various state statutes in the
11 states. You have dozens of federal laws, not as many
12 recently, but certainly in the '70s, '80s, '90s, you
13 had a real series of laws that were passed to deal
14 with various privacy issues in various economic
15 sectors. And then you have the FTC, kind of an
16 overarching, the broadest jurisdiction of any federal
17 agency regulating privacy that regulates most
18 companies, except for some carve-outs.

19 And that is the U.S. approach and there are
20 inconsistencies in the various laws. Some of them are
21 a lot weaker than others. On the stronger side, you
22 have HIPAA, which is very, very broad, has a broad
23 reach. It follows the data through the chain of its
24 custody. But you also have laws like FERPA that
25 regulate schools that by and large are kind of, for

1 lack of a better characterization, a bit of a joke.
2 They are not really enforceable; they lack a lot of
3 the features that more recent privacy legislation has.

4 Contrast this to a number of other countries
5 in the world, including, especially the E.U., they
6 have a comprehensive privacy law baseline of
7 protection. So they can articulate, here are the
8 basic rules of the road that we follow. Here in the
9 U.S., it is very hard to articulate, well, how is this
10 particular data protected? We really cannot. It
11 depends on, well, who holds it? If it is held by
12 certain entities, then it is regulated by HHS, but it
13 could also be regulated by the FTC and it depends on
14 who enforces it and it depends on what the sectors
15 are.

16 And one of the challenges with the sectoral
17 approach is that the sectors change. So in the '70s
18 and '80s, you know, what various types of companies
19 are doing in the sectors makes sense then, but now, as
20 we see, different companies are jumping into different
21 areas. So when we build laws around, you know,
22 sectors, they don't stay fixed. And, now, there is a
23 lot of overlap and companies saying, wow, we are
24 regulated by five different agencies and five
25 different bodies of law and we don't know what to do,

1 there is so much. Plus, then all the different state
2 laws that are overlapping and it becomes a bit of a
3 nightmare.

4 I am not sure we can dial this back in the
5 United States. I am not sure we can kind of go and
6 say, hey, we are going to do the other approach, but I
7 think there is some sensible aspects to the other
8 approach that are quite efficient and, to some extent,
9 I think could be particularly business friendlier than
10 the U.S. sectoral approach, which a lot of industries
11 were happy with initially because they liked the idea
12 of a law tailored to them or they liked the idea of
13 the fact that the laws did not apply to them and they
14 fell through the crevices. But those crevices have
15 been largely plugged up by the FTC, which regulates.

16 The other problem, too, with the U.S.
17 approach is that we get often no respect from the rest
18 of the world. We are kind of the Rodney Dangerfield
19 of privacy in the U.S., but I think we have some very
20 effective, some really good laws. I think the FTC has
21 done tremendously effective work. You know, we do
22 have a lot of protection. It is just that it is
23 inconsistent; it is hard to articulate. It is very
24 hard to explain to other countries, especially the
25 E.U., how the U.S. system works and how information is

1 protected here. It is so haphazard.

2 So I think the biggest challenge is what do
3 we do going forward when we have so many laws that are
4 locked into antiquated visions of the economy from 30
5 years ago and, you know, a role that has increasingly
6 been -- the leadership role has increasingly been
7 ceded by the U.S. Congress ever since I think around
8 2000, where we really have not seen a tremendous
9 amount of legislative activity on privacy. It really
10 has tapered off. And we have really seen the states,
11 especially California, and the E.U. take the lead.

12 And I think if you ask most large
13 multinational companies what privacy law are they
14 focusing on for their compliance efforts, GDPR, the
15 new California law, hardly anyone will say anything
16 about any other U.S. law. Maybe a little bit of
17 HIPAA. FTC, I barely hear whispered these days,
18 although I think a few years ago the FTC was spoken
19 about a little bit more. But increasingly what we are
20 seeing I think is the companies and these are U.S.
21 companies not really looking to the law here as to
22 what they are doing and how they are building their
23 privacy programs and practices.

24 So that is where we are. And the big
25 question is what should we do in the U.S.? What is

1 the next step? Do we kind of say, hey, we will let
2 the -- you know, be regulated by Europe and California
3 or will we have meaningful regulation at the federal
4 level that reflects the balances and approaches that
5 the U.S. would like to have.

6 MR. COOPER: Well, thanks, Daniel.

7 I would like to invite anyone to react to
8 that and also kind of throw out there it seems as we
9 think about the landscape of the U.S. privacy regime,
10 it seems to be a mixture of ex ante regulation with
11 notice and choice in some areas, HIPAA and COPPA
12 maybe, but then we also see enforcement, you know,
13 private and FTC.

14 What are the pros and cons of those
15 approaches and what might be -- you know, you think
16 about whether there should be a mixture, if we should
17 hew to one or another or if it makes sense to kind of
18 mix it up in some ways the way that we have here in
19 the U.S. So I would throw that out to anyone.

20 MR. VLADECK: Let me comment on that briefly
21 because until at least a few years ago, the difference
22 between the E.U. and the United States was we did a
23 lot of enforcement, but we had this crazy patchwork of
24 laws. On the other hand, in the E.U., even before the
25 GDPR, they had a general regulation which was much

1 more comprehensive than any of the U.S. privacy law,
2 but there was almost no enforcement. And some
3 scholars have done a lot of work, looking at sort of
4 privacy on the ground, both in the United States and
5 in the E.U., and they found that the privacy
6 commitments in the E.U. were met only to the extent
7 that there was a real enforcement or culture of
8 compliance, which left out large swaths of the E.U.

9 And so I think that somewhere in the middle
10 is the desired outcome, but strict rules without
11 enforcement, you know, at least according to the
12 studies that have been done did not work all that well
13 in the E.U., and I think that was one of the major
14 driving forces for enacting the GDPR and to basically
15 base the new system on commitments of compliance and
16 enforcement.

17 And it will be interesting to see the extent
18 to which the new GDPR is enforced by the data
19 protection authorities in the E.U., who are not used
20 to doing FTC-like enforcement cases.

21 MR. COOPER: Anyone else like to jump in on
22 the ex ante versus ex post question or anything --

23 COMMISSIONER OHLHAUSEN: I was going to say
24 I agree that regulation, you know -- if there is clear
25 regulation that says -- you know, like the Children's

1 Online Privacy Protection Act. Congress drew the
2 lines there and the FTC implements it and enforces it.

3 One of the things that I think has been a
4 real strength of the FTC's approach has been its
5 case-by-case enforcement, maybe a little bit less
6 predictable in some ways, but it trades that for great
7 flexibility. So a focus on harm in case-by-case
8 enforcement reduces the need for you to predict the
9 future to design some overarching regulation that
10 foresees all innovation.

11 Howard mentioned this, and I think we all
12 would agree, consumers have gotten enormous benefits
13 from a lot of these technologies and consumers have
14 gotten a lot of free content and they have gotten a
15 lot of information at their fingertips, as you
16 mentioned. And so that does not mean anything goes,
17 but I think we need to be careful about coming up with
18 a system that is too regulatory, because it cannot
19 predict what the new innovation is going to be and
20 perhaps it is going to prevent it from happening.

21 MR. COOPER: Okay.

22 MR. BEALES: Just to pick up a little on the
23 ex ante versus ex post problem, I think part of the
24 problem with the ex ante regulation is that the
25 approaches we have now and particularly the approaches

1 that are embodied in the GDPR and in the California
2 statute are really based on a premise that will not
3 work, that people are going to read privacy policies
4 and pay attention to these notices about what is going
5 to be done with the information and make choices based
6 on that.

7 And Dan says -- and I think he is right --
8 nobody reads privacy policies. It is probably a good
9 thing because there is a study out of Carnegie Mellon
10 that said if people actually did read their online
11 privacy policies, the opportunity cost to the U.S.
12 economy would be \$787 billion. It is just out of all
13 proportions to what might be at stake in commercial
14 privacy decisions. And with ex ante approach, that
15 difficult, if you will -- the focus ex post on where
16 have things gone wrong that need to be fixed and what
17 can we do to keep them from happening again seems like
18 a much more sensible way to approach the problems.

19 COMMISSIONER OHLHAUSEN: Howard, I just
20 wanted to weigh in a little bit on your point about
21 people not reading privacy policies. I agree probably
22 the average consumer does not, but we have academics
23 in the U.S. -- I bet Daniel reads privacy policies, I
24 bet David reads privacy policies, and academics and
25 consumer groups, consumer organizations and

1 competitors.

2 MR. COOPER: I do not read them.

3 COMMISSIONER OHLHAUSEN: Right, so James
4 does not. No, I am just kidding.

5 MR. COOPER: Well, you said academics. I
6 just want to make sure that you --

7 COMMISSIONER OHLHAUSEN: Academics other
8 than James Cooper.

9 (Laughter.)

10 COMMISSIONER OHLHAUSEN: But I think there
11 are mechanisms for if there is a problematic term in a
12 privacy policy for it to get noticed and surfaced.
13 And that is one of the things that we have seen I
14 think with social media, that when something is
15 discovered that people do not like, that news gets out
16 there pretty quickly.

17 MR. BEALES: If that is the goal, then that
18 points to a very different kind of a privacy policy
19 because you do not want something that is
20 understandable to consumers; you want something that
21 is understandable to geeks and competitors, who can
22 figure out whether there is something wrong going on
23 here. That is sort of not where we are headed. It is
24 not where the Europeans are headed. It is not where
25 California is headed. We want simple privacy policies

1 that anyone can understand, that tell you nothing, and
2 mostly are not read. I mean, no doubt some people
3 read them.

4 MR. SOLOVE: A while ago, I wrote a piece
5 about privacy self-management, which is this idea that
6 people manage their own privacy by reading these
7 policies and making choices. I think this is a flawed
8 approach, not just because people do not read privacy
9 policies. And, also, I think the point that there is
10 this tension, privacy policies are useful to
11 regulators and advocates and academics and others who
12 can read them carefully and you want to give a lot of
13 information, but the average consumer really cannot
14 get all of that. So there is a tension. You almost
15 need two different things, which is what Paul Schwartz
16 and I have proposed in our ALI Project, which is a
17 transparency statement for the regulators and then
18 something simpler for the consumers.

19 But as a consumer, reading the privacy
20 policies is relatively meaningless. I do not read
21 them because it is too many with the amount of
22 entities I do business with and sites I visit, you
23 know, hundreds, thousands. I do not have time. And
24 then the choices, do I share this piece of information
25 on Facebook? I don't know.

1 The implications for privacy depend on how
2 that information is combined and aggregated with other
3 information over time and how that information might
4 line up and what someone might do with something and
5 what algorithm someone might create five years from
6 now and a whole litany of things I cannot figure out.
7 So I really cannot make the judgment as a privacy
8 expert on exactly what the complications and costs and
9 benefits to me, especially the costs over time, are
10 going to be for me to release a certain piece of data.

11 So it is very, very difficult. And, now,
12 multiply that by 1,000. And I have to make that
13 decision all the time. Just really, really hard to do
14 for the consumer. So I am just not sure that that
15 approach -- you know, it is great if there is like one
16 company that you actually do business with, like I am
17 only on Facebook. But it is not. I am on all these
18 sites.

19 Like the professors who -- I give an amount
20 of homework every night and I think, hey, it is
21 reasonable for my students to read 30 pages in a
22 night, but what if they have 10 professors and each
23 assign 30 pages? And that is what the companies are
24 doing. Every company thinks, hey, they can pay
25 attention, we have this great mechanism. Yeah,

1 multiply it. It does not scale. That is the problem.
2 And the consumer, if you say, hey, we protect your
3 data with reasonable data security, well, what is
4 that? As a consumer, how do I assess your security?
5 How do I know how prepared your employees are to not
6 be phished? And I cannot -- how do I know what kind
7 of encryption you are going to use and all these other
8 things?

9 I cannot really make an informed assessment,
10 which is why we need an agency like the FTC to be
11 looking out for people. Just like when I would travel
12 abroad and the taxi fares were -- they did not have a
13 meter and I did not know what the right fare was and
14 they would just say like it is X whatever. I had to
15 trust them or make some -- I did not know. It is nice
16 to know that someone is looking out for me and there
17 is a meter and someone has thought of what the right
18 fare is going to be and I do not have to worry about
19 someone cheating me or I can pick up a jug of milk and
20 know that I can drink it and I am not going to be
21 poisoned. I do not have to do research.

22 Imagine if you did not have the food safety
23 and you actually have to go online and research like
24 the safety conditions at each farm to figure out do
25 you buy food from there? I would just like to know

1 like I pick up a product at the supermarket, it is
2 safe, and I think we want the same thing for privacy.

3 MR. VLADECK: It is amazing how when
4 whenever you use the phrase "privacy policy,"
5 everybody launches into a diatribe. So I am going to
6 take a minute and launch into my own.

7 One is they are not privacy policies. The
8 original sin was calling them something that they are
9 not. None of them really deal with privacy. They
10 deal with data use. And part of the problem is they
11 have been misnamed.

12 The other problem, of course, and this gets
13 back to the question that James started with, the
14 difference between ex ante regulation and something
15 else. If you have a regulatory regime that is clear,
16 so you know that everything you do on the internet is
17 safe or at least you have that promise, even if it is
18 not enforceable, then the privacy policy or the data
19 use statement becomes less important.

20 And part of the problem that we have -- and
21 the FTC has done a lot of work on simplified notice
22 and Dan and the ALI have done a lot of work on trying
23 to figure out a better system for this. But these are
24 really notice systems, and they need to be simplified.
25 Many of them are written by lawyers so they are bound

1 to be incomprehensible and they are often designed to
2 be incomprehensible.

3 So this is an issue that plagues us and I do
4 not think we have collectively figured out a way to
5 escape it.

6 MR. BEALES: I think actually Mick Jagger
7 had the answer to what is going to happen here. In
8 1964, the technology was a little different, but he
9 said, a man comes on the radio -- like I said, the
10 technology was a little different -- telling me more
11 and more about some useless information, supposed to
12 fire my imagination. What happens? "I can't get no
13 satisfaction."

14 MR. VLADECK: There we go.

15 MR. COOPER: All right. So, David, with
16 that segue -- thank you, Howard.

17 (Laughter.)

18 MR. COOPER: Now, that we have kind of set
19 the stage for where we are in the U.S., what do you
20 see as any of the problems? Because, again, the
21 headline of this panel is supposed to think about, you
22 know, kind of rethinking the current privacy data
23 security regime. What are some of the problems -- of
24 any of the current status quo, are there any harms
25 that you do not think are being addressed? Is there

1 inefficient enforcement, either over-deterrence,
2 under-deterrence?

3 So what do you think, David?

4 MR. VLADECK: So let me use a few examples
5 because time does not permit me to go through all the
6 concerns that I have. But one is I do not think we
7 have effective tools to really understand what is
8 going on with big data, let alone to regulate it
9 sensibly. So we all know that data collection is now
10 ubiquitous. We bring it into our own homes through
11 always-on devices and sensors or the internet of
12 things. We know that this data is being collected,
13 but our laws really do not have any restraint on the
14 sale or renting of this data.

15 We know it moves. We know it has
16 substantial economic value, but we do not have any
17 real information on the velocity or volume of this
18 kind of data aggregation. So that presents risks.

19 Paul Ohm, one of my colleagues both at the
20 FTC and here, wrote an article ten years ago in which
21 he sort of cast in dystopian light what he called "the
22 database of ruin." Well, we do not know yet whether
23 there are these kinds of enormous database, but there
24 is nothing in U.S. law that really restrains that
25 development. And these kinds of databases pose risks

1 to consumers. There is the risk of data breach.
2 After all, these would be honeypots. They would be a
3 magnet for identity thieves. And we know identity
4 theft is still rampant.

5 So one question that the FTC I think is
6 going to have to grapple with is sort of where is this
7 data? What is it being used for? How is it being
8 transmitted, to whom, and for what purpose? So that
9 is one issue that I think the Commission is going to
10 have to grapple with going forward.

11 Second, the rapid initiation of algorithmic
12 decision-making in the marketplace. Now, I said this
13 this morning, I am no fan of human decision-making.

14 (Laughter.)

15 MR. VLADECK: We generally do not do such a
16 great job, and machines may help. But for regulators,
17 these kinds of decisions are very difficult to
18 oversee. They are not transparent. Machine-learning
19 algorithms are impossible to interrogate. You cannot
20 put them under oath. It is hard to root out disparate
21 treatment based on factors that are impermissible,
22 age, gender, race, things like that. Nor is there
23 necessarily due process at the end of the
24 decision-making chain.

25 So I know the agency has already done a fair

1 amount of work on this. But this is an issue that I
2 think demands greater attention because I do think it
3 poses enormous risks to those who come out on the
4 bottom in terms of these kinds of decision-making.

5 In terms of enforcement, my concerns are not
6 really with over-enforcement, because the agency
7 resources are too scarce for that. Indeed, when I was
8 the director of the Bureau of Consumer Protection --
9 and I don't know whether Howard had the same concern
10 -- but I spent a lot of my time doing triage, deciding
11 which cases to bring and which cases not to bring,
12 even though many of those cases in the latter category
13 were meritorious and we should have brought them, if
14 we could have. So I do not think that is the problem.

15 I do think there are enforcement challenges.
16 So one is how do you enforce against an industry, like
17 the mobile app industry, which is a highly diffuse,
18 diverse industry, thousands and thousands of app
19 developers, many of whom either do not really know
20 what the law requires or just don't really care. So
21 the New York Times did a story yesterday about COPPA
22 violations, violations of the Children Online Privacy
23 Protection Act, by app developers that were tracking
24 kids 12 and under without explicit parental
25 permission.

1 Sure, the FTC could bring 20 or 30
2 enforcement actions against this kind of industry.
3 But it is not at all clear to me that you get any of
4 the kind of deterrent value that you really need. So
5 one question is, with respect to these kind of diffuse
6 industries, how do you make them comply with the law?
7 That is one problem.

8 Another is we have to figure out to what
9 extent machine-learning decision-making tools are
10 staying within the statutory guidelines. That is an
11 enforcement problem. And last, we have a lot of
12 companies under order, and order violations are hard
13 for the agency to detect and to deal with simply
14 because of the high volume of companies under order.
15 That is a serious enforcement matter.

16 I mean, for a company to violate an FTC
17 order undermines the ability of the agency to do its
18 work; it undermines the deterrent value of consent
19 decrees or enforcement cases. And I think that the
20 new management at the FTC is going to have to grapple
21 with that.

22 There are many others, but I will stop
23 there.

24 MR. COOPER: Would anyone else like to weigh
25 in?

1 COMMISSIONER OHLHAUSEN: One thing, building
2 on what David said, I agree that one of the challenges
3 for the approach that we have -- and when I talked
4 about privacy policies, it was not certainly to say
5 privacy policies, you know, are it and take care of
6 everything. It is just that I do not think they are
7 as totally useless as some other people seem to think
8 they are.

9 But the other problem is these kinds of
10 harms that we -- you know, you may have a lot of
11 little bits of data that were not sensitive, that were
12 not even personally identifiable when they were
13 collected, but through these new tools they can be
14 assembled in a more complete mosaic and identified to
15 a certain person.

16 And then I think the question there is, is
17 there a harm, is there a risk there? And that is
18 where I think we need to start thinking how do we
19 address that? Because a lot of those uses may be
20 great. They may be very beneficial. We do not want
21 to stop those, but for the harmful ones. And if we
22 look at something like going back to the pre-internet
23 days of the Fair Credit Reporting Act, it was trying
24 to get at those kinds of issues to allow some kind of
25 balancing and use of this data, but to allow consumers

1 to know if it was being used in a way that
2 disadvantaged them in connection with an important
3 decision, like employment or insurance or some other
4 ones, lending, and then gave them insight into what it
5 was and the right of correction.

6 So I think that is where we need to start
7 thinking about like kind of a risk-based approach,
8 because I do not think we can, necessarily, foresee
9 all the uses. I am a little concerned about the data
10 use specification requirement because, as Howard said,
11 there may be great uses down the road that consumers
12 would like. But they still need to be protected from
13 some of these new abilities to use these little bits
14 of data in a new way.

15 MR. BEALES: I don't know why the more
16 complete mosaic is itself a problem. The one part of
17 that that clearly is a problem is if the Government
18 can get that. But there is another tool to control
19 that problem.

20 COMMISSIONER OHLHAUSEN: Right.

21 MR. BEALES: And it is the one we ought to
22 use and not worry about the possibility that this
23 might be put together.

24 I want to say two things about -- you know,
25 I think big data is a really interesting question and

1 there are certainly potential costs there. But there
2 has also been big benefits. I mean, that is where our
3 fraud control tools come from is data aggregations,
4 often data that was collected for a different purpose,
5 that is put together in an algorithm that predicts the
6 likelihood that a particular person is really who they
7 say they are.

8 If it were not for those tools, there would
9 be a lot more identity theft than there is, which is
10 way too much. But that is a big data effect. You
11 cannot do that with little pieces of data one at a
12 time. You have to aggregate the data in order to get
13 a more comprehensive picture.

14 The other thing I wanted to say is about
15 algorithms, which raise some potentially interesting
16 questions. But I think the algorithms that ought to
17 be of concern are the ones where the user of the
18 algorithm does not face the costs of mistakes.
19 Because an algorithm is just basically a way to
20 classify you are a good risk, you are a bad risk; you
21 are a good prospect, you are a bad prospect.

22 There is a really interesting example of
23 Reuters, which wants to get scoops on international
24 news, and it does that in part by following tweets.
25 But there is a lot of bogus tweets. And so they built

1 an algorithm to figure out whether this was likely a
2 real story that they should follow up on or a bunch of
3 fake tweets that they should ignore.

4 They face the costs of both mistakes. They
5 are going to miss a story if they misclassify these
6 tweets as false tweets and ignore it. They are going
7 to waste resources if they misclassify these tweets as
8 true and pursue it and they are false. So they know
9 what the tradeoff is. They know what the costs are of
10 both kinds of mistakes. There is no reason to think
11 they make the wrong tradeoff.

12 And I think that is true of a lot of
13 marketing applications, where if I screen out "bad
14 prospects," I am turning away business. I do not want
15 to do that by mistake. I want to turn it away if it
16 is bad business, but I do not want to turn it away if
17 it really is good business. So there are some fairly
18 strong incentives within the system to make sure the
19 algorithm works well.

20 Where you do not have those incentives is
21 where somebody using the algorithm only pays part of
22 the costs and the rest of the costs are shifted to
23 somebody else.

24 MR. SOLOVE: With the algorithms, I think
25 there is a lot of concerns because suppose --

1 especially a predictive algorithm, suppose the hotel
2 chains get together and create an algorithm for
3 determining when a particular hotel guest is going to
4 damage the hotel room or treat the hotel room badly or
5 do misconduct in a hotel room. And they basically
6 come up with the algorithm and it comes up and says
7 that you are one of those people. And starts --

8 MR. VLADECK: Quotes Mick Jagger.

9 MR. SOLOVE: -- you know, you are -- yeah,
10 along with Mick Jagger, too.

11 (Laughter.)

12 MR. SOLOVE: And you start to not be able to
13 rent hotel rooms or suddenly you are charged more.
14 And what are your rights there? Because when you are
15 targeted in a predictive sense, it is like, well, hey,
16 I never did any damage. Well, we are not saying you
17 did, the algorithm is just saying that we think there
18 is a high probability that you might. So there is
19 nothing wrong with the algorithm. It is just taking
20 into account factors and, hey, it might actually be
21 true, but you have not done it.

22 Should people have rights to say just
23 because it says I am likely to, how do I disprove
24 that?

25 MR. VLADECK: Or how do you even know it?

1 MR. SOLOVE: Exactly. How do you know it?
2 How do you disprove it? How do you argue with a
3 prediction. So if the FBI says, our algorithm says
4 you are going to commit terrorism; we will not let you
5 on the plane; you will say, well, how do I prove it?
6 It's like, well, live your life and die, and then if
7 you have not committed terrorism, then we will take
8 you off the list because we know you did not do it.

9 (Laughter.)

10 MR. SOLOVE: The algorithm was wrong. There
11 has to be something to say who regulates, what are the
12 concerns with an incorrect thing? How much
13 transparency do we have? How can it be used? What
14 about people's rights to challenge it and say, hey,
15 the prediction is wrong, either inaccurate -- I mean,
16 how do we -- but to just kind of leave it to industry
17 to do whatever they want without looking to the harms
18 that consumers might suffer from this I think is
19 something that we definitely do not want to do. That
20 is why I think it is very important that we look into
21 this and have good regulation on it.

22 MR. VLADECK: Let me push back a little on
23 Howard's point. It may be that Reuters bears the
24 risks on both sides of this, but in consumer finance
25 or creditworthiness or anything else, the consumer who

1 is misclassified by the algorithm bears the risk, may
2 not be informed, and there are no shortage of stories
3 that have been publicly discussed where people have
4 been disadvantaged based on correlations, not on their
5 actual -- so, you know, American Express had a serious
6 problem because it was reducing the credit limits for
7 black customers who went to certain kinds of box
8 stores that were deemed to be indicative of a credit
9 risk. And when that became public, their answer was,
10 we screwed up, but we relied, essentially, on an
11 algorithm.

12 So, again, I am not trying to suggest that
13 machine learning cannot help us make better decisions,
14 but there needs to be both some transparency and some
15 due process here, particularly where it is not the
16 company that bears both sides of the risks.

17 MR. BEALES: Well, I think in the financial
18 transaction, it often is the company that bears both
19 sides of the risk because they are turning away
20 business that would be profitable business, and there
21 is an incentive to not do that. We can argue whether
22 it is the perfect incentive or not.

23 But I think the other thing we have to
24 recognize is human decision makers have all those same
25 biases and they are every bit as hard to tease out.

1 They are probably less transparent than algorithms.

2 And know when I was at the FTC in the 1980s,
3 in the early 1980s, and we were bringing a lot of
4 equal credit opportunity cases, every time we looked
5 at a judgment creditor, a guy who sits down and looks
6 at the applicant across the table and says, you look
7 honest, I will loan you money, there was
8 discrimination. It varied whether it was women or
9 race or what kind of discrimination, but there was
10 discrimination.

11 Credit scoring guys did not have that
12 problem. Credit scoring reduced the discrimination
13 problems that were inherent in judgmental creditors.
14 And that is the potential gain from algorithmic
15 decisions. More data is usually better because can
16 challenge your preconceptions about what is going on
17 and what is the right answer here.

18 MR. SOLOVE: Sometimes. I mean, I think
19 that is true sometimes, but sometimes algorithms are
20 no better than the humans that design them and there
21 are hidden biases that can crop up in algorithms, not
22 just the people who design them, in fact, the data
23 being inputted into them. If you input data that is
24 infected with human biases into algorithms, the
25 algorithm spits out data that also is infected as

1 well. So there are a lot of concerns all around.

2 Absolutely, algorithms can improve human
3 judgment. Absolutely, human judgment can be
4 problematic. But I do think that the cost of, let's
5 say, for a business just saying, hey, I do not want
6 this business, I am going to turn a consumer away is
7 not enough -- it is not the same level of harm to the
8 consumer. Because a business can say on the
9 aggregate, we just think certain types of consumers
10 are not very profitable for us, so who cares if we
11 lose a little bit of business; we ultimately gain.

12 For those consumers who cannot have access
13 to credit, who cannot get a loan, it is a much, much
14 bigger deal and a much, much bigger cost. So I
15 actually do not think the market would always work
16 itself out because I think that businesses might make
17 a good economic decision, hey, if we do this, yeah, we
18 lose a little business, but we also lose some risk.
19 But that does not always look the same way on the
20 consumer side.

21 MR. COOPER: Maureen, you wanted to jump in?

22 COMMISSIONER OHLHAUSEN: Yeah, I wanted to
23 weigh in on this. I do think that there is the
24 mechanism of the market where if one company has a
25 poorly designed algorithm and it is leaving good

1 business on the table, someone else has an incentive
2 to try to capture that.

3 And that is one of the things I think we are
4 seeing in the lending area. There are finer
5 distinctions being made with better targeting tools
6 that allow lending to occur at better rates than
7 really going by the rough calculation of a credit
8 score that, you know, you kind of fall on this side of
9 the line or that side of the line.

10 So I want to certainly take into account the
11 fact that there are competitive pressures to have a
12 better algorithm to expand your business.

13 MR. COOPER: Just to kind of follow, it
14 seems a lot of this discussion is about the
15 classifications, obviously, that come out of
16 algorithms. Is Section 5 the right way to address
17 that? We think about Section 5. At least three out
18 of the four of you here on the table have been in the
19 position of an enforcer.

20 Leaving aside whatever statutory or
21 regulatory authority Congress has given the FTC to
22 enforce discriminatory, is Section 5 -- should it be
23 addressed -- say an algorithm unfairly classifies
24 someone as getting subprime loans, for instance, is
25 that stretching Section 5 beyond where you think it

1 should go or is that the right place for Section 5 to
2 be or instead should it be Congress making cuts of
3 what is unfair discrimination?

4 MR. BEALES: It is beyond where I think
5 Section 5 should go. Obviously, the FTC has a role in
6 places where Congress has given it a role, like equal
7 credit opportunities, where it enforces, and it is
8 reasonable and appropriate for it to do that. That is
9 what it should do.

10 But to look for discrimination, even of the
11 same sort, in other places is a whole different set of
12 considerations than what the Commission knows about
13 and has expertise in. One of the proposals that was
14 kicking around at the time of the unfairness policy
15 statement was, well, maybe we should use Section 5 to
16 say boards of directors should be more representative.
17 Elizabeth Warren, call your office. And that was the
18 kind of thing that the Commission and Congress were
19 trying to get away from.

20 And that is why those subjective kinds of
21 values, I think, is something that the unfairness
22 statement says in general we cannot do that. And even
23 if it is something we might do, it is probably more
24 appropriate for a different agency to do it.

25 MR. COOPER: David?

1 MR. VLADECK: I have a slightly different
2 answer. I agree with Howard that this kind of issue
3 would arise mostly under ECOA or FCRA or some of the
4 other statutes the agency enforces. But I think to
5 the extent that there is some intentionality here,
6 then it would fit under the unfairness doctrine. That
7 is, if there was a reason for the designers or the
8 users of the algorithm to know that it somehow, either
9 inadvertently or because of the training data,
10 systematically excluded X people, based on gender or
11 one of the suspect classes, I think the agency would
12 have an unfairness case. But I think the burden on
13 the agency in a case like that would be very high.

14 MR. COOPER: I imagine you probably do not
15 want to weigh in on that.

16 COMMISSIONER OHLHAUSEN: It has been
17 covered.

18 MR. COOPER: Yes, it has been covered
19 adequately.

20 While we are on this about -- and you had
21 raised something, David. I think it is interesting
22 about earlier on, in your earlier response, thinking
23 about some of the problems, do you think that -- and
24 really both David and Howard's people sat there and
25 looked at the complaint recommendations and thought

1 about what relief you should get. Do you think the
2 FTC, in its 13(b) equitable powers, do you think it is
3 hamstrung at all in its ability to get adequate relief
4 in privacy cases or do you think there should be -- I
5 realize the Commission, I think on a bipartisan basis,
6 has been on record as saying that in data security
7 cases civil penalty authority would be good. I could
8 be wrong about that. I think that is right.

9 COMMISSIONER OHLHAUSEN: That is correct.

10 MR. COOPER: But leaving aside that, do you
11 think in privacy enforcement, do you think there needs
12 to be a bigger stick than we have now? In many cases
13 when these are apps that are free and collect data, it
14 may be very difficult to get equitable relief under
15 13(b).

16 MR. VLADECK: I do think that -- in my own
17 view, and I do not think this is the Commission's
18 view, is that there ought to be original fining
19 authority under 13(b). And take Ashley Madison.
20 There is no way to do meaningful redress there.
21 Injunctive relief is not going to give much solace to
22 people whose marriages ended or whose spouse committed
23 suicide. So I do wonder about the ability of the
24 agency to forge any kind of effective remedy in those
25 cases.

1 I also think that if you look back at some
2 of the cases that we brought early on during the
3 Leibowitz era, I think that a civil penalty, for
4 example, against Google or Facebook initially would
5 have had had a deterrent value. Facebook is currently
6 under investigation again. Google, it took only two
7 years before it violated the consent decree.

8 I do think there ought to be initial fining
9 authority under 13(b). I think the Commission would
10 have to use it carefully, particularly where other
11 remedies were just simply inadequate. But I do think
12 13(b) cases ought to be -- I think civil penalties
13 ought to be available in those cases.

14 MR. COOPER: Okay. Howard, do you want to
15 weigh in on that?

16 MR. BEALES: Sure. No, I do not like the
17 idea of civil penalties, especially in an area like
18 privacy. I like the original scheme of the FTC Act
19 that was essentially the one bite at the apple,
20 because the precise meaning of "unfair and deceptive"
21 is not that clear. And the way the Act was set up,
22 the Commission could get an order, and if you violated
23 the order, you were subject to civil penalties for
24 that.

25 But civil penalties sort of presume a really

1 clear standard I think of what is a violation and what
2 is not. And that is not so clear in a lot of the
3 privacy areas. I think it is a lot clearer in data
4 security. I do think civil penalties there make a lot
5 more sense. But I think in a lot of privacy and some
6 other areas, I think monetary relief is not
7 appropriate.

8 MR. COOPER: All right. So, Howard, while I
9 have you, we are now turning to kind of how we are
10 seeing a shift. We looked at some changes in the
11 landscape of privacy regulation around the world and
12 throughout the United States, you know, we see in the
13 GDPR, California, the FCC Privacy Rule that is now
14 defunct. They all seem to be taking more of a
15 FIPS-based approach in notice and consent, deletion
16 rights, correction rights, we see in the GDPR and
17 California.

18 On the other hand, we have the FTC which has
19 been really based on demonstrating likely consumer
20 harms or deception. This tees off a little bit -- we
21 have discussed a little of this in the ex ante versus
22 ex post discussion. But do you have thoughts on why
23 you think we have seen a trend towards this, at least
24 in recent evolution of these newer privacy schemes,
25 away from harms-based and more toward a consent-based?

1 MR. BEALES: Well, I think two things. One
2 is -- and I think this remains true -- there is a
3 remarkable unwillingness to articulate what are the
4 harms we are worried about or inability to articulate
5 what are the harms we are worried about. And if you
6 cannot do that, then it is hard to do a harm-based
7 approach, especially as an across-the-board regulation
8 that applies to absolutely everything. You have to
9 think through the harms that you are trying to prevent
10 first. And there has been, to me, a remarkable
11 unwillingness to do that.

12 Second, I think the FTC in the last few
13 years has -- it certainly has not abandoned worrying
14 about consequences, but it has also moved towards more
15 what I would call FIPS-plus in its enforcement action.
16 I mean, the Vizio case is a really good example.
17 There is just no way to tell the story about that case
18 that does not come down to notice and choice. People
19 were surprised to learn -- did it violate their
20 expectations to learn that their internet-connected TV
21 was connected to the internet? Really?

22 (Laughter.)

23 MR. BEALES: And did they think that it was
24 making recommendations for the next thing they should
25 watch without knowing what they had been watching in

1 the past? Really?

2 COMMISSIONER OHLHAUSEN: It did not make
3 recommendations, Howard. It said that is what it was
4 collecting the data for.

5 MR. COOPER: But it did not make
6 recommendations.

7 COMMISSIONER OHLHAUSEN: But it did not make
8 recommendations.

9 MR. BEALES: Well, that is not what the --
10 the complaint does not charge the failure to make
11 recommendations.

12 COMMISSIONER OHLHAUSEN: No, but it charges
13 that it was collecting the data and sharing it --

14 MR. BEALES: For ratings purposes. This was
15 a completely innocuous use. There is no harm there at
16 all, no harm there at all, other than people did not
17 know. It violated their expectation.

18 COMMISSIONER OHLHAUSEN: But it was also --

19 MR. BEALES: But why is that bad?

20 COMMISSIONER OHLHAUSEN: It was also
21 collecting data, like even if you were not watching
22 something, streaming. If you were watching a DVD or
23 something, it was collecting and reporting back, this
24 television watched this DVD. So that is not a ratings
25 purpose.

1 MR. BEALES: Well, again, what is -- I mean,
2 it is a ratings purpose because it is how are people
3 spending their time with the set, which is what you --
4 I mean, it is what the television rating services are
5 busy measuring is, how much time is the set on? That
6 is what the boxtop is recording.

7 COMMISSIONER OHLHAUSEN: But that is not
8 what was being collected.

9 MR. COOPER: Right.

10 MR. BEALES: But this is complementary to
11 that data. It would help you --

12 MR. VLADECK: Well, in addition to that
13 data.

14 MR. BEALES: Well, it --

15 MR. VLADECK: It is anything that --

16 MR. BEALES: This is competition for
17 Nielsen, all right, that has a box that measures what
18 the TV is on and what channel is it tuned to and that
19 is about it. It is additional information about
20 whether people are actually watching a TV show on the
21 channel that it is tuned to or watching something
22 else. I mean, there is -- you know, you can say it
23 was unexpected. But I do not know why it is bad.

24 MR. SOLOVE: Well, I guess there is a lot of
25 dispute about harm. This is one of the problems when

1 it comes to harm is that, you know, you say, well,
2 harm is never articulated. Well, maybe the harms that
3 you would think of what harm is is not articulated.
4 There are harms in some of these cases that do not
5 necessarily mean that someone is out financially or
6 their reputation is ruined.

7 Part of it just is consumer trust that you
8 buy a product, you think something is going to be used
9 in a certain way, and suddenly, you discover, well,
10 whoa, all this other stuff is going on. And that does
11 not just hurt the consumers; it also hurts other
12 industry. People start to not trust it. Well, gee, I
13 do not want to buy the next things because they are
14 going to do something with my data. I do not want to
15 buy a Google Home. I do not want to go and use these
16 new technologies because I cannot trust what they are
17 going to do. Nothing they say -- and it could be a
18 different company.

19 But if consumers start losing faith that,
20 you know, what is told to them, what they expect is
21 not what they expect, all these products, they are
22 going to start to say, why do I want to start bringing
23 this stuff into my home when it seems like
24 everybody -- the common story is they are doing
25 something else with it that I did not expect? And

1 that hurts other companies.

2 It undermines the companies that are doing
3 the right thing, and are saying what they are doing
4 with it and then doing that. And then if they want to
5 use it for something else, tell people. Try to get
6 their consent.

7 MR. VLADECK: This is a Bob Bork problem.
8 This is why we have the Video Privacy Protection Act,
9 because someone went to -- you know, they used to have
10 stores where you could rent videos -- and got a list
11 of what -- and everyone was outraged because who knows
12 whether he was sitting there at night watching Disney
13 shows or porn?

14 MR. BEALES: But Vizio says -- to me, the
15 Vizio case seems to say the store cannot keep the
16 record.

17 MR. VLADECK: No.

18 MR. BEALES: And that seems crazy. They are
19 not publishing this.

20 MR. VLADECK: It is a TV set. It is not
21 your content provider. It is not your content
22 provider. It is a TV set. It is like a radio. It is
23 not a content provider. It is -- and what Vizio is
24 doing is keeping an account of what you watch and
25 selling it with no restraint on selling it and that is

1 why --

2 MR. BEALES: They are selling it anonymized.

3 MR. VLADECK: Well, okay.

4 MR. BEALES: And aggregated.

5 MR. VLADECK: But that is why we have a

6 Video Privacy Protection Act because Congress --

7 MR. BEALES: No. There is nothing in the
8 Video Privacy Protection Act that would keep the store
9 from reporting the aggregate rentals by title.

10 MR. VLADECK: That is true. That is true.

11 MR. BEALES: And that is what Vizio wanted
12 to do with this data, was stuff by title. I just want
13 to say if we think about the problem the way Daniel
14 just characterized it, then I think it is a problem
15 that has no solution. I mean, there is an interesting
16 article in the Wall Street Journal today that I didn't
17 read closely about 5(G) and why it is important to be
18 first, that predicted, among other things, that we are
19 going to have internet-connected tennis shoes.

20 (Laughter.)

21 MR. BEALES: Now, imagine having to read the
22 privacy policy for your shoes and your light bulb and
23 everything else. There are going to be things that
24 happen in this new world that consumers will not know
25 about, right? Their cars will do things now that they

1 do not understand how it happens or that it happens.

2 If the goal is for consumers to understand,
3 at a technical level, what is going on and how all
4 information is being used, we are not going to get
5 there, guys. Let's think about what is second best.

6 MR. VLADECK: Well, I think the consumer --
7 I totally agree with that point. Consumers really are
8 not going to understand the technical thing. That is
9 why I think the FTC plays a great role here as a
10 backstop to say, look, someone's got your back. If
11 the uses are going to start to get so far afield, so
12 unexpected, we are going to stop that, we are going to
13 keep that in check.

14 And I think it should not be like, okay,
15 wow, you are going to be totally ruined, that should
16 not be the standard, or else then I think it should
17 just be -- obviously, if there is a small variation in
18 use and it is very innocuous, it is not a big deal, I
19 do not think we should go after trivial things. But I
20 think significant variances in use are not totally
21 trivial.

22 And it is not like it is impossible -- and
23 you can also look at the circumstances. How hard
24 would it have been just to try to shape expectations a
25 bit better about what this product is going to do?

1 Companies should have some kind of an obligation not
2 to just hide the ball and secretly do things, not
3 saying that it has to be in a fine print of a privacy
4 policy.

5 But, you know, the more people that
6 understand a little bit about like, you know, okay,
7 what are these new products doing and what are the
8 consequences, there is an education that needs to
9 happen as we make these changes, and it is not
10 happening because there is no incentive to do it.
11 It is like, great, I can get away with just doing it
12 on the sly, and no one is going to come after me.

13 MR. BEALES: I think the important backstop,
14 though, is not that there is something -- that I know
15 there is nothing surprising happening with my data.
16 Because, I am sorry, whatever your data is, there is
17 something that would surprise you that is happening
18 with it, almost for sure. And even if you are quite
19 sophisticated about what is being done with
20 information and how it is being used, that is probably
21 true.

22 The question should be, is there something
23 that is being done with that data that is creating a
24 problem? But the mere fact that I did not know it was
25 there is not the problem.

1 MR. COOPER: Well, now that Daniel and
2 Howard agree on the role of consumer expectations in
3 privacy, it is great that we solved that problem.

4 (Laughter.)

5 MR. COOPER: I want to make sure we have
6 time for some of the questions we got. But I want to
7 turn back to David and -- in my introductory remarks,
8 I kind of posited that weird inflection point that
9 there is something out there that seems to at least
10 have a lot of people talking or suggesting that we
11 need to rethink privacy here in the U.S., maybe moving
12 us closer to the E.U. We see this in California.

13 So to David, do you think that the pressure
14 for national or international conformity is going to
15 drive federal privacy law closer to these other models
16 whether we like it or not?

17 MR. VLADECK: Well, first of all, I think
18 that the enactment of the California statute and sort
19 of the slow implementation of it, deliberately slow
20 implementation, has created an interest in many other
21 states to see if they could replicate what California
22 has done. And so I do not think that Congress is
23 going to immediately race to enact federal privacy
24 legislation.

25 But many of the most important statutes that

1 we have, the environmental protection laws, the
2 occupational safety and health laws, these were all
3 enacted basically in response to an emergence of state
4 law. So my guess is that unless the business
5 interests that are unhappy with the California law
6 succeed in either scuttling it back into the
7 California legislature or attacking it successfully in
8 court, you will see other states moving to adopt a
9 regime based on the California statute, which is to
10 some extent based on the GDPR.

11 And so the other force that is very much at
12 work -- and the privacy lawyers in this, either here
13 or watching this on the web, may know this because
14 they have spent the last six months advising clients
15 nonstop on compliance with the GDPR. So I do think it
16 is going to have an influence on the United States. I
17 think that is problematic in and of itself.

18 I think there are many laudable goals in the
19 GDPR. I think for the United States to adopt that
20 kind of approach would be very difficult. We are not
21 based on a code system of laws. And the GDPR reads a
22 little like the Napoleonic codes updated a little.

23 (Laughter.)

24 MR. VLADECK: So I think there is some
25 friction in the joints. But I do think --

1 particularly, California has 37 million people. It is
2 the fifth largest economy in the world. It is the
3 locus for much of the development of the tech
4 community. And I think it is going to be highly
5 influential. And I think the FTC has to sort of be
6 very conscious about what is going to take place as a
7 result. And I do think that Congress has basically
8 made itself irrelevant in this debate and that may be
9 a good thing.

10 (Laughter.)

11 MR. COOPER: Howard or Daniel or Maureen?

12 MR. BEALES: I agree with that. I would
13 point to a slightly different example of what I
14 actually think is probably the most likely outcome.
15 California is big enough to sort of drive things
16 substantively, but as it turns out, so is Vermont.
17 Vermont passed a law requiring labeling of anything
18 that had genetically modified organisms. That
19 provoked industry support for a preemptive federal law
20 that says you have to label if it is genetically
21 modified ingredients, but you can label by a QR code
22 that people can scan and go to a website to figure out
23 whether it is genetically modified or not.

24 There will be pressure for preemptive
25 federal legislation. What that federal legislation

1 will look like is not so clear. But I think there
2 will be that pressure.

3 MR. SOLOVE: In the early days of breach
4 notification, I remember I testified before Congress
5 right after the ChoicePoint breach -- this was 2005 --
6 and there was interest, very strong interest in
7 Congress, look at all these states that are starting
8 to pass breach notification and industry was all
9 behind it. We have to comply with all these different
10 standards and this is going to be very complicated and
11 expensive and we really need some federal preemptive
12 law. There were even a couple of bills kicking
13 around. Nothing happened.

14 So I have very little faith that this
15 Congress really can pass a law, let alone tie its
16 shoes. So I think that it really -- I am not
17 expecting -- even though I think that some of these
18 laws could benefit consumers and benefit industry to
19 have some in these areas, I just do not think it is
20 likely. So I think Congress just will not have the
21 role, unless it somehow gets its act together, really
22 will not.

23 I mean, the most significant privacy legal
24 change that was passed was passed as part of
25 Obamacare. It was the High Tech Act's updating of

1 HIPAA and passing the notification rule, and that is
2 really the big accomplishment for Congress since 2000
3 really. Not much has gone on. I do not hold out much
4 hope. So I think it is going to be what it is.

5 And I think there are some problems with
6 that approach, when we are going to have a lot of
7 different varying state legislation on privacy.
8 Breach notification is at least something that is more
9 focused on one thing and you have variances. All
10 sorts of different laws, like California's, with
11 different variations is really going to be a big
12 nightmare for industry to comply with. And I do not
13 necessarily think that is a good thing.

14 MR. COOPER: Maureen, did --

15 MR. BEALES: I will say when I started at
16 the FTC in 2001, everybody said internet legislation,
17 privacy legislation is going to pass right away, and
18 you guys better get behind it. But it has been a
19 while.

20 MR. SOLOVE: Well, we said that at the
21 beginning of the Obama Administration, too.

22 (Laughter.)

23 MR. COOPER: Maureen?

24 COMMISSIONER OHLHAUSEN: Well, I was just
25 going to point out that Congress and FTC are not the

1 only actors in this drama, or the states. So NTIA and
2 NIST, Department of Commerce, and the White House are
3 all considering paths forward. Do we look at some
4 sort of approach that would allow more of a uniform
5 privacy framework to be put in place? So I would
6 encourage people to pay attention to that process as
7 well.

8 MR. COOPER: That will be interesting. I
9 just got a card that -- I was going to wait for the
10 audience. But it says, point of fact, HR6743, federal
11 data breach is going to the full house and it was just
12 voted out of committee today. So breaking news here.

13 (Laughter.)

14 MR. COOPER: So I am guessing it was
15 prompted by this panel.

16 (Laughter.)

17 MR. COOPER: Time to take immediate action,
18 immediate action.

19 So we are talking here about the pressure,
20 the external pressure on the U.S. One thing that we
21 have here in the U.S. is the First Amendment that
22 seems to push back against privacy regulations.

23 I wanted to, Daniel, turn to you. And I
24 know you have written and thought about this, sort of
25 international or at least comparative privacy law a

1 lot. Do you see any problems with extraterritorial
2 application element to the GDPR? For instance, we see
3 that the European Court of Justice is now considering
4 the extraterritorial application of the right to be
5 forgotten? We saw a Canadian court deal with some of
6 that earlier this year with Google. So do you see
7 that as a potential pushback?

8 MR. SOLOVE: I mean, there are definitely
9 certain problems with that. I mean, a lot of laws,
10 including U.S. laws, have extraterritorial application
11 as well, including the California law. To some
12 extent, every country and every region has a right to
13 regulate those who do business in its borders. I
14 guess one thing is good luck enforcing that over in
15 the U.S. If a company is not in Europe, the GDPR says
16 it applies, but I do not see what they are going to do
17 to really enforce it.

18 So it is there on paper. It looks scary on
19 paper, but, in practice, it is kind of a joke. They
20 really cannot enforce it. There are certain aspects
21 of GDPR that would not fly under the First Amendment,
22 but there are a lot of aspects that are fine under the
23 First Amendment that are embodied in various U.S.
24 laws. I can look to a lot of different provisions of
25 GDPR and find analogs and similarities in U.S. laws,

1 including even rights to be forgotten. There are
2 already rights to be -- COPPA has one, for example.

3 A lot of these are not like foreign, radical
4 concepts. There are certain things about GDPR that
5 just will not fly in the U.S. for First Amendment
6 reasons, as well as just general U.S. approaches. So
7 the idea that you need to have a lawful basis to
8 process data, that you have to be somehow authorized
9 to do it, and there are only certain justifications
10 that allow you to even use or collect data, I do not
11 think that would really work in the United States. It
12 is just so contrary to the U.S. approach, which is
13 generally a permissive approach, like you can use it
14 unless there is a problem that is caused by it.

15 And that is generally the U.S. approach is
16 not to just say you need authorization to do
17 something, unless what you are doing starts creating
18 an issue. I do not see that being carried over. But
19 I think a lot of the things the GDPR does and a lot of
20 things these laws do are not so radical and foreign
21 and different to the U.S. You look at HIPAA, you look
22 at GDPR, there are a lot of similarities, actually
23 much more than the California law. HIPAA has a lot of
24 similarities.

25 A lot of GDPR is just having a privacy

1 program, doing basic risk assessments and other
2 things, all of which HIPAA requires. And the GDPR
3 often does not say a lot about what those things
4 should entail. It says, hey, do privacy by design and
5 do it early, but it does not say what you are supposed
6 to do for that. It is largely empty. It says, do a
7 privacy impact analysis, but it does not have a lot of
8 specificity on these things. And that is sort of how
9 HIPAA is in a lot of ways, too.

10 So in a way, I do not think that things are
11 so radically at odds with each other and that the GDPR
12 approach is radically incompatible with the United
13 States. I think there are certain things that will
14 not transfer over, but I think the things that
15 transfer over, the commonalities and the things that
16 could work, are more than the things that cannot.

17 MR. COOPER: Anyone else want to jump in on
18 that?

19 All right. So in our little bit of time
20 left, I have lots of great questions. I,
21 unfortunately, will not have time to ask all of them.
22 But I want to direct one to Maureen because it is
23 right in your bailiwick.

24 It has to do with the FTC taking advantage
25 of its dual role as both having a consumer protection

1 and competition side, and using that to examine the
2 impact of data, not just in the consumer protection
3 dimension, but on the impact on small business
4 competition and entry. And I know you have written
5 about that and thought a lot about mixing privacy and
6 competition.

7 COMMISSIONER OHLHAUSEN: Certainly, in a
8 competition analysis, data could be considered if it
9 is an asset that is being combined in a merger in a
10 way that is going to reduce competition in some way,
11 much like combining two distribution systems or
12 combining two factories.

13 I think one of the questions, though, is
14 really a lot of times concerns about privacy are
15 really what is driving concerns about trying to use
16 privacy in a competition analysis. So it is not
17 really about hurting competition; it is about hurting
18 privacy. So I think there certainly are examples one
19 could think of, right?

20 So say there were two very privacy-
21 protective handset manufacturers and they sort of had
22 that big part of the market, and so you could say that
23 was a separate part of the market than other handsets,
24 and they were going to merge, and then they were going
25 to have a high market share of handsets that compete

1 on privacy attributes. That could be an antitrust
2 case. Just like you could have two manufacturers of
3 super premium ice cream who want to merge.

4 MR. COOPER: Just hypothetically.

5 COMMISSIONER OHLHAUSEN: Just
6 hypothetically, super premium ice cream -- that was a
7 case. So I think it is not that data cannot be a part
8 of it; it is just the concern has to be about
9 competition.

10 Now, on the other hand, we have had
11 situations where one company is buying another company
12 and they are going to be combining data sets. They
13 are not-horizontal competitors. It is not that it is
14 taking a competitor out of the marketplace. But the
15 data that is going to be transferred over to the
16 merged company was collected with a certain set of
17 promises. What we have said through our head of
18 Bureau of Consumer Protection is that the promises
19 travel with the data.

20 So if you collected this data and said, we
21 are not going to, you know, use it for marketing, and
22 then they are going to combine it and then use it for
23 marketing, they would have to get basically a new
24 consent from the consumers. So if a consumer says,
25 well, no, no, that is not what I wanted, then they

1 would have to take them out of that data set. So I
2 think that is the way it has been handled.

3 There are mergers cases where you are
4 combining two very unique data sets. Like we had a
5 case about mapping used for insurance and we had a
6 competition remedy because it was going to reduce
7 competition. So we actually had a remedy that
8 required sort of replication and sharing of this data
9 set.

10 But, often, these types of mergers that
11 involve a lot of data are being combined to create
12 what we would consider in antitrust like a new
13 product, like a new efficiency, as long as it is not
14 harming consumers as a consumer protection matter.
15 And that would not be considered a negative kind of
16 thing.

17 So I actually have an article about this,
18 called Competition, consumer protection and the right
19 approach to privacy.

20 MR. COOPER: She will be outside signing it
21 on the way out.

22 COMMISSIONER OHLHAUSEN: Right.

23 MR. COOPER: It is not for sale.

24 COMMISSIONER OHLHAUSEN: It is in the
25 Antitrust Law Journal in 2014.

1 So it is not to say these values are not
2 important; it is to say what tools you use are -- that
3 is an important consideration. If you are concerned
4 just about someone is going to use data in a way that
5 harms consumers, that is a core consumer protection
6 issue, and you should use those tools. If you are
7 concerned that this transaction that involves data
8 sets is going to reduce competition, either
9 competition on privacy or competition in some other
10 form, then antitrust is the right tool.

11 MR. COOPER: Anyone else?

12 MR. BEALES: Yeah, I think there is a
13 different perspective on it that is also important.
14 As we look at and as states and Congress look at
15 additional regulatory requirements, those often have
16 differential effects on competitors. And, in
17 particular, in the privacy world, it is a whole lot
18 easier for a consumer-facing company, like Google or
19 Facebook, to get consent than it is for the
20 behind-the-scenes somebody that does exactly the same
21 thing, using exactly the same information, but they
22 collect it via cookies planted by a host of different
23 publishers participating in an advertising network.
24 But that is the competitive fringe in the online
25 advertising market.

1 And regulations that make it harder for them
2 help to entrench Google and Facebook, and that is not
3 necessarily a good thing. But it is very much a
4 competitive concern.

5 MR. COOPER: Anyone?

6 Okay. So here is a question in our 2
7 minutes and 21 seconds left, about the -- it did not
8 come up surprisingly, but we kind of touched around it
9 -- the privacy paradox. Maybe, Daniel, I will aim
10 this one at you first. But the audience member says,
11 how do you reconcile the fact that consumers regularly
12 value privacy highly when asked, but they tend to do
13 things that contradict these stated values?

14 And I think we all know that as a privacy
15 paradox, that stated preference seems to diverge from
16 revealed preference in the privacy space.

17 MR. SOLOVE: Yeah, Alessandro Acquisti, an
18 economist at Carnegie Mellon, has done some really
19 great work on this and studied this very effect of
20 what people say and what they do are at variance. And
21 that is often the case.

22 And part of it is that the choices that
23 people have and the way that they make those choices
24 are shaped by how those choices are presented to them
25 and a bunch of other factors that could lead them to

1 make choices that are not always consistent with their
2 stated attitudes. So we might say, well, what is
3 true? Do we say the behavior is the truth about what
4 they really value or is it what they say? I actually
5 think it is neither. I do not think what they say is
6 actually reflective of how they actually value
7 something. But I do not think behavior is always a
8 good metric, either, because there is a lot of things
9 skewing the behavior. And Acquisti does a great job
10 of pointing out all the different skewing things on
11 the behavior.

12 So in a way, it is very difficult to measure
13 what consumers actually value because I think both
14 metrics are problematic for doing that. Because a lot
15 of it is how informed the consumer is and what
16 information they are given and so on. And you get
17 very odd effects.

18 One of his studies is very interesting. He
19 had two groups. In one group he told them, they are
20 going to collect very sensitive data. In one group he
21 said, we are going to protect it; we are going to give
22 all sorts of privacy protections and security
23 protections on it. In the other group he said
24 nothing. And guess which group disclosed more? The
25 group he said nothing to.

1 So it is almost like punishing you for
2 actually doing the right thing and that is because
3 when you told people all the privacy and security
4 protections, people's minds suddenly woke up, oh, my
5 gosh, maybe there are these risks I did not think
6 about, and that made them more cautious. So a lot of
7 interesting effects and I encourage you to read his
8 work. It is very illuminating and will do a much
9 better job than I did at tackling this issue.

10 MR. COOPER: I am sorry, David.

11 MR. VLADECK: I will make one other -- you
12 know, people are generally presented with
13 take-it-or-leave-it offers. You either are on
14 Facebook or you are not or you use Google search or
15 not. We did some research when I was at the FTC about
16 these issues and part of it just -- and this just sort
17 of echoes what Dan says -- how the choice is
18 presented.

19 MR. COOPER: Yeah. Howard, did you want
20 to --

21 MR. BEALES: I think how you frame it
22 clearly matters. But consumers have all sorts of
23 preferences where it is a perfectly valid preference
24 and a perfectly real preference, but when they
25 confront the cost of satisfying that preference, they

1 make a different choice. There are issues of how you
2 pose the question and how you define it and what
3 consumers know. But there is also these choices have
4 costs, and consumers might make them differently.

5 The example I like is organic foods.
6 Something like 48 percent of consumers say, yep, I
7 prefer organic. Organic's market share is about 5
8 percent.

9 MR. COOPER: Well, I wish we could go on
10 forever. I am sure the rest of you all do. But we
11 are out of time by the six zeroes on the clock up
12 here. So join me in thanking this great group today.

13 (Applause.)

14 MR. COOPER: And I will await my
15 instructions from Bilal.

16 (Panel 3 concluded.)

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1 CLOSING REMARKS

2 MR. SAYYED: I have one more little end
3 note. If Howard Shelanski, a professor here, will
4 give closing remarks, and here he comes now. Price is
5 Right style.

6 MR. SHELANSKI: All right, great. Thanks
7 very much, Bilal. And thanks to all of you for being
8 here. I am used to, at academic conferences, saying I
9 am standing between the audience and cocktail hour.
10 There are no cocktails here, so you guys are stuck.

11 (Laughter.)

12 MR. SHELANSKI: I will, nonetheless, keep
13 things brief.

14 I want to start by just reiterating what
15 Dean Trainer said this morning. It is a real honor
16 for us here at Georgetown to be able to host these
17 first days of this series of hearings that the FTC is
18 hosting. We have a deep connection to the FTC, as
19 Dean Trainer explained, and it is really just
20 wonderful to have such a vibrant debate and so many of
21 you here today.

22 And special props for my antitrust students
23 who showed up. I really appreciate that. Former
24 students, so they are not getting any benefit from
25 this since I am not teaching it this semester.

1 One of the things that I think has been
2 particularly heartening about today's discussion is we
3 really see the full integration of the agency's
4 consumer protection and competition missions. I think
5 both of those are front and center. Certainly, the
6 last panel makes that very clear in the issues that
7 these hearings are tackling.

8 You heard Bilal say earlier the Bureau of
9 Competition and the Bureau of Consumer Protection are
10 really complementary. I might add Bilal left one
11 thing out of his formulation, which was the Bureau of
12 Economics. It is my view that with a small handful of
13 FTE, the Bureau of Economics could actually be
14 completely substituting of both of those other
15 bureaus. But that is perhaps a chauvinistic view from
16 someone who spent some time at that agency and in that
17 bureau.

18 The importance of these hearings really
19 cannot be overstated. I think one of the great things
20 of the American regulatory system at large, and one
21 that -- sort of a distinguishing set of
22 characteristics that one sees when one goes around the
23 world and sees how regulation and law enforcement is
24 done in many other very sophisticated jurisdictions --
25 is the level of transparency and accountability that

1 characterizes the way our federal agencies act.

2 And to be sure, one could be cynical about
3 certain actions that those agencies take. But when
4 one takes a broad view, it really is quite impressive.
5 Agencies have to justify their decisions. Agencies
6 have to have a coherent framework and they have to
7 have evidence. And those agencies do not get to make
8 those decisions on their own because they are subject
9 to accountability through the courts. And you just
10 have to open up the paper today to see an example of a
11 court overruling a federal agency that did not meet
12 those standards. So the agencies have a real
13 obligation.

14 These hearings fall into that framework of
15 transparency and accountability. An agency that fails
16 to justify its actions in a particular case to a court
17 loses a case. An agency that fails to justify its
18 program and its approaches and framework loses its
19 relevance before the public. And that is, I think, a
20 very damaging and harmful thing to have happen.

21 So for an agency periodically to hold
22 sustained public hearings, where it examines both the
23 sets of problems on which it is focusing and the
24 analytical framework with which it is approaching
25 those problems is really a very important aspect of

1 maintaining that relevance, maintaining that
2 legitimacy with the public. And that is exactly how I
3 see these hearings and what I see the FTC as doing.

4 The FTC has always been an agency that
5 cannot stand still and rest too comfortably with the
6 problems it is focusing on or with the tools with
7 which it is analyzing its approaches to those
8 problems. Indeed, that was the spirit in which
9 Chairman Pitofsky launched the hearing a quarter
10 century ago. We were in a time of very interesting
11 economic turmoil with the rise of high technology
12 industries. Economics and other tools for assessing
13 where there were competitive harms, where there were
14 harms to consumers, were changing and developing.

15 And it was his judgment as Chair that the
16 agency needed to go out and make sure that it was well
17 understanding what problems the public was focused on,
18 that it was understanding the industrial changes that
19 were before it, and that it was understanding the
20 state of the art of the knowledge with which it would
21 assess those problems.

22 Well, I think all of those forces are even
23 stronger today. And when Chairman Simons came into
24 office, he came into office at a moment that most of
25 us in the antitrust field and many of us in the

1 consumer protection field recognized as sort of an
2 historic moment. I think there is sort of
3 unprecedented debate -- I don't want to say
4 "unprecedented," but certainly unprecedented for the
5 last 40 years -- debate over some of the fundamental
6 framework and conventional understandings of how
7 antitrust should be enforced.

8 There is a recognition that we have much
9 sharper tools out there for understanding how
10 consumers behave and process information. It is time
11 for the agency to step forward and make sure that it
12 is fully taking account of and understanding that
13 public debate, because if it does not, it will keep
14 looking over here and the public will be thinking
15 about problems over there.

16 So if you open up, again, the paper over the
17 past week, you will read that there is a lot of public
18 debate, a lot of debate in academia, a lot of debate
19 in think tanks about whether the consumer welfare
20 standard, as conventionally conceived in antitrust
21 enforcement, is adequate to address some of the
22 concerns about market structure changes or wealth
23 distribution changes, things that the first panel this
24 morning talked about.

25 I had people come up to me and say, can you

1 believe the FTC invited so-and-so; those are flaky
2 ideas; they should not be giving air time to those,
3 and the FTC and I firmly disagree. These are things
4 that people are thinking about and they are motivated
5 by the problems that everyday consumers are
6 perceiving. And if the agency turns its back on those
7 voices in the debate and does not take into account
8 what might be legitimate in those arguments, the
9 agency will lose its transparency and it will fail the
10 test of accountability before the public.

11 So recognizing that, we see on all of the
12 panels today, and on the panels that we will see in
13 the other 19 days of hearings that I think are
14 scheduled, a real diversity of views that explore the
15 outer boundaries of what would traditionally be
16 thought of as competition enforcement or consumer
17 protection enforcement.

18 And only by taking into account that
19 thinking at the outer boundaries of hearing about the
20 problems that might be novel or different in form from
21 the way we have seen them before, given the rise of
22 large digital industries, and AI and new kinds of
23 technology, only by fully exploring them and doing
24 what Chairman Simons said we should do and that he
25 would do in his opening remarks, follow the evidence.

1 Follow the evidence to identify where there is really
2 a problem, follow the evidence for where we have a
3 good understanding of tools that can resolve those
4 problems.

5 And that way the agency will do two things.
6 The agency will modernize its thinking. It will
7 better be able to explain its actions. Even where the
8 action is inaction, it will better be able to say,
9 action is not warranted or we do not know enough to
10 have action and we are making that decision having
11 taken into account the state-of-the-art thinking and
12 having really heard from the public, from stakeholders
13 of all kinds, about what the problems are that they
14 are feeling and that they are sensing out there in the
15 marketplace.

16 By doing that, the agency will become more
17 effective. It will modify its framework as it needs
18 to to be more effective. But it will also be more
19 effective and transparent in justifying what framework
20 it eventually arrives at after these hearings.

21 So these are more important as events
22 than the one-off kinds of conferences that very
23 often characterize a field. They are a sustained
24 and iterative process over 20 days, where some of
25 the same issues will come up again and again.

1 Everything is documented. Everything is public. And
2 at the end, there will be reports very transparently
3 explaining what evidence the agency is crediting, what
4 arguments it is crediting, what arguments it does not
5 feel it can credit, and the technology, if you will,
6 of consumer protection and competition enforcement
7 under Section 5 at the agency will be all the better
8 for it.

9 So this is an important enterprise. It is
10 an important enterprise not just for the people on the
11 different panels, but it is an important enterprise
12 for all of you to participate in, commenting, sending
13 your comments to the agency. The agency has an open
14 window for those comments right now. Because it is a
15 unique moment that we might not get again for another
16 20 or 25 years. Or else it will occur only
17 incrementally through the case-by-case kinds of
18 transparency and accountability.

19 So this is a critically important moment. I
20 think this is a really auspicious start today to that
21 moment. I look forward to following and participating
22 in some of, at least, the remaining 20 days. I would
23 encourage all of you to do so as well. Thank you.

24 (Applause.)

25 MR. SAYYED: So I am just going to say thank

1 you and say 5 percent down.

2 (Laughter.)

3 MR. SAYYED: And then our next session,
4 September 21, Constitution Center, so not very far
5 from here. And that will get us, I don't know, 10
6 percent down.

7 (Laughter.)

8 MR. SAYYED: Thank you. Thank you. Thank
9 you to the panelists. Thank you to everybody.

10 (Appause.)

11 (End of Hearing 1.)

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