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FEDERAL TRADE COMMISSION

COMPETITION AND CONSUMER PROTECTION
IN THE 21ST CENTURY

Friday, September 21, 2018

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Federal Trade Commission
400 7th Street, S.W.
Washington, D.C.

1	FEDERAL TRADE COMMISSION	
2	I N D E X	
3		
4		
5	ORAL ARGUMENT	PAGE
6	Welcome and Introductory Remarks	
7	By Commissioner Rebecca Slaughter	6
8		
9	Opening Address by Joseph E. Stiglitz	13
10		
11	Remarks by William C. Kovacic	36
12		
13	Panel 1: The State of U.S. Antitrust Law	53
14		
15	Panel 2: The State of Antitrust Law	126
16		
17	Panel 3: Monopsony & Buyer Power	204
18		
19	Closing Remarks by	
20	Commissioner Maureen K. Ohlhausen	272
21		
22		
23		
24		
25		

1 PROCEEDINGS

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3 MS. MUNCK: All right. Good morning, and
4 welcome to the FTC's second session of our hearings on
5 Competition and Consumer Protection in the 21st
6 Century. My name is Suzanne Munck, and I am the Deputy
7 Director of the Office of Policy Planning, and on
8 behalf of the FTC and all of my colleagues, I'd like to
9 welcome everyone who is joining our session in person
10 and via webcast.

11 And I would like to give my special thanks and
12 gratitude to our tremendous panels that we will have
13 today, including Nobel Laureate Professor Joseph
14 Stiglitz, who is one of the probably most esteemed
15 critics of approaches to antitrust in the modern
16 economy; and also our Former Chairman and Former
17 Commissioner, William Kovacic. So thank you very much
18 to everyone who is participating today. We are very
19 grateful for your time.

20 Before we get started, it is my job to run
21 through a few housekeeping announcements. First, if
22 you have your mobile phone with you, please silence it
23 today. We are very grateful for that.

24 Second, if you leave the Constitution Center
25 today for any reason, you'll have to go back through

1 the security screening again. So please keep that in
2 mind as you're scheduling the time for coffee, et
3 cetera.

4 Most of you have received a lanyard with the
5 FTC event security badge. We recycle those. So if you
6 wouldn't mind giving that back at the end of the day,
7 we would be very grateful.

8 If there is an emergency that occurs that
9 requires you to leave the Constitution Center but
10 remain in the building, follow the instructions
11 provided over the PA. If you have to evacuate the
12 building, an alarm will sound. Everyone should leave
13 the building in an orderly manner through the main 7th
14 Street exit; that's where you entered. After leaving
15 the building, turn left and proceed down 7th Street and
16 across E to the FTC emergency assembly area. You can
17 also just look for me or any other FTC staff and we
18 will make sure to guide you in the right direction.

19 If you notice any suspicious activity today,
20 please alert security. And please be advised that the
21 event is photographed, webcast, and recorded. By
22 participating in this event, you are agreeing that your
23 image and anything you say or submit may be posted
24 indefinitely at ftc.gov or on one of the Commission's
25 publicly available social media sites.

1 Restrooms are located in the hallway just
2 around the corner. If you need anything, please ask
3 any of the FTC staff; we're happy to help you. And we
4 have a cafeteria onsite that closes at 3:00 p.m.

5 So with that housekeeping, it is now my
6 tremendous pleasure to introduce Commissioner Kelly
7 Slaughter, then to hear from the panelists today.
8 Thank you very much.

9 (Applause.)

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1 WELCOME AND INTRODUCTORY REMARKS

2 MS. SLAUGHTER: Thank you, Suzanne, and thank
3 you to all of you. It's so nice to be here today. I
4 am pleased and privileged to be opening our second day
5 of hearings on Competition and Consumer Protection in
6 the 21st Century. I have long been interested in how
7 policymakers tackle complicated questions about the
8 challenges and opportunities posed by new technologies.

9 In fact, as an anthropology major, I wrote my
10 college thesis on the first set of congressional
11 hearings on genetic engineering in the early 1980s. I
12 conducted a detailed and sophisticated analysis of the
13 language that members and witnesses used in those
14 hearings and reached a staggering conclusion: everyone
15 came into that exercise with their minds made up.

16 As an anthropology student who had no
17 experience in government at the time, I was shocked by
18 this conclusion, but now, with the benefit of a decade
19 of experience working in Congress under my belt, my
20 insightful deduction feels more like a statement of the
21 staggeringly obvious.

22 I bring up this story because the hearings we
23 are now convening have a similar backdrop to those
24 genetic engineering hearings in the early eighties.
25 Technological innovation has raised serious and

1 important questions of law and policy, and I can
2 understand why those familiar with the ways of
3 Washington might be suspicious that there is a
4 predetermined outcome or a desire to simply endorse the
5 status quo.

6 However, I believe this moment is different.
7 These hearings are not a project of reaffirming our
8 current policies and practices. To the contrary, they
9 must be a critical rethink of what we do, how we do it,
10 and what we should do differently or better to advance
11 the FTC's mission of protecting consumers and promoting
12 competition. If, at the end of the day, we appear to
13 be merely patting ourselves on the back for a job well
14 done thus far, we will have failed.

15 This is an extremely exciting moment to be at
16 the FTC. Technological innovation is not only
17 affecting our traditional work in both competition and
18 consumer protection, it is blurring the line between
19 our two traditionally distinct missions. As we heard
20 on the first day of these hearings, there is
21 substantial evidence that markets and sectors are
22 becoming increasingly concentrated across the economy.

23 At the same time, they are becoming
24 increasingly technologically dependent. Technology is
25 no longer simply an industry. It is a part of every

1 industry. As a result, it is relevant in more and more
2 matters before the Commission.

3 Privacy and data security might come to mind
4 first, but the FTC consumer protection staff also grapples
5 with the implications of technology when tackling
6 cryptocurrencies, online marketing, data throttling,
7 tech support scams, thin tech, and even robocalls.

8 On the competition side, we have also long had
9 to keep pace with technological advancement. We are
10 seeing more and more mergers and conduct matters with
11 technology-related issues, such as data collection,
12 intellectual property, and network effects. And as
13 consumers become data commodities themselves, the
14 nature of competition has been evolving as well.

15 What is even more interesting to me is how
16 these questions about competition and consumer
17 protection no longer happen in isolation. Addressing a
18 legal question on one side often has profound
19 implications for the other. Consider a hypothetical
20 merger between two companies which each control
21 substantial consumer data. What are the privacy and
22 security implications of that rollup? Consider also
23 the consequences for consumers when limited competition
24 means there is no meaningful choice about whether to
25 patronize a company that may not prioritize user

1 privacy.

2 Policy changes on the consumer protection side
3 have competition implications as well. How could
4 effective data portability help facilitate entry and
5 competition while sufficiently protecting privacy?
6 Will new privacy regulations have the unintended
7 consequence of stifling innovation and entrenching
8 incumbents?

9 The FTC is uniquely well positioned to tackle
10 these issues with thoughtful attention to their
11 interplay. Many other jurisdictions have completely
12 different agencies to address privacy, consumer
13 protection, and competition missions. The FTC is
14 somewhat anomalous because these issue sets are all
15 housed under our single umbrella. It is incumbent on us
16 to take advantage of our structure and expertise to meet
17 this economic moment.

18 In other ways, perhaps, we can learn from the
19 contrast with other jurisdictions. First, the passage
20 and implementation of GDPR across the pond, as well as
21 CCPA closer to home, provide excellent natural
22 experiments for us to see how longstanding ideas, like
23 the right to be forgotten, work in practice. We can
24 also monitor implementation for unintended
25 consequences, including for competition.

1 At the same time, the European Commission is
2 pursuing high-profile competition cases that involve
3 American companies. Of course, they are working with
4 an entirely different set of laws with respect to
5 competition. The abuse of dominance standard, which
6 does not exist in our statutory framework, puts
7 specific burdens on firms that reach a certain market
8 share.

9 As we observe the European cases and practices,
10 we have an opportunity to consider the benefits or
11 risks of changing our statutory standards here. I hope
12 that these hearings generally and today's panels
13 specifically give us a chance to analyze these issues
14 carefully.

15 Chairman Simons noted in his introduction last
16 week that he has an open mind as to what conclusions
17 will be drawn for the hearings, as do I. This is not
18 to me like those genetic engineering hearings I
19 analyzed back in college. I do not approach this with
20 the conclusions pre-inscribed. This critical
21 self-examination should not lead to a reaffirmation of
22 everything we are already doing.

23 Reflection premised on changing conditions will
24 inevitably uncover areas that are ripe for improvement.
25 It is simply not plausible that a meaningful

1 self-examination will lead to the conclusion that
2 nothing should change. I am very open-minded as to
3 what that change should be in terms of substance and
4 magnitude. I also think it is important to consider
5 what should change operationally at the FTC and what
6 should be changed by Congress. Those inquiries are not
7 mutually exclusive. We can both do better with our
8 current toolbox and identify areas where we need to
9 supplement it with additional authority or additional
10 resources.

11 My mother teases me frequently with the adage,
12 "Change is hard." It's funny because it's true, and I
13 think it's particularly true not only for me personally
14 but also for many of us across the legal profession who
15 are raised with the idea that doctrine is developed
16 carefully and thoughtfully over time.

17 Even though change is hard, it can also be
18 good. Healthy democratic institutions can comfortably
19 acknowledge areas of weakness or prior errors and
20 improve. We can think carefully and also radically at
21 the same time. We must hear and consider new ideas and
22 new voices and not be wed to the notion that the status
23 quo is any more justified than a departure from it.

24 Thinking both carefully and radically is
25 nothing new for our first speaker today, whom I have

1 the honor of introducing. Joseph E. Stiglitz is an
2 extraordinarily accomplished economist who has been at
3 the forefront of major economic policy issues for the
4 past 40 years. His work and achievements are vast, so
5 I will attempt to give you just the highlights.

6 Professor Stiglitz currently teaches at
7 Columbia University, and he is Co-Chair of the
8 High-Level Expert Group on the Measurement of Economic
9 Performance and Social Progress at the OECD. That is a
10 mouthful. He is also the Chief Economist of the
11 Roosevelt Institute. His career has included stints in
12 leadership at the World Bank, the President's Council
13 of Economic Advisors, and the Initiative for Policy
14 Dialogue.

15 Professor Stiglitz may be best known for his
16 innovative work to create a new branch of economics,
17 the economics of information, and for his analysis of
18 markets with asymmetric information. He has received
19 almost innumerable prizes and accolades, including the
20 Nobel Memorial Prize in Economic Sciences. And,
21 perhaps most notably, his son once worked for me as a
22 law clerk.

23 Thank you to Professor Stiglitz and to everyone
24 who is participating in the FTC's examination of
25 Competition and Consumer Protection in the 21st

1 Century. I also want to thank the FTC staff for their
2 tireless work in planning and carrying out these
3 hearings, and I look forward to lively discussions
4 today. Thank you.

5 (Applause.)

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1 OPENING ADDRESS BY JOSEPH E. STIGLITZ

2 MR. STIGLITZ: Well, it's a real pleasure to be
3 here at this time where the issues that we're talking
4 about are so much up in the air. I had the good
5 fortune to participate in a similar convening 23 years
6 ago, in 1995, when I was Chairman of the Council of
7 Economic Advisors. At that time, the broad consensus
8 in the Council was that America had a monopoly problem.
9 We were also concerned -- we and the Office of Science
10 and Technology Policy, with which we worked closely --
11 were very concerned that this market power problem was
12 going to have and was having an adverse effect on
13 innovation. Those concerns that I felt then I think
14 have been multiplied in the intervening almost 25 years
15 enormously. So what I want to do today is to try to
16 describe the ways and the reasons that I think the time
17 is ripe really for a rethinking of competition policy.

18 We have a market problem. It's both -- a
19 market power problem. It's both a monopoly and a
20 monopsony problem, and I think in the past we haven't
21 focused enough on the issues of monopsony. It's
22 evident, it seems to me, that current antitrust and
23 competition laws, as they are enforced and have been
24 interpreted, are not up to the task of ensuring a
25 competitive marketplace. The point is that if our

1 standard competitive analysis tools don't show that
2 there is a problem, it suggests something may be wrong
3 with the tools themselves. Many changes have occurred
4 in our understanding of economics, in the structure of
5 the economy, and there have been innovations in
6 anticompetitive practices. It may be that the
7 innovation isn't showing up in GDP, but it's showing up
8 in market power, and competition law, I think, has not
9 kept up.

10 Much of the current presumptions and law has
11 been influenced by what is sometimes called the Chicago
12 School. I don't want to blame just Chicago, and not
13 everybody in Chicago has flawed views, so it's just a
14 term of art and not meant to target a particular
15 location. What I'm really referring to when I say the
16 Chicago School is to the competitive equilibrium model,
17 and that model, which has informed our thinking, is
18 basically not robust, as I'll explain, and it does not
19 provide a good description of the economy. And the
20 legal framework based on that as the underlying model
21 will not serve the purpose of ensuring a competitive
22 marketplace. It won't do that very well.

23 Having an inadequate competition framework has
24 broad economic and political consequences. In other
25 words, having an economy that's rife with market power

1 means that we have a less efficient economy; it reduces
2 opportunity as a result of important barriers to entry;
3 it creates an unlevel playing field. Market power can
4 lead to growth not based on efficiencies.

5 The example that everyone knows about is the
6 lower cost of capital of large banks as a result of
7 implicit "too big to fail" guarantees may result in big
8 banks expanding not because of economies of scale or
9 scope, but simply because of the implicit guarantee of
10 Government.

11 There are political consequences. The
12 concentration of economic power is translated into
13 politics, undermining our democracy, and a broad sense
14 of powerlessness in society leads to a view that the
15 system is rigged and unfair, and that, too, has
16 political consequences. These, of course, were some of
17 the original concerns of antitrust law, and I think the
18 focus has been unnecessarily narrowed.

19 But I want to emphasize that my talk today is
20 really on the economics. If we get the economics
21 right, we'll have broader political benefits, but I
22 think we really have gotten the narrow economics very
23 badly wrong.

24 The failures of competition show up at the
25 macroeconomic level; growing inequality, lower

1 investment, decreasing entry and growth of small
2 businesses. I wanted to emphasize lack of competition
3 is not the only source of these problems, but I believe
4 that it's an important contributor to many of these
5 trends. There has been just a rethinking of the
6 consequences of these inefficiencies.

7 When I was a graduate student, Arnold
8 Harberger's work talked about the triangles, the
9 Harberger triangles, the inefficiencies associated with
10 them being relatively small compared to the
11 macroeconomic consequences and insufficiency of
12 backward demand. But there are new studies by Farhi
13 and his co-authors at Harvard which show that the loss
14 of GDP, national output, as a result of market power,
15 of the markups of price over margin or cost that would
16 not exist in a competitive marketplace, are orders of
17 magnitude larger and today are very, very significant.

18 From the perspective of economic theory, we
19 know that the efficiency of market economy is based on
20 individuals and firms facing the same price. That's
21 the way everybody has the same marginal cost, marginal
22 benefits, but the pervasive price discrimination that
23 big data, the new technologies that were referred to
24 just a minute ago by the Commissioner, undermines the
25 fundamental theory of welfare economics, and except in

1 the limited case of perfect discrimination, the attempt
2 to extract more consumers or producer surplus distorts
3 the economy. That was one of the points that I made in
4 one of my earlier articles on price discrimination in
5 the presence of imperfect information.

6 And then turning to what most of us think in
7 the long run is really important, innovation, it is
8 also clear that market power can have a very negative
9 effect on innovation, and I'll have a few minutes to
10 talk about why the Schumpeterian model, as it's
11 conventionally understood, doesn't provide, again, a
12 good description.

13 But the basic idea that -- what are the
14 conditions under which market economies are more
15 innovative are ideas that I've explored in my book,
16 Creating a Learning Society, in which I've shown that
17 increase in market power can have a very negative
18 effect on innovation.

19 Well, the lack of competition in many sectors
20 is evident in the limited range of choices. You've
21 probably already talked about that in your previous
22 discussions. In many cases, lack of competition has to
23 be assessed at the local level. Small businesses in
24 many locales have only one or two providers of loans.

25 The FTC has done important work in the area of

1 hospitals, which are all obviously local, and my
2 referring to that is important because while we're
3 going to be talking a lot about lack of competition in
4 new sectors, like technology, we shouldn't forget that
5 there's lack of competition in a lot of the old sectors
6 as well and that our antitrust standards have not
7 worked not only for the new areas but also for the old
8 ones.

9 Often, the lack of choice is hidden, and as I
10 say, it's pervasive throughout the economy. You think
11 you're going to different drugstores with different
12 labels, but, of course, they're all owned by the same
13 company; buying different beers, but they're all owned
14 by a couple of companies. And as you start looking
15 through various parts of the economy, it's not only the
16 big things, it's also the little things like dog foods
17 and batteries and coffins.

18 So there's broader evidence of increases in
19 market power, data on increased concentration across a
20 wide range of sectors, increased markup in many sectors
21 typically linked to increased concentrations, some
22 interesting econometric work that solves the
23 identification problem that plagued people in earlier
24 days. In many sectors, the pervasive price
25 discrimination, as I say, which is actually counter to

1 the basic argument that we use for what makes for a
2 good economy.

3 There's an increased share of rents. The share
4 of labor has been going down. That's been getting a
5 lot of attention, but so has the share of capital when
6 you appropriately measure. You can look at the
7 accumulated value of investment, both in fiscal capital
8 but also intangibles, and if you impute an appropriate
9 risk-adjusted rate of return, the share of capital is
10 going down.

11 Well, what does that mean, that the share of
12 labor is going down, the share of capital is going
13 down? The shares have to add up to one, that's one
14 thing the economists can agree on, and the residual is
15 what we call rents, and some of that is increased land
16 rents, but a lot of it has to do with increased market
17 power profits, and that is affecting the efficiency of
18 the economy but also the distribution.

19 It has negative macroeconomic consequences.
20 Like I mentioned before, investment is lower than it
21 should be. The downward sloping demand curves result
22 in the margin return to investment being lower than the
23 average return, and this is consistent with investment
24 being weak even as profit shares increase. And there
25 are studies that look at cross-section and relate the

1 two and show that this is not only an observation we
2 can make on the basis of time series data but also
3 cross-section data.

4 The constructed barriers to entry discourage
5 entry and innovation, remarkably little entry in some
6 very highly profitable sectors, even though there have
7 been high levels of innovation in sectors that are, you
8 might call it neighboring, where the same kinds of
9 technology would seem to be relevant.

10 Of course, we know that firms have strong
11 incentives to engage in anticompetitive behavior in the
12 absence of government constraints, so we shouldn't be
13 surprised. Anybody who believes in economics believes
14 in incentives, and when you look at what are the
15 incentives, there are incentives to behave in an
16 anticompetitive way.

17 I joked that in our business school, we teach
18 our students how to be anticompetitive. I mean, we
19 focus on how to create barriers to entry. We have some
20 really good students who go out there and do that. Of
21 course, that means the Economics Department then has
22 more business, because we fight those barriers to entry
23 that the business school helps create.

24 But this long-standing presumption dates back
25 to Adam Smith, all of you know, "People of the same

1 trade seldom meet together, even for merriment and
2 diversion, but the conversation ends in a conspiracy
3 against the public, or in some contrivance to raise
4 prices."

5 It's interesting that many people who think of
6 Smith as the father of modern economics and the
7 defender of the competitive model, he didn't believe
8 that markets would be competitive on their own. He
9 knew that there would be anticompetitive actions.

10 And in some ways it's quite striking. He
11 anticipated, for instance, the conspiracy of Apple and
12 others in Silicon Valley to suppress wages. "Masters
13 are always and everywhere in a sort of tacit, but
14 constant and uniform combination, not to raise the
15 wages of labor above the actual rate...enter into
16 particular combinations to sink the wages or labor even
17 below this rate. They are always conducted with the
18 utmost silence and secrecy..." He couldn't have said
19 it better, describing what's happened.

20 And our business leaders really understand
21 this. Peter Thiel said "Competition is for losers."
22 Warren Buffett said, "The single most important
23 decision in evaluating business is pricing power," and
24 he described in a way the economics. We think in terms
25 of an entry barrier, like being surrounded by a moat,

1 and the ability to keep it with the impossibility of
2 being crossed. We tell our managers we want the moat
3 widened every year. So it's very clear that they
4 understand the importance of making sure that markets
5 are not competitive, and they've learned how to do
6 that.

7 I want to spend now a few minutes on why
8 there's been this growth in market power, and then I'm
9 going to try to talk about what are the new
10 understandings that we have in economics about why the
11 competitive model that was the paradigm in the
12 background is wrong, and then I'm going to talk about
13 why these two things, the changes in the economy, our
14 new understandings, should lead to new presumptions, a
15 new basis of antitrust policy.

16 So there are multiple forces underlying the
17 growth in market power. There are changes in
18 structured demand towards local services in which
19 competition may be limited. There are changes in
20 technology. We've mentioned the network platform
21 economies, industries with large upfront costs and big
22 data. Sometimes, though, there's a fatalistic view
23 when you say, well, these market forces, we just have
24 to accept it, and I think that's wrong.

25 To maintain a competitive marketplace in the

1 presence of these changes would require more active
2 competition policies with new tools and presumptions.
3 The point is that when you're dealing with assessing
4 the consequences of a merger, vertical or horizontal,
5 in the presence of an economy in which competition is
6 limited, the consequences are markedly different than
7 in an environment in which the economy is very close to
8 perfectly competitive.

9 So, in fact, the underlying model that we need
10 to use has to be one that recognizes these underlying
11 changes going on in our economy. So while there are
12 these technological changes and demand changes, I think
13 one has to also recognize that there has been enormous
14 innovation by the business community in extending and
15 amplifying market power. Big data has allowed the
16 exploitation and price discrimination. There are
17 innovative contracts with restraints, bundling of
18 nonlinear pricing. These are ideas that 50, 60 years
19 ago were not in the toolkit of the typical business
20 person, but now, go through a good business school,
21 you'll learn all the tools that allow you to amplify
22 and extend your market power.

23 There are preemptive mergers, the techniques in
24 extending patent life, pay-for-delay. When you see
25 what is going on, you have to admire the cleverness.

1 You know, there's a lot of innovators. I wish it were
2 directed to increasing the productivity of our economy
3 rather than creating entry barriers, but it does
4 demonstrate that, similar to our education system, we
5 have led to creativity, not necessarily for social
6 good, though.

7 These are the changes in the economy, but there
8 are also major changes in our understandings of
9 economics. Most importantly, there's a greater
10 understanding of the limitations of a competitive
11 equilibrium model that really was the work horse model,
12 the fundamental paradigm that was taught 50 years ago.
13 The model is not robust. When an economist says a
14 model is not robust, that means slight changes in
15 assumptions destroy the conclusions, a conclusion about
16 the efficiency in a market, conclusions about the
17 presence of market power. So, for instance,
18 information economics showed that even very small
19 assymetries in information totally changed the nature
20 of the market equilibrium that emerged.

21 Game theory has perhaps had the greatest
22 impact, the fact that in so many sectors of our
23 economy, there are a limited number of players. Again,
24 50 years ago, we didn't have the tools to analyze those
25 kinds of situations. Now we have rigorous tools to

1 analyze those situations.

2 Behavioral economics has resulted in our,
3 again, understanding the way markets work is markedly
4 different than the competitive equilibrium model. In
5 standard economics, giving a discount or charging a
6 price is exactly the same; it's the relative price.
7 But in practice, those two can have very different
8 effects, and the businesses know that. That's why they
9 put constraints. They say you can do one thing and not
10 the other.

11 Standard theory would say, well, why would you
12 ever do that? They're equivalent. But they're not
13 equivalent. They understand the nature of behavior,
14 and, unfortunately, our legal framework hasn't caught
15 up. So there are a whole set of presumptions that were
16 based on the old model, and they no longer hold.

17 The irony is the critique of the standard
18 competitive model was in full force just as the model's
19 influence expanded. So at the time Bork was writing
20 and others were writing, we already understood that
21 that model was not a good model, but the legal
22 profession didn't. There was a lag or perhaps the
23 important role of ideology.

24 There are some other aspects of the new
25 understandings that I want to just mention very

1 briefly. It shows that once we recognize the
2 pervasiveness of market power and that even small
3 market power in multiple industries can add up to
4 having very large effects, very different from
5 Harberger's perspective, and that the market power and
6 the market imperfections can be generated in multiple
7 ways.

8 I already mentioned assymetries of information.
9 Search costs, the work of Peter Diamond, show that even
10 small search costs can lead to large market power, even
11 to monopoly situations. My own work showed that even
12 small sunk costs can lead to large market power,
13 undermining what was called the contestability
14 doctrine. And once you have this market power, that
15 market power can amplify and extend into multiple ways.
16 And we now know that there are serious problems of
17 monopsony and especially in the labor market.

18 I want to turn for a minute to the dynamics,
19 because obviously innovation is important. We've
20 learned three things. One, potential competition is
21 not a substitute for real competition. The second is
22 the Schumpeterian doctrine that monopolies are only
23 temporary competition to be the monopolist drives
24 innovation are also not robust. Monopolies can and
25 have the incentive, have the ability to stifle

1 innovation. And that means the competition policy
2 needs to focus not just on the effects of competition
3 today, but on competition in the future.

4 So the bottom line of all of this is these
5 changes in the way our economy functions, changes in
6 our understandings of the economy, require new
7 presumptions, new criteria and tools, new remedies.
8 One way to think about this is within a Bayesian
9 framework. If we have strong beliefs about the way the
10 economy behaves, we will build those priors into what
11 evidence we require to come to whatever conclusion that
12 we come to.

13 But the law over the last several decades has
14 been influenced by presumptions of the competitive
15 equilibrium model, which is not a good description of
16 many sectors in the economy and I think the economy as
17 a whole, and that means that we have to rethink the
18 presumptions. We ought to be thinking more about new
19 rulemaking, new regulations.

20 Certain kinds of practices should be forbidden
21 in the context where, say, there's large amounts of
22 market power with a strong burden placed on those who
23 are engaging in those practices to show that perhaps
24 there's an efficiency defense.

25 So what we've seen is that, over the last

1 several decades, rampant abuse of the efficiency
2 defense for the restraints, and the two-sided market
3 argument that's been used, for instance, in the
4 American Express case and in the Mastercard/Visa, is an
5 example. The presence of significant externalities is
6 not even established; no attempt to show that observed
7 pricing patterns are those predicted by the theory; no
8 attempt at incidence theory; pretend the price imposed
9 on merchant is not shifted to consumers, as it would be
10 in the case of anticompetitive models.

11 There's a kind of intellectual incoherence in a
12 lot of the argumentation, no attempt to analyze the
13 impact of restraints across platform competition, that
14 there are horizontal effects of vertical constraints,
15 and that's one of the basic insights of modern recent
16 research in industrial organization.

17 Well, let me talk a little bit about some of
18 the new presumptions that I would put forward. I think
19 there should be a presumption against predation. I
20 think the presumption against intervening in vertical
21 mergers needs to be changed. A vertical merger can
22 have a very big effect on the competitive landscape.

23 The consumer welfare standard I think is
24 misguided, especially with monopsony and when long-run
25 dynamics are important. Even if a firm with monopsony

1 power passes on some of the gains to consumers, there's
2 extortion in the economy and societal welfare is
3 lowered. Predation may lower prices in the short run,
4 but reduced competition will hurt in the long run.

5 At the same point there needs to be new
6 approaches to determining market power. Some of these
7 changes have already been going on for some time, and
8 what worries me now is that there could be backsliding
9 by the courts. So historically there was always a
10 focus on market share as an indicator of market power,
11 but there are many cases where you can ascertain market
12 power directly, and when you can, you should.

13 Is there evidence of pricing power or power to
14 force buyers to accept contract provisions that are
15 prima facie not in their interest? Large markups
16 should be a prima facie evidence of market power.
17 Usurious interest rates by banks are an example. Price
18 discrimination, if it pays to sell to some firms at a
19 low price, then selling to another at a high price
20 should be a prima facie evidence of market power unless
21 the defendant can show that they are justified by cost
22 differences. And forcing buyers to accept terms that
23 should be unacceptable, like arbitration clauses.

24 So consumer protection needs to be extended to
25 transparency of contract, and this echoes the remark

1 that was made in the beginning, that increasingly there
2 is an interplay between consumer protection and
3 competition.

4 There are other considerations that may
5 reinforce the conclusion that a market is not acting
6 competitively, a market constraint is anticompetitive.
7 For instance, persistent profits with no entry for an
8 extended period of time should be symptomatic that
9 something was wrong.

10 This leads one to the view that some of the
11 simplifications of the past should not be viewed as
12 acceptable. There are some instant cases where one can
13 reliably ascertain incidence without full general
14 equilibrium analysis. Illinois Brick puts the
15 constraint on antitrust enforcement and, going beyond
16 that, would enable one to attack some obvious cases of
17 anticompetitive behavior that have been left
18 unaddressed.

19 So this brings one to a discussion of some new
20 remedies. Just like there's been a lot of innovation
21 in anticompetitive behavior, there needs to be
22 innovation in remedies. Some of this what I call
23 innovation is actually going back to standards,
24 practices that were done in the past.

25 So one has to recognize that market power, once

1 established, can persist. So there's a view sometimes
2 that we don't want to make a mistake and stifle a
3 merger that might be good for the economy, and so
4 there's a lack of -- the Type I and Type II errors are
5 balanced, but the point is that once you allow a
6 monopoly power to get established, it persists, and the
7 effects can go on for decades.

8 So the market is not self-correcting. The view
9 that if we make a mistake, it's self-correcting, is
10 just wrong. There is one large persistence. There is
11 both theoretical and empirical evidence in support of
12 that, and we have to recognize that firms have
13 incentive and ability to circumvent and innovate to
14 re-establish market power.

15 That means, for instance, there will have to be
16 continued court oversight, that new natural monopolies
17 and oligopolies need new policies. Just because market
18 power arises from technology doesn't mean we should do
19 nothing. It requires even more intense scrutiny of
20 behavior, stronger policies to prevent the leveraging
21 of market power.

22 And among the kinds of policies are structural
23 policies, breakups, prohibitions from going into
24 downstream or upstream activities. My own view is
25 typically the economies of scale and scope have been

1 exaggerated and seldom established. And also,
2 regulatory policies, nondiscrimination.

3 I'm running out of time, so let me go on to
4 just mention just a couple more points. One is that we
5 need stronger remedies. Some of this we can learn from
6 abroad. As the Commissioner was mentioning before, I
7 think abuse of market power, however acquired, should
8 be illegal, and some of the issues that have gotten the
9 most outrage, public outrage, are cases of that kind.
10 And so the fact that our antitrust laws aren't able to
11 deal with these kinds of abuses really undermines
12 confidence in our competition policies. We need to
13 have more active consumer protection prescribing
14 arbitration clause, and strong transparency, net
15 neutrality are examples. So there are a whole set of
16 issues of that kind.

17 Lack of workers' bargaining power is a
18 competition issue. I know that historically there's
19 been a focus on product markets, but labor markets are
20 markets, and there is a lack of bargaining power, and
21 once you go away from the competitive equilibrium
22 model, you realize that there are restraints that
23 affect the outcome that result in, for instance,
24 abusive working conditions, and while, again, there are
25 forces contributing to that, like globalization, I

1 think competition authorities should articulate the
2 consequences of trade agreements for competition,
3 including for workers' bargaining power.

4 I know you're going to be having separate
5 hearings on big data and privacy. I think that big
6 data and privacy are both consumer protection issues
7 and competition issues, and this big data can be a very
8 big entry barrier. It also enables the extraction of
9 consumer and producer surplus from the other side of
10 the market, and what that means is that some of the
11 profits are not a result of greater efficiencies but
12 greater ability to extract surplus, and that distorts
13 the long-run performance of the economy, and it has
14 large distributive consequences.

15 There are some areas where concentration of
16 market power are especially problematic, and one is in
17 the marketplace of ideas in the media, and it's a
18 mistake, I think, to view the media only as a mechanism
19 for delivering advertising. Concentration of media in
20 a few hands can reduce competition in the marketplace
21 of ideas. I know that's going into a new area, but it
22 is, it seems to me, an important one for our society.

23 So in conclusion, the time is ripe, I think,
24 for a re-examination of our competition and consumer
25 protection laws. Our economy has changed, and our

1 understanding of economics has changed, and we can
2 better grasp the failures of the existing framework.
3 The underlying political and economic concerns about
4 power and exploitation that drove the original
5 legislation are still present, perhaps even more so.

6 But even if you looked at this from an economic
7 perspective, what is clear is that competition law, as
8 it's been interpreted over the last several decades,
9 quarter century, has not kept up with the changes in
10 our economy, has not kept up with the innovations and
11 the ability to extend and amplify market power, and has
12 not kept up with changes in our understanding of basic
13 economics.

14 So today competition and consumer protection
15 law needs to be broadened to incorporate the realities
16 of the 21st Century and the insights of modern
17 economics. Thank you.

18 (Applause.)

19 MR. ABBOTT: Thank you for those very
20 provocative remarks, Professor Stiglitz. I'm sure
21 we'll have more to say about many of the topics you
22 raised.

23

24

25

1 REMARKS BY WILLIAM C. KOVACIC

2 MR. ABBOTT: I'm pleased to introduce now Professor
3 William Kovacic, who, to make an address, taking a breath,
4 Professor Kovacic is a Professor at George Washington
5 University Law School where he's Director of the Competition
6 Law Center. He is also a nonexecutive director of the UK's
7 Competition in Markets Authority.

8 Before joining GW Law in 1999, he was an
9 FTC Commissioner -- actually, that should be 2009 -- he
10 was an FTC Commissioner, and he also served as Chairman
11 of the FTC from 2008 until 2009. Previously, Professor
12 Kovacic was the FTC's General Counsel.

13 Professor Kovacic.

14 (Applause.)

15 MR. KOVACIC: Thank you, Alden, and my great
16 gratitude to my former colleagues at the FTC for the
17 wonderful opportunity to participate in this program.
18 The very holding of the program is part of a wonderful
19 tradition that this agency has developed over time and
20 an indication of its recognition of its special
21 institutional role in providing a foundation for
22 thinking about the way ahead.

23 In talking today, I am going to give you my own
24 views, not those of the Competition in Markets
25 Authority in the United Kingdom, where I serve as a

1 nonexecutive director.

2 Today I want to talk about what I think is an
3 epidemic failure to understand the foundations of
4 modern U.S. policy, to understand how that policy
5 developed, and to understand what kinds of changes
6 would be necessary in order to effectuate adjustments.
7 A number of which I think would be quite appropriate.

8 I'm going to talk a bit about where the
9 consumer welfare standard came from, a bit about where
10 some major principles that underpin substantive
11 doctrine arose, and to talk about the need for
12 institutional adjustments in order to facilitate
13 changes.

14 And, in particular, I am going to criticize
15 what I think is an obsession with Chicago -- that is,
16 the sense that the University of Chicago, Bob Bork and
17 others, in the sixties, seventies, hijacked U.S.
18 antitrust policy and they haven't given it back. And
19 to talk instead about what I think to be some of the
20 deeper, underlying sources of the system that we see
21 today.

22 Forty years ago, two prominent volumes about
23 competition law appeared, one, indeed, written by Bob
24 Bork, *The Antitrust Paradox*. I suspect most people in
25 this room have read that. The other is Phil Areeda's

1 and Don Turner's first edition of their antitrust
2 treatise called Antitrust Law. I don't know if many
3 people in this room have read that volume. I am going
4 to suggest to you that that book has as much to say
5 about where antitrust policy is today, how it
6 developed, and how we have to think about changes in
7 the future.

8 The Antitrust Paradox is quite famous,
9 especially for its single-minded emphasis on consumer
10 welfare, which Bob Bork basically defined in terms of
11 allocative efficiency, perhaps approaching a total
12 welfare standard. There's no question that that book
13 was enormously influential, widely read, widely
14 considered.

15 I'm going to suggest to you that it only
16 brought along part of the profession and the community.
17 That is, if Bork's book alone had been the only source
18 of insight, the changes could not have occurred in the
19 way that they did. I am going to suggest to you that
20 Bork was able to bring the right/center right along in
21 thinking about issues this way, but without Areeda and
22 Turner, we would have a much different system.

23 What did Areeda and Turner have to say in
24 antitrust law? A couple of notable things on goals in
25 particular. They didn't speak about consumer welfare.

1 They didn't speak about quite the same single-minded
2 emphasis on efficiency. But they did say that
3 competition law that does not embrace a fundamentally
4 economic orientation and focus on microeconomic
5 economic effects is badly misguided.

6 They go through the egalitarian vision of
7 competition law that appeared in the legislative
8 history. They faithfully recite all the concerns about
9 SMEs, about worker satisfaction, about small
10 communities, about the protection of the democratic
11 order. They conclude that discussion by saying, "Who
12 cares? Ignore it."

13 And why did they say ignore it? To do
14 otherwise is to create a multigoal framework without a
15 weighting or hierarchy that leads you to idiosyncratic
16 outcomes judge by judge, agency by agency, which they
17 described as "on the border of unconstitutionality."

18 In other words, they said the only practical
19 way to apply this law in a coherent, meaningful way is
20 to adopt a principally economic orientation and focus
21 without using the specific term on consumer concerns.
22 Not just price, quality, of course, innovation, but
23 Areeda and Turner brought the center and the center
24 left along with them.

25 I'd suggest to you that at the time of my

1 childhood and long after, who was the most famed
2 lecturer in competition law? It was Phil Areeda.
3 Whose courses were the most influential? Whose
4 articles carried thinking again and again? It was
5 Areeda and his collaboration with Don Turner.

6 Why did this have so much importance? It was
7 the emphasis on what they called administerability.
8 That is the capacity of agencies and courts in the
9 usual circumstance of contested facts, substantial
10 amounts of information, to reach accurate and
11 consistent conclusions about the legitimacy of
12 behavior. And again and again, Areeda would pose the
13 question, "You have to tell the business person what
14 she cannot do in 20 words or less. It can't be a
15 multifactor test that is very diffuse."

16 In many respects, that carried into their
17 analysis of substantive principles. It wasn't just the
18 goals. Where are the predation defaults that Joe was
19 talking about set more than any one place? It's in
20 Harvard. And if you go back to the 1975 Areeda and
21 Turner paper on predatory pricing, you see the essential
22 ingredients of the modern U.S. approach to predation.

23 Were they thinking in part about Chicago ideas?
24 I suppose. Phil Areeda was notoriously ungenerous in
25 acknowledging intellectual debts to others. He had

1 very few footnotes that said this is where the thinking
2 came from, but I think in many ways the institutional
3 perspective that they brought to bear on the topic was
4 decisive. Their decisive influence was the standard
5 has to be administerable, especially in the judicial
6 system in which cases are tried before juries,
7 generalist judges: where notions of intent, multifactor
8 tests are likely to lead you astray.

9 And yes, indeed, Areeda and Turner were
10 confronted in a famous set of proceedings that this
11 agency convened in 1979, 1980. A famous discussion of
12 predation. I think lots of the tools Joe's been
13 talking about were available nearly 40 years ago. Game
14 theory, prominent in the literature; behavioral
15 features, not so labeled, but preexisting and a matter
16 of concern. And one author after another attacked the
17 Areeda-Turner formula and its price/cost test and
18 especially their observation that you take the low
19 price today and you worry about tomorrow later on.

20 What was Areeda and Turner's answer? Are we
21 concerned with dynamic effects? Of course, but we
22 think they are "speculative and indeterminate." And
23 one author after another offered a basis for
24 challenging it, but what stuck in the minds of judges,
25 in particular, was the notion that the standard had to

1 be relatively simple.

2 Is that subject to change? In my mind, on
3 predation, have the courts -- to use a regrettable
4 American baseball analogy -- have they shrunk the
5 strike zone unacceptably? I think so. The Department
6 of Justice and American Airlines ought not to be
7 bounced out of court on a motion for summary judgment,
8 where there is no jury trial and it's the Government of
9 the United States. That strike zone is too narrow.
10 That should go to trial. That's worthy of fuller
11 discussion.

12 But if we ask ourselves where did the emphasis
13 on nonintervention standards in so many areas come
14 from, and what we now call consumer welfare, where did
15 that arise. It is as much Phil Areeda and Don Turner as
16 it is Bob Bork in Chicago. If you focus single-
17 mindedly on Chicago and slaying the Chicago dragon, you
18 don't make adjustments possible because you don't address
19 these underlying concerns.

20 If you want to adopt a broader goals framework,
21 you will have to answer the challenge that these
22 commentators offered, which says, show me how it's
23 applied in a specific case. Show me the hierarchy of
24 values. You want to give more emphasis to workers than
25 you do on consumers. Consumers get lower prices but

1 workers get lower wages. What's the tradeoff? What's
2 the exchange rate between the efficiency that comes
3 from scale economies and the limited opportunities for
4 SMEs?

5 If all you're saying is to tell the judge, "You
6 figure it out." That's an inadequate response. I
7 think to effectuate a change in the goal structure will
8 require a lot of hard thinking to answer the basic
9 question that Areeda posed again and again when people
10 would assail him on this, "Tell me how it's going to
11 work in practice, and don't just tell me that they'll
12 sort it out in some way."

13 So on goals, administerability is a crucial
14 consideration, and that view, by the way, has been
15 adopted by many, not just those on the right, but a
16 jurist like Steve Breyer who said, "One sentence from
17 Areeda and Turner is worth pages from anybody else."
18 Steve Breyer is the perfect modern embodiment of that
19 point of view. And if you cannot get his vote, my view
20 was, when I had Alden's job in an earlier day, if we
21 couldn't get his vote, hypothetically, we had no basis
22 going ahead.

23 What to do about this in light of what I
24 suggest is the Chicago obsession and the remarkable
25 forgetfulness about Phil Areeda and Don Turner? A

1 couple of things. One, on the point of goals, in
2 formulating a different goal structure, the
3 administerability challenge must be met and it has to
4 be addressed head-on. You don't get a richer goal
5 structure unless you can explain the exchange rate and
6 explain the hierarchy of values. What gets weighted,
7 how much, in what case.

8 I'm not suggesting that it can't be done. I'd
9 simply suggest that in modern discussions, in saying,
10 well, the view is too cramped, it's not elaborate
11 enough, it's not faithful to the original legislative
12 history -- footnote, Areeda and Turner said, of course,
13 it's not -- but the original legislative history vision
14 can't be applied because it is not administerable; it's
15 faintly unconstitutional.

16 How do you beat that model? To answer that
17 question, you have to come up with an administerable
18 model, and I'm suggesting that there are lots of center
19 and center left judges and observers who have taken on
20 that view about administerability. Unless you persuade
21 them, you have no chance in moving the needle on
22 goals.

23 What about doctrine? Is it just the ideology?
24 No. It comes back to this question of
25 administerability. Is it just a blind faith in the

1 market working, the equilibrium model that Joe offered?
2 No. It's the matter of administerability. And what
3 element of administerability in the predation cases
4 that Areeda and Turner care so much about, private
5 rights of action.

6 In that famous first volume, which is a must
7 read, they point out in stark terms that private
8 rights, U.S.-style, are a menace; mandatory trebling,
9 one-way fee shifting, class actions, contingent fees.
10 They said in the close abuse of dominance case, that's
11 going to overdeter. They said, well, you can't change
12 trebling, that's in the statute, but what can you do,
13 judges? You can change the doctrinal threshold. You
14 can raise the bar. And we urge you to do that, because
15 the real danger here is overdeterrence. It is the
16 false-positives, so err on the side of raising the
17 doctrinal bar.

18 And that's what the courts do almost
19 immediately after the publication in 1975 of the
20 predatory pricing paper and they've continued to do.
21 And the predatory pricing paper foreshadowed
22 everything, including recoupment. Courts took that on.

23 Bork criticizes that article bitterly in The
24 Antitrust Paradox. He says, "It's a nice idea, but the
25 right rule is no rule," and the rule that prevails

1 today is the Areeda-Turner rule more than any other.
2 Bork didn't win that argument, much as Chicago won very
3 few of the arguments on basic doctrinal principles.
4 It's much closer to the Areeda-Turner format than
5 anyone else.

6 If you want to change that doctrine, you have
7 to do one of two things, I think. And I think I'm using
8 an MRI instead of an x-ray. I think I have a better
9 diagnosis of what limits the system there. You have to
10 persuade courts that the private rights are not the
11 menace that are suggested. That is, you have to amass
12 evidence that suggests that's not the hurdle. You
13 have to create a government-only cause of action. You
14 have to insulate the Government from the operation of
15 doctrines that have been limited in order to preclude
16 private treble damage actions.

17 That's been a problem for the Government
18 because all of these limiting doctrines spill into the
19 Government's cases. When the FTC lost Rambus, what
20 were featured in the D.C. Circuit's opinions as the
21 decisive precedents working against the Commission?
22 They were all Supreme Court decisions in which a
23 crucial policy foundation for the Supreme Court's
24 decision was overdeterrence by private rights. They
25 were all private cases.

1 Footnote: When was the last time the U.S.
2 Government was before the Supreme Court as a party in a
3 Section 2 case? That was 1973. All of the
4 jurisprudence since then has taken place in the context
5 of private cases in which the Court's concerns about
6 overdeterrence are magnified.

7 So what cases got quoted back at the FTC?
8 They were cases like Discon, where the fear is
9 overdeterrence because of private rights. The FTC had
10 exactly no success saying, "We're the U.S. Government,
11 we are not seeking treble damages here, we want an
12 injunction, equitable relief, treat us differently."
13 That carried exactly no weight.

14 I'm not necessarily asking you to believe
15 that the result that the D.C. Circuit achieved in
16 Rambus was incorrect, though I think it is. I am
17 asking you to note how striking it is that the
18 doctrinal principles that the Commission tripped up
19 on came in cases that were founded principally upon
20 a concern about overdeterrence by private rights.

21 So you have to carve out a separate
22 government-only cause of action. That could be
23 Section 5. I think Section 5 more and more, as I
24 look at it, except for the little niche of invitations
25 to collude, is too rigid, too fragile, and is not likely

1 going to work. The FTC has tried to run up that hill
2 so often, so many times. Doctrinally, it's not going
3 to work.

4 I would suggest an approach that prevails in
5 the UK. That's the Competition in Markets Authority
6 Markets Regime, which allows the CMA to do its study
7 and in selected instances to achieve remedies in order
8 to correct anticompetitive conditions. It's not
9 tethered to the operation of European doctrine dealing
10 with abuse of dominance.

11 Our system, with this idea, would not be
12 tethered to existing limiting principles built into the
13 Sherman Act or Clayton Act jurisprudence. That is,
14 unless you create a mechanism that gives the Government
15 freedom in a policy space to make more judgments --
16 and, yes, they will have to persuade critical courts
17 that they deserve the deference, that they're doing the
18 good homework, and are creating the basis for making the
19 judgments -- but to say, in that space, we do deserve
20 your deference, and we have a mandate that is
21 exclusively used by us.

22 The UK does not seek divestiture in case after
23 case, but they carried out a magnificent restructuring
24 of the ownership of London area airports and others as
25 a result of this. I think a markets regime for the

1 U.S. that allows the Government, in this case the FTC,
2 to operate without the overhang of the limiting
3 concerns about overdeterrence by private rights is
4 essential if Section 2 is going to work.

5 What's the alternative? You are going to have
6 to go case by case through the courts. And look at
7 Joe's agenda. Did you find that a bit breathtaking?
8 Can you think of how many cases, rules, or other
9 initiatives it would take to do that? That's a lot of
10 hard work that will take a long time. Hard work that
11 may be very much worthwhile, but behind each of those
12 is a big case, and we know in this agency that building
13 those cases effectively is like building an aircraft
14 carrier. You don't turn them out in a day or a week.
15 That will take a lot of effort.

16 I'm suggesting that a way that you can do that
17 is to go back to the courts and say, "Please change
18 your minds on these issues." To slowly and gradually
19 overcome the concerns with private rights, or you
20 change the framework to give the Government a policy
21 space in which it can operate, liberated from the
22 constraints that have been imposed by the concerns with
23 the operation of private rights of action.

24 I'm not saying that the Supreme Court's
25 perceptions about private rights are correct. I am

1 saying with certainty they believe it. And it's not
2 just the right side of the Court. It's Steve Breyer.
3 It's Ruth Ginsburg. It's a universally held suspicion.
4 If you can't correct that, you can bring all the cases
5 you want, and you're running into a brick wall.

6 Last thoughts: Changes in institutions. If
7 you are going to take on a broader agenda -- and there
8 are areas worth doing it. I think the Commission
9 itself realizes that. I'm a little concerned in Joe's
10 talk that there's a sense that the agencies don't think
11 about this. Of course, they do, and they work hard on
12 these issues, but I do think the U.S. is operating well
13 inside the protection possibilities frontier with
14 respect to its institutional framework. And there are a
15 number of steps that would helpfully take it out to
16 that frontier, one I've just mentioned. I would like a
17 markets regime in the U.S.

18 First, to do all of these things will require,
19 to take on Joe's agenda, a much better program by which
20 the public agencies set strategy and choose priorities;
21 not in isolation, but as a collaboration. We have no
22 equivalent to the European Union's Economic Competition
23 Network, which has become a very valuable device for
24 not only coordination across the institutions, but more
25 and more the formulation of strategy. We have no such

1 thing. That's an embarrassment.

2 We have nothing like the United Kingdom's
3 United Kingdom Competition Network, which joins up
4 regulators in sectoral areas with the Competition in
5 Markets Authority. We have no network of that kind,
6 and I've seen firsthand how the ECN and the UKCN add
7 lots of value to policy integration and enable
8 individual public officials and institutions to achieve
9 collectively results that they cannot accomplish. If
10 you want to take on the bigger agenda, you will have to
11 do more with what you have. This kind of network
12 governance and cooperation can do it.

13 Better setting of priorities, better setting of
14 strategy to map out doctrine, but suppose we're going
15 to carry out Joe's agenda. What do you do first?
16 Which cases do you want first? Which rules? This will
17 not just happen spontaneously. That requires a degree
18 of integration and planning that doesn't exist now.

19 It involves looking at past successes and past
20 failures. Is the current concern with concentration
21 unique? Go back to the early seventies and look at the
22 literature that's just scalding about the failure of
23 the U.S. system to deal with concentration, and the
24 massive literature that develops in the late fifties
25 onward, written by Don Turner and Carl Kaysen, that the

1 biggest failures of competition policy is dominance and
2 collective dominance.

3 The concern has been there a long time. There
4 have been instances in which agencies have tried to
5 take those issues on. It's worth studying what's
6 succeeded and what failed in great detail as a way of
7 thinking what you do next. So, better priority setting,
8 better strategy, collective effort rather than
9 individual effort. I'd say you can't start touching
10 this agenda in a significant way unless you get more
11 results out of what you have.

12 Last thought: The FTC's unique array of
13 capabilities. About 130 competition agencies in the
14 world today. Half of them do something more than
15 competition law. What's the single most popular
16 additional element? It's consumer protection.

17 And when I look around the world, the question
18 is, in theory, everybody has a nice slide deck about
19 how they can be tied together and how they're
20 conceptually linked. How many actually do it in
21 practice? That's more rare.

22 But there's a lot of room for seeing what, for
23 example, the ACCC in Australia, the CMA in the UK,
24 which I've seen firsthand, the New Zealand Commerce
25 Commission, and, indeed, the Competition Bureau in

1 Canada have done. They're a lot farther ahead than
2 their counterparts are which have similarly situated
3 portfolios -- that is, this institution -- in achieving
4 a general integration.

5 I think the FTC's capacity to bring to bear its
6 three product lines -- competition, consumer
7 protection, and privacy -- backed up with a robust
8 capability to gather data and analyze it gives it the
9 capacity to do special things. Historically, that
10 capacity has been difficult to realize in practice.
11 That won't happen by accident or spontaneously.

12 So in thinking about the changes, in a way I'm
13 talking about, one, how we have to think about more
14 than Chicago. That's a distraction in key respects.
15 Second, we can't just think about the physics, about
16 what we would like to do. We have to think about the
17 engineering of how to get there. And great physics
18 with bad engineering is a formula for failure.

19 Thank you.

20 (Applause.)

21 MR. ABBOTT: Thank you, very much. Two
22 excellent addresses. It makes me think of the famous
23 article about two views of a cathedral by Calabresi and
24 Melamed, so this is as seen from different light, you
25 have two very interesting perspectives.

1 PANEL 1: THE STATE OF U.S. ANTITRUST LAW

2 MR. ABBOTT: Now we are going to go to a panel.
3 Our first panel is The State of U.S. Antitrust Law, and
4 it will include -- and by the way, I'll be the
5 moderator. I'm Alden Abbott, General Counsel of the
6 Federal Trade Commission.

7 Okay. Well, I'm informed that there's a demand
8 for an exogenous shock here, a ten-minute break. So I
9 will follow instructions, and we will have -- and do
10 keep it to ten minutes, because we're running a little
11 bit behind schedule. Thank you.

12 (A brief recess was taken.)

13 MR. ABBOTT: Please take your seats. Thank
14 you.

15 We had a provocative discussion of the state of
16 competition policy from two very different and
17 interesting perspectives. We're going to have our
18 first panel now on the state of U.S. antitrust law, but
19 before introducing the speakers, there will be interns
20 going through the audience, taking questions from
21 interested members of the audience. So if you have a
22 written question, write it down on a card that's
23 distributed to you. These will be given to me and,
24 time permitting, we will try and give at least ten
25 minutes for those questions. We will address some of

1 those questions.

2 I'm about to move immediately into Panel Number
3 1. Again, I'm Alden Abbott, the General Counsel of the
4 Federal Trade Commission. Our second panel will
5 feature one of the keynote speakers, Professor Joseph
6 Stiglitz. Other speakers include today Dennis Carlton,
7 who is David McDaniel Keller Professor of Economics at
8 the Booth School of Business, University of Chicago,
9 and Senior Managing Director of Compass Lexecon.
10 Professor Carlton recently served as Deputy Assistant
11 Attorney General in the Antitrust Division of the
12 Justice Department, and he also served on the U.S.
13 Antitrust Modernization Commission.

14 Eric Citron is a partner at Goldstein &
15 Russell, P.C. Previously he clerked on the U.S.
16 Supreme Court for Associate Justices Sandra Day
17 O'Connor and Elena Kagan. He has also served as
18 counsel for the Assistant Attorney General in the
19 Antitrust Division of the Justice Department.

20 Eleanor Fox is the Walter J. Derenberg
21 Professor of Trade Regulation at New York University
22 School of Law. She served as a member of the
23 International Competition Policy Advisory Committee to
24 the Attorney General from 1997 to 2000, and as a
25 Commissioner on the National Commission for the Review

1 of Antitrust Laws and Procedures from 1978 to 1979.

2 Finally, Keith Hylton is William Fairfield
3 Warren Distinguished Professor at Boston University and
4 Professor of Law at Boston University School of Law.
5 Professor Hylton, who's a lawyer and economist, is the
6 Immediate Past President of the American Law and
7 Economics Association.

8 We have a number of specific questions which
9 we're going to address. Our session will run through
10 11:55 a.m., I'm informed, and before turning to that, I
11 would like to devote up to ten minutes, but no more, to
12 reactions to the presentations by Professor Stiglitz
13 and Professor Kovacic, both provocative and
14 wide-ranging.

15 Reactions? Professor Carlton, your thoughts?

16 MR. CARLTON: Okay. Well, first, thank you
17 very much for inviting me here. I enjoy being here,
18 and I enjoyed listening to Joe and Bill, both of whom
19 have produced ideas and scholarship that I greatly
20 admire. I agree with some of what they said but
21 disagree with others. So let me try and explain very
22 briefly.

23 My main message: Before making dramatic
24 changes in antitrust, look carefully at the evidence
25 and ask yourself what role, if any, antitrust has in

1 explaining what is an emerging phenomenon.

2 Second, antitrust has proved that it can
3 improve the process of competition. It is not well
4 suited to fix all social problems, and it's a mistake
5 to misuse it in that way.

6 Let me briefly talk about the evidence. A
7 dominant piece of evidence over the last 20, 30 years
8 is enormous technological change. Automation plus
9 computers have displaced workers who once had good
10 jobs. That's probably the most important reason why
11 inequality is increasing.

12 We talk about Facebook, Google, Apple, Amazon.
13 Think back 20, 30 years, the tremendous innovation that
14 has occurred as a result of these firms. Yes, they are
15 large. Does that mean we should break them up? Don't
16 confuse success with an antitrust violation, but we
17 should be vigilant to make sure that they don't
18 maintain that dominance illegally. I think the
19 antitrust laws can do that.

20 What's the evidence on concentration that Joe
21 talked about? I think it's way overstated, at least if
22 you use the standard metrics -- admittedly crude -- in
23 antitrust. Just to give you one example, although
24 there are exceptions, most markets that have seen
25 increased concentration, they're very modest.

1 For example, let's look at manufacturing. If
2 you ask yourself the question, what fraction of
3 four-digit industries in manufacturing have
4 concentration ratios above 2500, which we would
5 consider highly concentrated, the answer is less than 5
6 percent. The other important feature, people who have
7 studied increasing concentration, what do they find?
8 There's a linkage in those industries between
9 increasing concentration and increased productivity.
10 That's good, not bad.

11 Price-cost margins, people have studied those
12 recently, a good topic. Joe mentioned that they have
13 been rising. That literature is still in a state of
14 flux. I will tell you later, if I'm asked, about what
15 one of my students is doing in that, but let me just
16 mention one thing. A recent paper by Bob Hall, one of
17 the leaders in innovative techniques in this literature
18 from 20, 30 years ago, recently did a paper, and he
19 shows what's happened to price-cost margins. Yes, he
20 claims they have gone up, too, but what industries? He
21 ranks them.

22 Number one, finance. Number two, utilities.
23 Number three, healthcare. Manufacturing, hardly at all
24 a trend in price-cost margins. What do you think about
25 those three industries I just mentioned? What common

1 characteristics do you think they have? Regulation.

2 Third, what is antitrust? This is an essential
3 question for government agencies. What do you think
4 antitrust has to do with these trends? I think very
5 little. I think technology is the main source of
6 what's going on. Low investment? I don't think that
7 has to do with increased concentration. It has to do
8 with the changing nature of investment in the U.S.
9 economy. It's been baffling macroeconomists for a
10 while.

11 Decline in startups which was mentioned? Do
12 you know when decline in startups started? In the
13 mid-1980s. It's not a recent phenomenon. It's a
14 troubling phenomenon. We have got to get to the bottom
15 of it. I don't think it has much to do with increased
16 concentration. Poverty? These are all important
17 problems. I don't think looking to antitrust to solve
18 them is the right thing.

19 There was a mention briefly about merger
20 policy, and I'm sure there will be something about John
21 Kwoka's important recent research, but I want you to
22 look carefully at Kwoka and what he says about merger
23 policy. The median increase he finds in his studies --
24 which have their own problems -- is 1 percent. That's
25 tiny. That's not explaining these major trends in the

1 economy.

2 So let me just end by saying it's hard to
3 respond in, you know, three minutes to very well
4 thought out papers. So I want to make sure I don't get
5 mischaracterized as saying we can ignore this evidence
6 on increasing concentration, it doesn't matter. We can
7 ignore this evidence on the declining business
8 startups. We can ignore this evidence on increasing
9 price-cost margin. I'm not saying that at all.

10 We need to study that and understand the
11 reasons for it, but I am not going to say that
12 antitrust is fine. There are certain things that have
13 to be improved in antitrust in light of many recent
14 developments, and I hope later to be able to tell you
15 what those improvements that I would recommend would
16 be. Thank you.

17 MR. ABBOTT: Thanks, Professor Carlton.

18 Who would like to chime in now? Professor
19 Hylton?

20 MR. HYLTON: Yes, I will agree with some of
21 what Dennis said. The concentration issue, it's both
22 IT investment and the resulting productivity and
23 regulation that can account for some of what we're
24 seeing in this area. The investment is going to lead
25 to lowering of costs and increasing returns to scale,

1 which would give rise to some concentration and to some
2 extent the observed monopsony problem, but Dennis has
3 said enough about that, so I won't say much more about
4 it.

5 But one of the interesting features of the
6 modern economy is something that I refer to as the kill
7 zone problem, and I think Professor Stiglitz touched on
8 this briefly, and I do find that troubling, frankly,
9 and wonder what can be done about that and whether it's
10 -- and it strikes me as a somewhat special problem
11 that's arisen with platform markets and competition.

12 And I do see that as something that's out there
13 that I don't feel comfortable with where we sit at this
14 stage, but it's in the nature of -- I see specific
15 problems such as this that are connected to the modern
16 issues coming out of antitrust. I don't really see
17 general problems out there. I think most of what we're
18 doing in antitrust is defensible.

19 As far as what Bill said, Bill emphasized the
20 public/private distinction, and increasingly it seems
21 the FTC itself, though, has taken steps to increase its
22 own regulatory power, such as the restitution theory
23 that it's brought in some cases for restitution
24 damages, and to the extent that this is happening, it
25 would lead courts to view the FTC with the same kind of

1 concerns that it would view private litigants with.

2 And so I think to some extent, in Bill's own
3 theory, the private/public distinction would not matter
4 here, much as the trend within the FTC continues.

5 That's all I'll say as a reaction.

6 MR. ABBOTT: Okay. Professor Fox?

7 MS. FOX: Thank you.

8 Those were two very, very interesting opening
9 statements, and I want to take on two of their points
10 of controversy and maybe a couple of additional points.
11 So Professor Stiglitz says consumer welfare standard is
12 misguided, and Professor Kovacic says consumer welfare
13 standard is what we have, and if we had an alternative,
14 there would be lack of administerability.

15 And Professor Kovacic says Chicago School is a
16 distraction, and Professor Stiglitz says we have to
17 recognize the -- whether or not we call it Chicago or
18 we don't call it a geographic location -- but we have
19 to recognize part ideology, part whatever it is has
20 pulled antitrust in a direction where it has no teeth
21 and doesn't respond to monopoly problems that are
22 becoming more urgent every day.

23 So as to the first, consumer welfare is
24 misguided, of course, it can depend on what you mean by
25 "consumer welfare," and I take Professor Stiglitz to

1 say if you have any deference with the meaning of that
2 term, it is too narrow, that markets are the main
3 focus, that if all you're doing is deciding that you
4 have to see whether consumer surplus is lessened, and
5 then there's no antitrust enforcement, you have a very
6 weak, toothless antitrust.

7 And I actually think there's more of an
8 agreement on that point than might come out at first
9 glance, because I see both Bill and Joe saying
10 antitrust is about defense of markets, and we have to
11 do what we can to defend the market in a good and
12 administerable way. I agree that consumer welfare, as
13 it is used, is misguided, because on the one hand it's
14 either too big and everybody gets in under the tent and
15 it means nothing, or else it's too narrow in the way I
16 said before.

17 I think that we have to move to a more robust
18 and dynamic sense of defense of the market, and I
19 think, in fact, that we are, and our enforcers are, in
20 their rhetoric, they're saying now this is good for
21 consumers in the market or it's bad for consumers in
22 the market, so I think this is very important.

23 Now, this leads me to the second point.
24 Chicago School is a distraction or Chicago School is
25 the problem? I was in the Supreme Court room on the

1 day of the argument of Brooke Group, because I was one
2 of the lawyers in the Hartford case which followed it,
3 and if you recall, Phil Areeda argued for the
4 Plaintiff, and Bob Bork argued for the Defendant.

5 Phil Areeda had a rule on predation that was
6 very clear, and he lost; and Bob Bork, who didn't want
7 any rule on predation at all but had to go with some
8 rule and put in the recoupment scenario, he won. And
9 Phil Areeda pointed out in that particular case that
10 the defendant had a kitty of \$18 million that it set
11 aside to try to get rid of Liggett's attempt of a new,
12 no-frills product in the market, and it basically
13 succeeded in the end in compromising the new no-frills
14 product. So competition was lost. Dynamic innovation
15 was lost. Phil Areeda had a simple, good rule and he
16 lost.

17 So one of my points is it is Chicago School or
18 what we put into that term, because we know what we
19 mean. It means premises markets work very well;
20 Government, don't get in if you can help it. It was
21 Chicago School that drove that decision to be a very
22 pro-defendant decision. So maybe we do need some
23 presumptions in the other direction.

24 And maybe it's not the case that Chicago School
25 rhetoric is disruptive, but it shows how use of a very

1 narrow consumer welfare standard has made the antitrust
2 law, except U.S. -- and except for cartels and except
3 for straight horizontal mergers -- U.S. has lost
4 resonance because we're not dealing with the monopoly
5 problems today.

6 Thank you.

7 MR. ABBOTT: Thank you. From a practitioner's
8 point of view, Eric Citron, what are your thoughts?

9 MR. CITRON: Sure. I mean, the one thing I
10 certainly agree with is that it's hard to offer any
11 meaningful response to such interesting and long
12 presentations in three minutes, but I guess what I
13 would say is two things.

14 One, I definitely agree with Professor
15 Kovacic's point that a lot of what we see in modern
16 antitrust doctrine in the courts is driven by concerns
17 about administerability and by a difference between
18 judges who aren't really economists by training and
19 enforcers who tend to be.

20 And I think that this is a problem, you know,
21 because as Professor Stiglitz was pointing out, there
22 is a lot more nuanced thinking available in economics
23 than most of the judges know or are taught, and it's an
24 interesting feature of the Phil Areeda treatise or the
25 Posner book or whatever you want to use as your

1 antitrust tome, that they give you, like, one chapter
2 on how to understand economics from the perspective of
3 an introductory student, and then they teach you
4 everything you need to know about antitrust doctrine.

5 Those simplifying assumptions are driving the
6 doctrine, and we know they're false. If we were trying
7 to land a spacecraft on the moon, we wouldn't use the
8 assumption that, you know, it all happens in a vacuum,
9 like you do when you first learn physics. We would use
10 complex, thoughtful, modern economic doctrine, driven
11 by what we know also about human behavior. That would
12 be my second point.

13 If you remember that both the law and consumer
14 behavior are things not that perfect, idealized
15 consumers do, but that human beings do, judges who make
16 mistakes and don't know very much about some topics and
17 consumers who don't make decisions with prices and
18 quantities or whatever, they make decisions with
19 information, and firms can control the information and
20 how it gets to them. We need both our antitrust
21 thinking and our thinking about legal institutions to
22 reflect how human beings actually do their jobs.

23 And I do agree, for example, with Professor
24 Kovacic, that when you look at how judges are making
25 decisions. They're definitely influenced by things

1 other than the merits, like are a bunch of plaintiffs'
2 lawyers going to make a bunch of money off this case,
3 or something like that, and I don't like them. For
4 that reason, you may want to tweak the institutions so
5 that we can get more trust in more complex thinking,
6 government enforcement, and less blow-back from the
7 distrust that judges have towards private rights of
8 action and the like.

9 But the really important thing is that we have
10 cutting-edge, forward-thinking enforcement and not
11 radically simplified enforcement, which I think leads
12 to underaction, underenforcement generally.

13 MR. ABBOTT: Okay, thank you.

14 Let's turn now to a number of specific
15 questions for the panel. We've already heard a couple
16 of mentions of the consumer welfare standard. I was
17 going to start by asking, is the consumer welfare
18 standard adequate to deal with the competitive
19 challenges of the new economy? And in assessing
20 consumer welfare for antitrust enforcement purposes,
21 what should we be concerned about?

22 Keith, do you have something to say about that?

23 MR. HYLTON: Well, the question that I start
24 with is, what are the alternatives to a consumer
25 welfare standard? I think Bill reflected on this

1 briefly, that we tried alternatives before. If you go
2 back to Judge Hand in Alcoa, he relegated consumer
3 welfare and efficiency to secondary status under the
4 Sherman Act and seemed to promote atomism as a goal of
5 Sherman Act enforcement, or you could go to the other
6 extreme if you wanted to. You could say complete
7 freedom, maybe that's an alternative to the consumer
8 welfare standard.

9 I don't think there is a realistic alternative
10 to it or at least one that's worked very well in the
11 case law, and if you recall the Alcoa case, Judge Hand
12 held that Alcoa had violated Section 2 for preemptive
13 capacity expansion, which would be a pretty unusual
14 theory for a court to accept today. So the consumer
15 welfare standard I think has provided a good template,
16 a good line for judges to use.

17 It's pointed to the empirical issues that
18 judges have to take into account in looking at
19 antitrust cases. It's certainly different from what
20 Judge Hand was using, but Judge Hand's standard was too
21 ambiguous and too structuralist and provided few
22 guidelines for courts. So in the end the consumer
23 welfare standard has been a big improvement.

24 I would say it's something like a foreseeable
25 consumer welfare standard, because courts are taking

1 into account efficiency gains, and consumers often
2 don't get to benefit from the efficiency gains
3 immediately. They don't get to eat the efficiency
4 gains right away, but in the foreseeable future, they
5 often do get to eat -- "eat" -- the efficiency gains.
6 So that's what we have.

7 You could move from the consumer welfare
8 standard, but I'm not sure what you would do, what it
9 would be. You could try to take externalities into
10 account, but if you do take externalities into account
11 as a reason to move away from the consumer welfare
12 standard, you have to have a good sense of what those
13 externalities are, and you have to structure then a set
14 of rules for courts in weighing those externalities.

15 One of the issues is how do you implement the
16 consumer welfare standard, and at least in the Section
17 2 area, we see two ways in which courts are
18 implementing the consumer welfare standard. One is as
19 the balancing test, just a balancing of anticompetitive
20 harms against procompetitive benefits. That's the
21 rough language, loose language that we have as a result
22 of the Microsoft decision, and you can call that a
23 neutral balancing test or a court's attempt to balance.

24 Another approach that you see is kind of a
25 biased approach coming out of cases such as Brooke

1 Group on predatory pricing or Trinko or LinkLine, where
2 judges are saying in a sense that as long as there is
3 an efficiency gain, as long as there is an efficiency
4 basis for the defendant's conduct, for the dominant
5 firm's conduct, then it's okay under Section 2 to have
6 anticompetitive harm under an efficiency basis, and the
7 Ninth Circuit said it specifically in the Allied
8 Orthopedic case, looking at a charge of predatory
9 innovation under Section 2.

10 So those two approaches, this sort of neutral
11 balancing approach under the consumer welfare standard
12 or biased balancing approach, and that seems to be the
13 biggest question in the case law, just which issues
14 should be allocated to what sort of standard.

15 And right now what courts have done seems to be
16 a pretty sensible allocation. You know, the predatory
17 pricing area -- cases are in the sort of biased
18 balancing approach, largely on the basis of error cost
19 arguments that the court has accepted. Then there's a
20 general default standard in Microsoft, but as time
21 passes, courts will have to think about what kind of
22 cases go into what kind of balancing standard using the
23 consumer welfare test goal as the backdrop.

24 So I think those are the major issues. I don't
25 see us moving away from the consumer welfare standard.

1 I don't see a plausible alternative that's, as Bill
2 would say, administerable as well. We have tried it
3 before, and the other tests throw up a great deal of
4 confusion for courts. So I think that's where we stand
5 on that one.

6 MR. ABBOTT: Eric, as a practitioner, do you
7 see any alternative to the consumer welfare standard?

8 MR. CITRON: Well, let me say one thing first,
9 and then -- I mean, just as an initial point, it is odd
10 that antitrust is the one area of the law where we
11 insist that the rule be perfectly administerable and
12 have only one overriding policy goal. You know, nobody
13 thinks, like, U.S. tax policy has to have one policy
14 goal and the law will not work if we try to incorporate
15 others or anything like that. The working pure of
16 antitrust, I'm not sure that it's necessary.

17 I think, though, we do have a problem, which is
18 courts have to make decisions; they need a decision
19 rule. You can't have the decision rule be, "Let's look
20 at a million things; you'll make them up when you see
21 them." The decision rule will, therefore, have to be,
22 I think -- the one we have is consumer welfare focused
23 and probably should remain consumer welfare focused.
24 That doesn't mean the law can't incorporate these other
25 concerns, and it's the effort to banish the others that

1 I disagree with.

2 So we can be more concerned -- we can be less
3 concerned about Type I or Type II error, for example,
4 or we can be less concerned about false-positives if
5 this is a market where there is going to be big
6 informational distortions associated with missing,
7 because this firm controls not just price but also
8 information about prices or information about
9 consumers' alternatives, or we could be more concerned
10 if they think there is going to be democratic
11 institution disruptions from the size of this firm.

12 You know, people are scrambling right now to
13 try to be the city which will have the highest negative
14 tax rate for firms to locate their businesses there.
15 That's a big distortion. It's one that's relevant
16 economically and politically. When you see size like
17 that, you can be more concerned but still focused
18 fundamentally on consumer welfare.

19 So you can move the bar a little bit by
20 incorporating other concerns. That's not to say, you
21 know, what we're going to have is some nonconsumer,
22 welfare-focused standard. That's not what we have
23 right now. We have a single-minded, obsessive focus on
24 consumer welfare, and that tends to make antitrust
25 enforcement in the courts very myopic.

1 MR. ABBOTT: Okay. Regarding -- thanks,
2 Eric -- single-minded focus, what about looking at
3 additional policy concerns? We've already discussed
4 this a bit, but such as corporate size or wealth,
5 income distribution, labor and employment
6 considerations, other policy issues? We've heard
7 Professor Kovacic talk about that a bit.

8 Dennis, your thoughts?

9 MR. CARLTON: Well, I think antitrust is
10 designed to promote the process of competition, period.
11 It's not designed to solve important problems that may
12 well exist. It's just not suited for that.

13 Now, if you start asking questions, well, isn't
14 poverty an important problem? Isn't investment an
15 important problem? Isn't unemployment an important
16 problem? These guys are going to merge, and to achieve
17 efficiencies maybe some people will lose their jobs.
18 If you start worrying about those problems, you will
19 distort antitrust decisions, and it will lead to a lot
20 of inefficiency, it seems to me.

21 It's like I have a hammer. It's good for
22 banging in a nail. It's not particularly good if I
23 have a screw and I say to someone, "Put the screw in
24 the wall," and they take a hammer and they try to put
25 the screw in the wall. It's just not going to work.

1 And I think there's an even greater danger, and
2 that is this: If you start asking yourself what
3 happens when you have multiple goals -- and Bill
4 touched on this -- you get a lot of discretion. So
5 judges would have a lot of discretion, antitrust
6 enforcers would have a lot of discretion on which cases
7 to bring. That seems pretty undisciplined. How are
8 you going to tell whether someone's doing a good job if
9 they can weigh a million things in their decision? I
10 think it will lead to inefficiency and bad policy.

11 Even worse, it will lead to -- when you have
12 wide discretion, no one can tell whether you're doing a
13 good job or a bad job; that is, whether you're adhering
14 to the criteria that you're supposed to be. That puts
15 you subject to lots of outside influence. It could be
16 political influence, could be -- God forbid --
17 corruption, it could be the incentive of firms to
18 lobby, or it could be -- and Joe touched on this and I
19 agree with it -- the incentive of very profitable firms
20 to sponsor legislation that says, "Listen, it's not so
21 bad. We are within this. You have this huge
22 discretion. Why don't you do this."

23 And, in fact, the FTC has I know in the past --
24 and I believe continues -- to examine proposed
25 legislation for its economic effects but at the state

1 level. What Joe is saying from his discussion, what he
2 suggested is national policies can distort competition.
3 That's a slightly different problem. Regulation can
4 distort competition and serve special interest groups.
5 I think the more you defuse the goal of antitrust and
6 competition policy, the more likely you open our
7 society up to distortionary policies that will serve
8 private interests.

9 MR. ABBOTT: Eleanor, do you have some
10 additional thoughts?

11 MS. FOX: Yes, I do. I think that this
12 question comes up the way it does because of what has
13 become a very common rubric today. Either you take
14 consumer welfare or you go down the dangerous path of
15 public interest and populism, and I think that's a
16 false dichotomy.

17 So what I want to do is I want to mention three
18 of the list of public policy concerns, and I want to
19 show you how they're very relevant to the market
20 working. So, one, bigness; number two, distribution;
21 and number three, equitable access to markets. And I
22 am working within the market paradigm. I'm not making
23 any argument to say that antitrust ought to be
24 compromised by any value you have.

25 So number one on bigness, remember the

1 Holcim-LaFarge merger, this huge merger of the two
2 biggest cement companies in the world, which everybody
3 knows that's one of the top two of the most cartels in
4 the world. It was cleared with lots of conditions by
5 every authority and every established authority in the
6 world, and then the developing countries just had to
7 live with what they got.

8 Why isn't it relevant that these companies have
9 a very big track record of getting legislation to
10 prevent low-priced imports from coming into their
11 countries? If you check Google and LaFarge, you will
12 see the companies are at this cutting edge of
13 protectionism, and the company now becomes so huge that
14 it's bigger than countries, and its political power has
15 to be greatly increased.

16 All right, number two, distribution. There's a
17 very interesting question about distribution of wealth.
18 Joe has said before and he's said now, antitrust ought
19 to be for the people. So we have something, as in
20 American Express, where one way of looking at it is if
21 you go for the holding -- this is below -- that this
22 restraint that allows American Express to prevent
23 merchants from giving a discount if they go with the
24 cheaper card or telling them anything about a cheaper
25 card, if you go with that is anticompetitive and

1 presumptively ought to be enjoined, you also are going
2 with the notion that discounts are good for people.

3 They are especially good for poorer people and
4 the masses of people, and is it possible that we could
5 balance what is lower prices all over the -- in the
6 stores for people against some people getting more
7 frequent flyer miles? And even to go with the
8 presumption that firms need to take actions like
9 gagging the discounters to protect against free riders,
10 as Justice Breyer pointed out, is not clear at all,
11 that there was a free rider problem.

12 Equal access, I want just to say a word about
13 Cal Dental. A dentist rule that wouldn't let dentists
14 advertise, "I'll give you a better deal, I'll give you
15 a big discount," so-called because the dental
16 profession had to regulate professionalism, doesn't
17 that idea -- a restraint -- it's hard to see that it's
18 not a competitive restraint, although the Supreme Court
19 so found, and that the distribution would be in favor
20 of the people who don't have money, who don't have
21 access to dentists, also for dentists who need to get
22 into the market?

23 So there is so much room today, because our law
24 is so conservative, for thinking equity issues along
25 with efficiency issues going together, not separately,

1 and I think that's where we ought to focus our public
2 policy concerns.

3 Thank you.

4 MR. ABBOTT: Okay. I think I'll skip by the
5 question of industrial concentration and increase in
6 price-cost margins. It's already been alluded to. Let
7 me go to a point that Bill Kovacic made about
8 administerability.

9 About 35 years ago, Judge and Professor Frank
10 Easterbrook offered "Limits of Antitrust," an article
11 which called for structural rules and presumptions to
12 guide antitrust analysis. Related to this is the
13 application of decision theory, which seeks to minimize
14 the sum of error costs and administrative costs in
15 antitrust enforcement. Should decision theory be
16 employed by enforcers in selecting cases and in
17 evaluating specific facts? Should judges apply
18 decision theory and what are the limitations and
19 possible problems with its application?

20 I might mention, there's an article in 2015 by
21 Professor Jon Baker in Antitrust Law Journal that's a
22 critique of decision theory.

23 Keith, your thoughts on decision theory and
24 antitrust?

25 MR. HYLTON: Sure. It's been mentioned

1 increasingly in antitrust opinions, discussion of error
2 costs, rationales for decisions. Breyer has used that
3 reasoning in a number of his opinions, but it's been in
4 antitrust for a long time when you think about it,
5 because if you go back to the Trenton Potteries
6 decision on price-fixing, supporting the per se rule
7 against price-fixing, the rationale offered in Trenton
8 Potteries for the per se prohibition of price-fixing is
9 mostly an error cost rationale, mostly an argument
10 about, well, we could use a more fine-grained, granular
11 rule, but we're likely to have a lot of mistakes, and
12 those mistakes are going to be really costly. So it's
13 better to have a per se prohibition.

14 So antitrust has been taking advantage of error
15 cost decision theory arguments for quite some time. So
16 in a sense they would be, I think, not very productive
17 to try to avoid or, you know, sort of push down or get
18 away from these error cost arguments. They will find
19 their way back into the doctrine, because courts are
20 going to realize that the standards are difficult to
21 apply. Judges can make mistakes, and you've got to
22 have a sense in the background, well, what are the
23 costs of these mistakes? What are we messing up if we
24 make mistakes and how bad is that? So the Trenton
25 Potteries rule is based on an assessment of the cost of

1 these mistakes.

2 The Brooke Group predatory pricing standard is
3 based on the same kind of rationale. It seems to me
4 we've got error cost rules that are weighing in favor
5 of plaintiffs, in favor of defendants in this field,
6 and they are going to be part of the field. It's going
7 to be part of the doctrine, because judges are -- and
8 to me it's a wonderful thing that antitrust doctrine
9 has developed to allow courts to make these sensible
10 judgments, which would be unlikely to come out of a
11 legislative process.

12 So, no, I'm actually quite favorable toward
13 them. Are they perfect? I'm sure you can find
14 mistakes. I'm sure there are areas where you'd like to
15 see the error cost framework maybe changed slightly in
16 some way, but for the most part I think the courts have
17 taken the right approach.

18 And I can offer some suggestions myself of
19 where I think the error cost framework could be changed
20 a little bit, to make specific changes, specific
21 improvements, but for the most part I don't see it as
22 controversial. I think it's been there in antitrust
23 for a long time. Since the Trenton Potteries decision,
24 it's now sort of brought out to the surface, and judges
25 are openly embracing the thought process and talking

1 about it openly.

2 MR. STIGLITZ: Can I just make a comment?

3 MR. ABBOTT: Yes, please, Joe Stiglitz.

4 MR. STIGLITZ: So, increasingly, people are
5 always making judgments with priors and with judgments
6 about the consequences of one type of error or another.
7 What worries me a little bit is the persistent mistakes
8 and the judgments about mistakes, which I think has
9 been part of the concern, and there are two points I'd
10 make.

11 The first is when hysteresis effects are
12 important, then making a mistake that you will allow
13 market power to increase, when you don't prosecute, can
14 have -- will not be self-corrected. We know that
15 markets are not self-correcting, so the agglomeration
16 of market power is going to be persistent.

17 I think the error of saying a particular
18 merger, say, shouldn't go through, the cost of that,
19 you know, if you believe that the economies of scale
20 and scope are relatively small, the cost of that is
21 relatively small, and if there are real economies of
22 scale and scope, then that error will be self-corrected
23 in the future because some other firm is going to -- or
24 that firm -- some other way of getting the advantages
25 of those scale and scope economies will occur.

1 So the point is we know that there is in a
2 sense one direction, and I don't think the courts in at
3 least a lot of the decisions have not balanced that
4 correctly, not taken into account the importance of
5 hysteresis effects.

6 The second point I'd make is the magnitude of
7 those costs depend, in part, on our legal framework.
8 If we had a framework where we could go back and
9 revisit these issues, if we could say, okay, you said
10 that there wasn't going to be any agglomeration of
11 market power, you weren't going to raise price, but
12 five years later, we'll go back and revisit that, then
13 that would put these errors in a different perspective.

14 So if we change our legal framework so it gave
15 us more authority to go back, if they say, "Oh, don't
16 worry about these anticompetitive effects, we are
17 really not predatory pricing, we're really going to
18 keep those prices low," and then you see three months
19 later they act exactly the opposite, then you can go
20 back and revisit it.

21 I feel very differently, and so the nature of
22 your judgments of those errors has to be put in the
23 context of what are the remedies if you make an error.

24 MR. CITRON: Can I just follow up?

25 MR. ABBOTT: Go ahead, Eric.

1 MR. CITRON: I agree with what you're saying,
2 like asking whether decision theory should be
3 incorporated in legal rulemaking is like asking whether
4 we should get the rule right or wrong. Of course, you
5 should incorporate anything that leads to more accurate
6 legal decision-making.

7 The question is, is the organizing assumption
8 of something like the limits of antitrust true or
9 false? The organizing assumption is if we make a
10 mistake that it's underregulating, it's okay, the
11 markets correct themselves. If we overregulate, that's
12 the only source of durable market distortion.

13 If that premise is true, great. I don't think
14 it is true. We should probably analyze it using our
15 modern economic tools to figure out if it's right or
16 wrong. And we should be -- and on the ground, for
17 lawyers, what you see is just decision creep, right?
18 What this critique from Judge Easterbrook makes the
19 most sense in is per se rules that might be way
20 overbroad, a per se rule against vertical price
21 restraint or something like that, but at the American
22 Express oral argument, you have Justice Gorsuch asking,
23 well, shouldn't we just not do anything in this case
24 because of what Judge Easterbrook wrote in 1984? And
25 this is a rule of reason case where a district court

1 has made a bunch of findings about the effect of the
2 rule at issue.

3 The organizing assumption needs to be one that
4 is accurate if you were going to incorporate decision
5 theory in this way. If what we're trying to say is
6 should we have a rule that we just favor
7 underenforcement for its own sake, you know, I can't
8 possibly agree with that.

9 MR. ABBOTT: Okay, interesting.

10 So we're hearing different views on
11 presumption, so let me move forward and raise a new
12 issue, actually an FTC-specific issue. FTC
13 Commissioner Chopra has proposed that the Commission
14 consider adopting competition rules through a notice
15 and comment rulemaking process. Is this a good idea,
16 and what about strengths and weaknesses?

17 Dennis?

18 MR. CARLTON: Well, I'm not a lawyer, so I
19 can't tell you about exactly the legal implications of
20 rulemaking, but especially in antitrust, having a rule
21 strikes me as undesirable, especially after we just
22 heard what Joe said about how the nuances of economic
23 thinking and the economic circumstances influence the
24 ultimate decision.

25 If you have rules, then you have a lack of

1 flexibility to adapt the rule to the particular
2 situation. You know, maybe that's okay for consumer
3 protection, maybe you want to have a different thinking
4 about that, but at least for antitrust, that makes me
5 nervous.

6 But having said that, what I am in favor of --
7 and I think the Commissioner's paper would endorse
8 this -- is that the FTC should be doing -- and the DOJ,
9 too -- studies of important policy questions in order
10 to inform us of sort of the general findings that can
11 influence how judges and state legislatures and, you
12 know, maybe even Congress view certain practices, and
13 that is related to the last question.

14 It's all about, you know, your projections of
15 how long will market power last if I make a mistake;
16 how long will an inefficiency last if I don't allow a
17 merger. Those are empirical questions. Those
18 presumptions don't need to have anything to do -- if
19 you have the empirical evidence in an industry that
20 there's never been entry, so why do I expect entry to
21 solve a problem?

22 So let me just give you three examples. The
23 FTC did studies of hospital mergers and I think had a
24 big effect on showing the world or the U.S., people in
25 the United States who were interested, that sometimes

1 hospital mergers can be bad. You shouldn't just say
2 they're fine.

3 The FTC has a program where they go around -- I
4 think they still have such a program, they did when I
5 was in the Government -- in which they go around and
6 they warn states about the harms from certain
7 legislation that they're considering; for example,
8 licensing. Licensing in the U.S. has gone up from
9 something like 5 percent of the workforce to 30 percent
10 of the workforce. They created an entry barrier.

11 And let me say one other important issue,
12 merger retrospectives, very important to do, but a
13 merger retrospective is not asking, "Ah, there was this
14 merger. Did price go up?" That's important, but what
15 you want to be thinking about if you're a decision-
16 maker is, can you, the researcher, tell me something
17 before I have to make a decision that will help me make
18 a future -- that will improve my decision-making?

19 Everybody has 20/20 hindsight. You can't say,
20 "Oh, that was a good merger, that was a bad one, you
21 made a mistake there." As a policymaker I want to say,
22 "Look, that's interesting information, but what did I
23 do wrong? What should I have done differently?" And
24 if the researcher says, "Beats the hell out of me," I
25 wouldn't say that's particularly helpful research. So

1 let me give you a research program.

2 The research program is economists, when
3 studying mergers, have merger simulation models, for
4 example. When you look at a merger and you assess
5 whether to allow it to go through, what did your model
6 say? Now, let me compare that to what actually
7 happened. I want to know when the models work, when
8 they don't. That's not been done in a systematic way.

9 That's something the FTC and DOJ could do,
10 could try to do. When I was at the Department of
11 Justice, I made this suggestion. I would say it went
12 over like a lead balloon, but I would suggest that
13 there are studies the FTC can do that can inform us on
14 important policy matters for which perhaps our priors
15 are wrong, and those should be corrected, and that's a
16 very important function of the FTC and DOJ to engage
17 in.

18 MR. ABBOTT: Thanks.

19 Keith, do you have thoughts on competition
20 rules?

21 MR. HYLTON: It's an old problem, the question,
22 should an agency engage in rulemaking or adjudication,
23 and it's sort of across -- this is a problem that's
24 been across several agencies. The NLRB, National Labor
25 Relations Board, for a long time that's been an issue.

1 Should the NLRB, you know, generate new rules through
2 adjudication, through deciding labor disputes, or
3 through rulemaking?

4 And for the most part it's worked through
5 adjudication, and I think that's been a good thing,
6 largely because of some of the points that Dennis
7 touched on, that they involve intricate, tough
8 problems. You need to hear from people with real
9 stakes on those issues, what they -- you need to hear
10 what they know about it and what the source of the
11 problem is, and the same thing is true in antitrust.

12 I mean, so my point is that the NLRB process
13 has actually produced better law as a result of
14 adjudication than I think the agency could have
15 produced through rulemaking. I think the same thing is
16 true of the FTC. I think adjudication as the common
17 law process generally has an advantage over the
18 rulemaking process or civil law process, because of the
19 information that litigants bring before the judge,
20 private information that otherwise you can't get a hold
21 of, or if you try to get it, you will get it from
22 lobbyists who will try to distort the decision-maker's
23 preferences.

24 Adjudication has the benefit that people are
25 revealing important information, private information

1 about what's at stake, and they're honest about it.
2 They're not just trying to push some program, or if
3 they're pushing a program, it's clear what they're
4 doing. It's not hidden in any way. So the
5 adjudication question is like the question of common
6 law versus civil law.

7 Plenty of important benefits come out of the
8 common law process. In fact, you know, Judge Posner
9 made a career off of talking for a while about the
10 benefits of the common law process, the efficiencies
11 created by the common law, not to say that rulemaking
12 can -- not to say that rulemaking can never be good.

13 Sometimes there's an important big change,
14 institutional change, and sometimes you can only get
15 that through a rule, but generally that's probably not
16 the best way to go for an agency or some tribunal that
17 has to make fine-grained decisions on the scope of a
18 right and sort of vary that scope depending on the
19 interest on both sides of that question, which can vary
20 a great deal depending on the nature of the dispute and
21 the nature of the parties.

22 MR. ABBOTT: Joe Stiglitz, do you have thoughts
23 on possible competition rules?

24 MR. STIGLITZ: Yeah. Well, first, I think the
25 way that Keith put it is right, that there is always

1 going to be a mixture between rulemaking and
2 adjudication, but I think we don't have the right
3 balance right now, and this actually in a way interacts
4 with the earlier question about administerability.

5 A rule of law is a statement that you know with
6 some degree of predictability what kinds of actions are
7 legal and not. There are some cases where you can
8 write down a rule. I don't think there's any problem
9 saying that some of the fraudulent -- you know, it --
10 if you misrepresent what you do, if you're engaged in
11 fraud, that should be illegal. I mean, you can say
12 there's subtly. Well, there might be some
13 circumstances in which freedom of speech is important,
14 and I have the right to lie as a part of my freedom of
15 speech. Well, okay, but as a business practice, you
16 should outlaw it, and you could come back and make some
17 defense, but it's rebuttable presumptions.

18 It seems to me that we could write down rules
19 that say if you have a very large market share and you
20 engage in a vertical merger -- and there are those
21 cases -- or you engage in particular kinds of
22 restraints that we could write down, the presumption
23 will be very strongly that that's anticompetitive.

24 And, you know, that goes back in some ways to
25 the issues Dennis talked about, the importance of

1 preserving the process of competition. If you have
2 clear cases of monopsony where consumers might benefit,
3 because some of those benefits of monopsony power are
4 passed on to consumers, you would say, no, that's still
5 interfering with the dynamics of competition.

6 So having rules that make it clear what is
7 admissible and what's not -- and there's always going
8 to be things that are outside of the boundary of the
9 rules -- and those are the things that you are going to
10 have to adjudicate. So even in common law countries,
11 you have adjudication. So it's the balance, and I
12 think we haven't gotten the balance right.

13 MR. ABBOTT: Interesting.

14 Now, let's go now from some broad conceptions
15 to a specific case, which has already been alluded to
16 by a couple of people, the AmEx case. A few months ago
17 the Supreme Court held 5-4 that the lower court erred
18 in failing to apply a two-sided market definition in
19 evaluating so-called antisteering agreements between
20 American Express and merchants accepting its credit
21 card. The antisteering agreements basically prevented
22 the merchants from revealing that another card -- that
23 other cards might offer certain advantages to
24 consumers.

25 Now, this raises several questions. Now, first

1 of all, this two-sided market definition, although
2 there's been a lot of research on the concept of
3 two-sided markets where you will have a -- sort of an
4 equilibrator of a platform, say a publisher or a
5 restaurant owner who's dealing with two different sets
6 of transactors, a newspaper, say, dealing with
7 consumers and advertisers and so forth.

8 The idea of a two-sided market definition has
9 been discussed by economists at some length but was a
10 novelty in judicial decisions, as pointed out in a
11 dissent by Justice Breyer. Will this holding have a
12 significant effect in high-tech platform and other
13 markets? In particular, the concern raised about
14 durable monopoly, say, by the big digital platforms,
15 the Googles, Facebooks, and so forth.

16 Is this sort of decision -- does it make it
17 harder to submit to apply antitrust scrutiny to the
18 activities of the big platforms? And if so, is that
19 problematic? And let me ask Eric.

20 MR. CITRON: Yeah. I mean, I don't want to say
21 too much about AmEx, lest my head explode here, but I
22 will say, you know, you have a situation where you have
23 enforcement agencies from both parties -- you know,
24 active during both political parties' occupation of the
25 administration and a huge number of the most respected

1 antitrust scholars and the economists saying that the
2 rule that AmEx is seeking is incorrect, and then you
3 get the Court saying that the rule that AmEx is seeking
4 is correct, and that's a problem. It is inaccurate
5 antitrust enforcement, and the question is what you do
6 about that afterwards?

7 The Court says we're not really going to do a
8 two-sided market definition all the time. We recognize
9 that we do it one side at a time in the newspaper
10 space. We're not overruling that decision or anything
11 like that. This is something special about American
12 Express.

13 Now what happens is a contested point, and it's
14 for antitrust enforcement agencies and for thinkers in
15 antitrust who relentlessly criticize the Supreme Court
16 for making this mistake. And that's okay. You can
17 say, look, we recognize that case came out that way.
18 It shouldn't go any further than that because it is not
19 correct.

20 So I don't know what the consequences of the
21 decision will be, but they should be narrow. The Court
22 was only able to write a very narrow opinion, but it is
23 really up to the thinkers in this room and at the
24 agencies to say, look, there are some times two-sided
25 market definition might make sense, like in the

1 predatory pricing realm, but when you're asking
2 questions about restraints in trade and market power in
3 a particular relationship, like can a card company get
4 merchants to do what it wants or not, you don't really
5 need another part of the market to know whether or not
6 there's power in that relationship. That's what every
7 antitrust law professor would have told you, and
8 there's no reason for the agencies to abandon that view
9 just because the Supreme Court has come out a different
10 way in one particular case.

11 MR. ABBOTT: Dennis, do you agree?

12 MR. CARLTON: Yes. I should add I've worked
13 against the credit card companies for many years, both
14 here in the United States as well as around the world,
15 so I have a paper that's coming out with Ralph Winter
16 in the Journal of Law and Economics, and it explains
17 why rules like those in American Express can harm
18 competition.

19 The no-steering rule was basically that a
20 merchant can't, when a customer is checking out, tell
21 him, hey, why don't you use this card. It's also the
22 case that American Express doesn't -- the rules don't
23 allow a merchant to surcharge an American Express card
24 if it's a more expensive card for him to use.

25 Now, the Court relied on saying it's a

1 two-sided market; it's much different than one-sided
2 markets. We know one-sided markets. When there's a
3 promotion, we know how to handle it. I will let you
4 read my paper with Winter, but we show that there is no
5 basis for that. We can actually show that rewards to
6 the card consumer can be treated exactly as promotional
7 effort in one-sided markets and you get the same
8 conditions. I thought Breyer's dissent was exactly
9 right in bringing out the criticisms.

10 So my own view is that having different rules
11 for one-sided verse two-sided markets, so the
12 three-part test and who has the burden, that just
13 strikes me as based on faulty economic logic. The
14 Court is very unclear on how it would define two-sided
15 markets. I think it's going to make it harder for
16 plaintiffs to win cases when the defendant can say he's
17 a two-sided market, and given the vagueness of the
18 definition of "two-sided markets" in that Court's
19 decision, I guarantee you everybody's going to say I'm
20 a two-sided market, you know -- right, you know, so I
21 think it could impair the administration of the
22 antitrust laws to preserve the process of competition.

23 I hope Eric is right that it's so narrowly
24 interpreted to apply only to cards that are green or
25 whatever, that it doesn't apply to anything else, but

1 I'm more -- and I should add, it's part of a -- these
2 no-steering rules appear in many different guises. Joe
3 mentioned this, and I agree with him, and I've opposed
4 rules in these other guises where a platform -- there
5 are restrictions that one platform places on someone
6 who's selling, for example, products on their website
7 that says you can't sell at a different price anywhere
8 else.

9 We have got to examine those rules. I'm not
10 saying they're always bad, but they raise difficult
11 problems about competition, and those are going to be
12 increasingly important as these platforms continue to
13 grow because of the internet.

14 MR. CITRON: I just want to say -- because it's
15 really close, I think, to the mission we're talking
16 about here -- I mean, Dennis and I don't agree about a
17 lot of things, but, you know, the agreement that you
18 have there, it's an opportunity to say, okay, what can
19 we do about it when the Court makes a mistake?

20 We were talking about the agency's rulemaking
21 authority. We don't have to let courts that aren't
22 necessarily experts in the realm be the last word. You
23 can publish papers and do other sort of soft power
24 things at the agencies, try to continue to move the law
25 in the right direction, try to show judges where they

1 made mistakes, and you can use the rulemaking authority
2 of the agency to try to address areas where the
3 decision rule in the courts doesn't end up being the
4 correct rule.

5 MR. ABBOTT: Joe Stiglitz?

6 MR. STIGLITZ: I just want to say, I very
7 strongly agree with Eric, and this is really an
8 illustration of what we were talking about earlier, the
9 scope for rulemaking by the FTC, and it's a really good
10 example where you can step in and make a difference.

11 MR. ABBOTT: Okay. Let's move to a very hot
12 area that's generated a fair amount of literature in
13 recent years, the interplay between intellectual
14 property laws and antitrust laws.

15 In general, does antitrust do an adequate job
16 at considering innovation incentives when evaluating IP
17 agreements? And I've got a number of follow-on
18 questions.

19 And certainly, as you know, there's been a lot
20 of discussion about so-called standard essential
21 patents and refusals to license or restrictive
22 licensing terms by standard essential patent holders
23 and as to whether those should be subject to antitrust
24 scrutiny.

25 But let me start on the very general level as

1 to whether antitrust does an adequate job in policing
2 agreements, licensing and related agreements involving
3 intellectual property and, in particular, patents.

4 Let's see. Dennis again.

5 MR. CARLTON: Okay. So there are a lot of
6 complicated issues associated with the intersection of
7 IP and antitrust. Part of it has to do with the
8 adequacy of the granting of patents. If you are
9 overgranting patents, creating patents that have a high
10 probability of being invalid, you're just creating
11 problems, and, in a sense, the antitrust laws are there
12 to try and fix things as best they can, but the right
13 way to fix things is to really go after the
14 intellectual property laws.

15 In terms of, say, standard essential patents,
16 it seems -- and I have several papers on this -- it
17 always seemed to me that the issue with standard
18 essential patents is that a standard-setting
19 organization, an institution is existing to allow
20 collaborative efforts to create a standard that
21 supposedly is going to benefit everybody, and the
22 people involved signed a contractual commitment saying
23 I'll charge you something that's reasonable, and then
24 they never say what that means. It's reasonable and
25 nondiscriminatory. And then if you wind up in the

1 courts, everybody's definition of "reasonable" is, you
2 know, it depends on which side of the bargain you are.

3 It seems to me the institutions, the
4 standards-setting institutions, should play a greater
5 role in trying to resolve those issues, and I would
6 suggest that standard-setting organizations pay much
7 more attention -- I know they don't like to get
8 involved because they're fearful of triggering
9 antitrust violations on their own part, and they want
10 to leave that out of their bailiwick of responsibility,
11 but it seems to me if you're the responsible
12 institution to allow collaborative effort, you should
13 be also responsible for the consequences of that
14 collaborative effort.

15 If it leads to someone saying, well, that
16 standard essential patent is exercising market power,
17 and the only reason it's exercising that market power
18 is because you let them be in the standard, and he's
19 violating the contractual commitment, it seems to me
20 the institution should try and resolve that. I think
21 it's a very hard problem for courts to resolve. My
22 experience is it's a big mess when you have to
23 litigate, and I think compelling arbitration from a
24 standard-setting organization itself would be a
25 superior resolution. There is no easy answer to this

1 question.

2 MR. ABBOTT: Eric, anything to add on that
3 point?

4 MR. CITRON: I've been talking a lot, so I
5 won't say very much. I mostly agree with Dennis. The
6 only thing I would add is that we have to have
7 continued vigilance to make sure that standard-setting
8 organizations mostly do standard-setting and don't do
9 price-fixing and its various kinds of alternatives,
10 which is like you have to do business this way, under
11 the guise of a privacy, you know, regulation or a
12 security regulation or something like that.

13 The test should be pretty relentless. Was this
14 a necessary -- was this necessary to secure an
15 efficiency or is this unnecessary collaboration between
16 competitors? And this is just an area where I think
17 courts are becoming not vigilant enough, and the
18 agencies have to maintain their vigilance.

19 MR. ABBOTT: On a somewhat different aspect of
20 IP antitrust, do you think antitrust is doing an
21 adequate job in dealing with assessing mergers and
22 contracts in high-technology sectors and, in
23 particular, digital platforms? Say a dominant digital
24 platform acquires intellectual property of a small
25 startup firm, that sort of thing. Anyone want to

1 comment on that?

2 MR. HYLTON: I mentioned the kill zone problem
3 earlier. Maybe I'll come back to that. So the kill
4 zone problem has been out there for a long time, where
5 startups are afraid that, well, you know, it's
6 Microsoft and their platform, the desktop. A startup
7 wants to create their software that could be on the
8 Microsoft desktop, and Microsoft comes to them and
9 says, "Hey, we'll buy you out for \$1, or we'll just do
10 it ourselves." And so, you know, you sell out to
11 Microsoft for \$1 in that case. And, of course, once
12 people are aware of that problem, no one wants to
13 innovate in the platform space.

14 So that strikes me as a problem, and I don't
15 know what antitrust can do about it at this stage. It
16 seems to me it's an empirical issue, whether this is
17 having, on net, a negative social welfare impact. I
18 would like to see what the studies show, and people are
19 doing empirical work on this question right now.

20 But maybe it needs some -- if there is a
21 problem, maybe it needs some specific kind of
22 scalpel-like solution. Maybe it's closer to one of
23 these unusual cases like salvage contracts in the high
24 seas where, you know, courts say we're not going to
25 enforce -- you know, we are going to put an arbitration

1 process over this, because the problem with the kill
2 zones is that the platform owner always has the
3 credible threat to say, "Well, if you don't sell out to
4 us for \$1, we will just do it ourselves," and you'll
5 never see any money out of that venture.

6 So maybe there's some way that we could
7 structure the arrangement so that the credible threat
8 can't be made to an innovator on the platform to get
9 around the kill zone problem. I see that as sort of an
10 example of one of these specific problems generated by
11 platform markets and mergers in platform markets that
12 antitrust hasn't solved, or at least we're not sure
13 that the antitrust solution -- which is, I guess, not
14 to do anything -- is the right solution. And since I'm
15 reluctant to intervene in markets, I'd like to see what
16 the studies show on this, but if they show something,
17 maybe that's an area where there's a tweak that needs
18 to be made.

19 MR. ABBOTT: Interesting.

20 Let me -- yes, please.

21 MS. FOX: I think there is a problem in this
22 area, and I agree with everything that Keith said, and
23 just to take it a step further or maybe a step back,
24 actually, I think that many authorities who passed
25 favorably on Facebook's acquisition of Instagram are

1 sorry they did, that they did not think hard enough
2 that these two companies that did not look like direct
3 competitors actually were in the same future
4 competitive space.

5 And I think as a result of that, I think
6 there's going to be more care, and I think there
7 definitely should be more care, so that the dominant
8 platforms don't swallow up the new entrants that could
9 be challengers.

10 MR. CARLTON: Can I say one thing?

11 MR. ABBOTT: Yes, Dennis.

12 MR. CARLTON: I kind of agree a bit with both
13 of those. As Keith points out, it's an empirical
14 question. If you don't allow the dominant firm to buy
15 the people with the great new ideas, and they may be
16 better generators than the giant firm, there could be a
17 harm, because those ideas -- you might not have an
18 incentive to create those ideas. That's the hard
19 problem. So that's why you need an empirical study.

20 But there's another problem, and I'm not
21 sure -- although I partially agree with what Eleanor
22 said about, you know, potential competition, I want to
23 just put a finer point on it. If I produce Product A
24 and Eric produces Product B and we say we're not in the
25 same market, let us, you know, merge, that sounds

1 right, but let's suppose we both use data sets and have
2 different data sets.

3 Well, maybe it's not Product A and B that's
4 important; it's the merger of those data sets. And
5 when you say future competition, I can't even predict
6 what those two data sets, combined, are going to be
7 used for. So maybe there's another market we haven't
8 paid enough attention to -- namely, the market for the
9 use of data -- and do we want to allow combinations of
10 data? Maybe it's efficient, maybe it's not, I don't
11 know, but I might be worried that that is creating
12 monopoly power in something I hadn't thought about
13 before.

14 MR. ABBOTT: Right, but before -- and I have a
15 number of audience questions --

16 MR. HYLTON: Joe wants to --

17 MR. ABBOTT: Go ahead. Yes, please.

18 MR. STIGLITZ: And that's one area, by the way,
19 where the FTC's consumer protection interact and
20 privacy concerns interact with antitrust, and those
21 combinations of data give -- can be a very big barrier
22 to entry for other firms. It is a tool for -- I
23 suggested for extracting consumer surplus and producer
24 surplus, so having negative social value and engaged in
25 distribution.

1 And it's related to, you know, what I said.
2 You have to make judgments about the future effects on
3 the dynamic process of competition. So I really agree
4 with what everybody said, except one qualification.
5 I'm not sure that doing studies of what's happened in
6 the past is going to be very dispositive about a
7 particular example, like Instagram.

8 I think you're going to have to use judgment on
9 that, and those are areas where we'll make mistakes,
10 but when you have a platform that is already dominant,
11 I think one ought to be particularly wary. And so
12 that's sort of the frame of mind that one ought to go
13 into, that almost surely you're not -- at least as I
14 make the judgment, that the anticompetitive effects,
15 the effects on undermining the dynamic process of
16 competition, that risk overwhelms the possibility that
17 some idea -- and if you look at some of these ideas,
18 like having pictures sent over electronically, that's
19 not -- you know, that's not a breathtaking idea, and
20 somebody will invent it maybe a week later, but the
21 world will survive.

22 MR. ABBOTT: Okay. We've talked about big data
23 briefly. What about the implications of data
24 protection and privacy, typically viewed as consumer
25 protection problems? Should -- since consumer

1 protection looks at those issues, should antitrust also
2 try to assess them in particular cases?

3 Who would care to comment, say Eric?

4 MR. CITRON: Yeah. I mean, I just would --
5 when it comes to big data, privacy, and other, I think,
6 related areas of consumer protection, I like what
7 Professor Fox was saying earlier about thinking about
8 consumer welfare by also thinking about the health of
9 markets, right? You know, if data is going to allow --
10 if ownership over a very large set of data, consumer
11 data, is going to allow firms to distort the markets in
12 which they operate, that's a problem. It's a
13 competition problem in addition to a consumer
14 protection problem.

15 If a lack of price transparency in how you deal
16 with your consumers or contract transparency in how you
17 deal with your consumers allows you to distort the
18 market in which you operate, that is both a competition
19 problem and a consumer protection problem. And I think
20 we should be thinking about data concerns particularly
21 in that way, because I think data is an important
22 barrier to entry in a lot of new technology markets and
23 spaces, and those markets are unhealthy because of very
24 large agglomerations of data in some hands and its
25 inability to reach others.

1 MR. ABBOTT: Eleanor, any thoughts?

2 MS. FOX: Right. So I agree with Eric. Bill
3 Kovacic made the point earlier, and Joe endorsed it,
4 that this is a really good area for the Federal Trade
5 Commission to combine its expertise in antitrust
6 consumer protection, bringing in data privacy.

7 Europe is way ahead of us on thinking about
8 these issues. I think we have to think more seriously
9 about them here. I think we have to think more
10 seriously about an issue that I know many would not
11 like to, but it is a big platform that has a lot of
12 power that is both the gatekeeper and is one of the
13 people on the platform always preferring itself.

14 And in addition, as the European Commission is
15 just investigating right now, whether Amazon is taking
16 all the data, being both a customer and a platform, and
17 whether it's taking all this great data that it's
18 getting and preempting the next new big idea that you
19 can discern from analyzing all that data. A very
20 complicated question.

21 I'm not signaling that I know an answer, but I
22 think that there are problems, clearly problems of
23 unfairness, where there may not be an inefficiency in
24 catching the problem. And in Europe I think the
25 Commission will think that way, and I think that it's a

1 test that we ought to put ourselves to, also, first to
2 see, is there a market obstruction? Does it lessen
3 innovation?

4 But second, I would be all for also saying,
5 well, if you can't quite put it into antitrust, is it a
6 problem of preferring your own that is so unfair and
7 inequitable to the people using your platform when you
8 are both the gatekeeper and one of the people on the
9 platform.

10 MR. CARLTON: Could I just add?

11 MR. ABBOTT: Dennis, yes.

12 MR. CARLTON: There are really, I think, two
13 additional points I would like to make. The first is
14 this issue about data. Although I agree it's both a
15 privacy issue and an antitrust issue, there is an
16 overlap, no question. The key issue in data is
17 property rights, and that's what you have to ask. Who
18 has the property right in the data?

19 If I am on a platform selling my goods on
20 Amazon, does Amazon have the right to my property, as
21 to who my customers are? That's a property issue.
22 That should be defined.

23 And so we have different laws -- and you know
24 I'm not a lawyer, but I have a general understanding --
25 and I have a property right to my healthcare data. Do

1 I have a property right in my search engine data?

2 Well, I think we should ask the questions. What does
3 the individual or a firm have in terms of property
4 rights in its data? That's one question.

5 Second, we have only talked or I have only
6 talked about sort of mergers, when you're merging data
7 sets. That's not the only antitrust concern you want
8 to be concerned about. If I'm a dominant firm and I'm
9 using -- a third-party website is relying on me for
10 something, and Alden's my competitor, and I say to that
11 third-party website, "You want to deal with me? You
12 better not give Alden any data." That strikes me as
13 something we should be concerned about.

14 So I think those are new antitrust issues that
15 are going to arise more and more, I think, and I do
16 think antitrust has the tools to deal with it. I don't
17 think antitrust necessarily has the tools to deal with
18 who has property rights in data. That might be outside
19 antitrust, but I think it's important to define
20 property rights correctly; otherwise, we will get an
21 inefficient outcome.

22 MR. HYLTON: Alden, both Joe and I -- maybe I
23 will yield to Joe first.

24 MR. STIGLITZ: Yes. Well, even after we assign
25 property rights, there is a consumer protection issue,

1 because firms may induce people to sell that property
2 right at a price because they don't really know the
3 value of that property, so that actually poses, I
4 think, a really challenging question for the FTC about
5 what is the transparency in the transaction. And since
6 the sum of the values of -- by combining property --
7 the value of the data to the individual may be very
8 little, but when you combine it with other data, it
9 becomes very valuable. That was the first point.

10 And the second point is this misuse of data
11 that's generated another way is a problem that is
12 confronted in other areas. For instance, in some of
13 the -- Goldman Sachs, when it was processing
14 transactions, a standard thing is front-running, and
15 that's illegal, but one of the things that happened in
16 the flash trading was we allowed them to engage in that
17 until we stopped that, and that really distorted the
18 market.

19 That was a really good example where the use of
20 data, when you were in multiple roles, gave you an
21 advantage over the people who you were supposed to be
22 serving, and it distorted the market, because through
23 this what is effectively front-running, it took away
24 all the extenders for other people to gather
25 information, because the value of that information was

1 being appropriated.

2 Finally, I would just mention that -- I want to
3 mention that other countries, Europe in particular, is
4 ahead of us. For instance, some of the European
5 countries just don't allow you to combine data sets,
6 and they're -- you know, so you face a restriction that
7 has an efficiency loss, you might say, but the
8 competitive benefits may well outweigh the efficiency
9 losses, and the efficiency gains in most areas are
10 probably very little. They are just allowing people to
11 exploit you a little bit more.

12 MR. HYLTON: So I just want to one say and then
13 I will be quiet, that the property rights issue that --
14 I think Dennis is entirely right, that it's a property
15 rights issue, and to some extent underneath there is a
16 market structure issue, because if we had competition
17 among platforms, I think property rights would develop
18 naturally.

19 So for sort of an example, you know, Bing, I
20 guess, has a bidding system already. They offer
21 rewards, I guess, or something if people search on
22 Bing, but I don't think anybody takes advantage of it.
23 But to the extent that you had competition among
24 platforms, a platform would be forced by competition to
25 protect privacy, to protect properties rights, but we

1 don't have that, and so as a result the dominant
2 platforms can just abuse the users.

3 And so the ideal solution would be competition,
4 would be other multiple data brokers and platforms. We
5 don't have that now, and so we have got to worry about,
6 you know, the property rights issue and what can be
7 done about it.

8 MR. ABBOTT: I have a few audience questions,
9 and let me very quickly ask about an important issue.
10 Joe Stiglitz had discussed briefly vertical mergers and
11 new learning, and are the enforcers doing an adequate
12 job in assessing vertical mergers and, perhaps more
13 broadly, vertical restraints? Anybody else on the
14 panel want to comment on that?

15 MR. CARLTON: Well, I won't say anything about
16 vertical mergers because of the AT&T case that I was
17 involved in, under appeal right now, but I will say
18 something about vertical restraints. Vertical
19 restraints of the form that I mentioned, similar to
20 those in the American Express case, in which the
21 vertical restraints is what I call a vertical most
22 favored nations clause, in which one manufacturer says
23 to a retailer or a platform, "I don't want you to price
24 my product any higher than my rivals," or there is some
25 condition in which you are telling the retailer how to

1 price relative to your competitor.

2 I think those raised subtle or maybe not so
3 subtle issues that hadn't been well thought through. A
4 very simple example. Let's suppose Eric and I are two
5 manufacturers, and he's the retailer, and we have a
6 most favored nations clause, a clause just like we
7 said. If I raise -- if I lower my price, Alden can't
8 lower the retail price. If I lower the -- my wholesale
9 price to him, he can't lower the retail price.
10 Therefore, I am not going to get a whole bunch of
11 customers over. So I don't have a real incentive to
12 lower my price.

13 What about if I raise my price? If I raise my
14 price, I don't have to worry that my retail price at
15 Alden's store is going to be higher than Eric's and
16 that I'm going to lose customers. So it creates an
17 incentive for both of us, instead of to compete by
18 dropping our wholesale price, to compete by raising our
19 wholesale prices together. It eliminates competition.
20 It's a striking phenomenon, very simple to understand,
21 and I think hasn't received enough attention.

22 MR. ABBOTT: Anyone else?

23 MR. CITRON: The only thing I would say about
24 vertical mergers -- and I think it might be true of
25 what we sometimes call conglomerate mergers, too -- is

1 we just aren't thinking creatively enough about
2 potential competition. It's a really big issue. It's
3 a really big problem.

4 The Instagram-Facebook example is one
5 particularly good one. It strikes me, you know, nobody
6 thought Netflix was going to be a content maker.
7 Everybody thought Netflix was going to be a
8 distribution company. It turns out it's now a big
9 content company. That's because access to capital is
10 important, access to markets is important, access to
11 expertise is important, and a lot of vertical mergers
12 are adjacent companies that could be expanding into
13 those spaces vertically on their own and generating new
14 competition, and instead they don't.

15 It's a merger between potential competitors
16 that we don't see because we're so focused on what the
17 companies do right now. I think that's something we
18 should worry a lot harder about, both in the vertical
19 space and in the conglomerate space.

20 MR. ABBOTT: Eleanor?

21 MS. FOX: Yes, I think we do need clarification
22 on vertical mergers and vertical agreements. I agree
23 with what Dennis and Eric said. I would love to see
24 vertical guidelines. I think we ought to have them.

25 I think there's going to be so much kind of

1 philosophical dissension of trying to get to an
2 agreement on vertical guidelines that I am not
3 predicting that they will happen in the end, but I
4 think that it's a very important exercise to go through
5 and see if agreement can be reached.

6 MR. ABBOTT: Can't hurt to try.

7 MS. FOX: Yes, can't hurt to try.

8 I also think in the vertical space that we
9 haven't given enough attention to leveraging problems,
10 because it often is the case that you have one firm
11 that is functionally related in two markets and can
12 discriminate against those that are not its own firm,
13 and I think that this can create problems. It doesn't
14 always, but it certainly can create real competition
15 problems.

16 MR. ABBOTT: Okay.

17 Keith, before we turn to our audience
18 questions, do you have anything to add on vertical?

19 MR. HYLTON: Not much. I mean, AT&T-Time
20 Warner, that seems to be largely a question about
21 evidence and a case, you know, based on evidence and
22 proof, and the litigants seemed to have a lot of
23 opportunities to make arguments about anticompetitive
24 effects, which, you know, the arguments were put out
25 there, and, you know, the trial court judge just

1 thought the evidence weighed in favor of the merging
2 parties. So I don't see a big problem here.

3 I mean, I don't see how you're going to -- how
4 antitrust can do anything about the evidence and proof
5 issues. That's not really an antitrust matter. That's
6 an issue of how a judge weighs the burdens and weighs
7 the evidence that's produced under those burdens, which
8 is everything that, from what I could see, that
9 AT&T-Time Warner involved. I don't see an antitrust
10 issue there.

11 MS. FOX: Oh, so, can I just add one more?
12 There is possibly a question that for so many years in
13 the past -- well, since 1980 -- there's been this very
14 strong assumption that if it's vertical, it's got to be
15 good and it's got to be efficient. Joe, you raised
16 this in your initial presentation. Maybe we should
17 rethink that.

18 MR. STIGLITZ: Yeah, and particularly when you
19 have oligopolistic markets. You know, if these were
20 all very competitive markets, I think our attitudes
21 would be very different, and we would say there are
22 probably some efficiency gains or something else going
23 on, but when you're doing this in an oligopolistic
24 market, it's very easy to show that those vertical
25 mergers do result in less competition, and not only in

1 the dynamic way in the potential competition, but
2 actually, if you write down a model, any model of a
3 Nash equilibrium, a game theoretic model, it is very
4 clear that that will happen.

5 And the problem as I saw it in the AT&T case is
6 that the judge didn't understand the analytic
7 framework. It wasn't the evidence. It was actually
8 the analytic framework through which he could interpret
9 the evidence, and that's always going to be a problem,
10 because we have mental models through which we have to
11 process the data, the evidence that we have, and the
12 mental model that's in the minds of a lot of judges is
13 the wrong mental model.

14 MR. ABBOTT: Okay. We're running short of --
15 it's about seven more minutes. Here are a few audience
16 questions.

17 We haven't talked about antitrust immunities,
18 but one question for Professor Fox -- others can chime
19 in -- could antitrust and competition law have
20 something to say about lobbying by large firms in light
21 of the issue of economic power translating into
22 political power through lobbying or other forms of
23 influencing our lawmakers, which contributes to
24 maintaining market power?

25 So the issue of anticompetitive activities,

1 lobbying, questions of the petitioning antitrust
2 exception doctrine, but in general, are these issues
3 worthy of additional thought and analysis?

4 Professor Fox?

5 MS. FOX: Right, thank you. So I would say two
6 things. One is Noerr-Pennington, which provides what
7 looks like a really robust defense that allows lobbying
8 and puts it outside of antitrust violation, is too
9 broad a defense, and the Federal Trade Commission has
10 been doing good work on this point over the years with
11 Tim Muris, for example, doing really great work in
12 trying to narrow the exemption, and I certainly support
13 the Federal Trade Commission in trying to narrow the
14 exemption.

15 There's no good -- in my view, there is no good
16 reason to allow the competitors to get together to
17 lobby. If you want to keep the channels open, you can
18 allow individuals to come before the decision-maker,
19 governmental decision-maker.

20 All right. So the second is the other place
21 which I mentioned earlier fit into an existing
22 competition problem. It wasn't its own problem of just
23 saying lobbying is anticompetitive, and that is where I
24 mentioned it in -- also in LaFarge, that I thought it
25 was really a merger that looked so anticompetitive and

1 also so huge, I thought it was a good idea to take the
2 whole picture into account, which included an awful lot
3 of lobbying against cheap imports coming in.

4 MR. CITRON: Yeah, I just think we have to
5 recognize, one reason why big can be bad is because big
6 leads to rent-seeking behavior at governments, and we
7 can't address that directly because the First Amendment
8 is a bar to it. We just have to be aware of that, the
9 way that power can be used at government to get what
10 you want.

11 MR. CARLTON: And it seems to me -- unless it
12 violates some law, which I have no idea if it does --
13 that a responsibility of economists, especially at DOJ
14 and FTC, is if they see protectionist legislation being
15 proposed, they should say so.

16 MS. FOX: Yes.

17 MR. CARLTON: And I understand that may have
18 political risks, it may even be illegal. I don't know
19 if DOJ and FTC can do that, but if they can't, they
20 should be able to.

21 MR. STIGLITZ: Just let me add, the analytics
22 of what are the effects of various regulations should
23 be within your remand. I mean, and the way in which a
24 whole set of rules and regulations affect bargaining
25 power and oligopolistic markets, markets with imperfect

1 competition, would be an important contribution to try
2 to bring that out.

3 MR. ABBOTT: Okay. Let me ask one more
4 question. You know, to what extent, if any -- and this
5 is probably primarily for Professor Fox, but others
6 should chime in -- to what extent, if any, should U.S.
7 policymakers and antitrust enforcers look to the EU for
8 guidance on competition issues?

9 And I would go beyond the EU to additional
10 agencies, such as mentioned by Professor Kovacic, the
11 UK, Canada perhaps, Australia. Are there specific
12 things that they are doing now that perhaps we should
13 consider adopting?

14 MS. FOX: So I'll start out on that. I think
15 the United States does not look enough at our
16 counterparts all over the world, and even within our
17 own country, and I think Bill was entirely right to
18 bring up the UK experience and the market inquiries
19 experience as a great tool.

20 As for EU, it's a little complicated because EU
21 does sometimes lean a bit far in imposing duties on
22 firms, but we lean a bit too little in imposing duties
23 on dominant firms, and I think that there's a lot that
24 we can pick up by watching the EU, but with a -- with
25 some skepticism, but with some receptivity, and we

1 ought to realize that we're out of step with the world
2 in imposing so few restraints on our dominant firms.

3 MR. ABBOTT: Okay. We have got three minutes
4 left. Let's have, very quickly, closing thoughts. Let
5 me go back to Professor Stiglitz.

6 MR. STIGLITZ: Well, thank you. Maybe I'll
7 begin by picking up on something that Eleanor just
8 said, which is that because we don't take as active
9 policies on antitrust and competition, it may have
10 macroeconomic effects. While we all deal with
11 individual cases, cumulatively, when you don't deal
12 with them sector by sector, it winds up in leading to a
13 less competitive economy, and that has macroeconomic
14 consequences.

15 The second observation I want to make that we
16 haven't been able to talk about, which is the strategic
17 question, which is some of this, I think, may be able
18 to be done through case by case. Some of it can be
19 done by FTC rulemaking. I think some of this will have
20 to be done eventually by Congress, and I think there
21 will have to be a judgment -- you know, have we gone
22 down -- have the courts gone down in a particular
23 direction so far that to reverse it will take another
24 20, 25 years? Because of the nature of dynamics, you
25 know, the damage that will be done in that 20, 25 years

1 could be very large.

2 So I think that one of the issues that I think
3 our society needs to confront is how much can we do
4 within the existing legal framework and how much do
5 we -- where do we begin to start saying we have to
6 redefine the law?

7 MR. ABBOTT: Okay.

8 Keith Hylton?

9 MR. HYLTON: Sure. I guess I'd begin with the
10 statement that, in general, I think antitrust is in
11 pretty good shape. I mean, the platform markets are
12 generating new problems, and there are questions -- the
13 data privacy issue, the kill zone problem that we have
14 talked about -- that antitrust doesn't seem to have a
15 solution for right now, and we need to do some research
16 to figure out the extent to which the problem requires
17 something, requires a solution.

18 As far as the rulemaking/adjudication divide or
19 going to Congress, you know, my inclination is I prefer
20 the adjudication approach that we've taken and
21 rulemaking where it's codification of principles that
22 have come out of adjudication that are pretty well
23 established or where there's a need for a big change.
24 I would be wary of seeing the FTC shift toward
25 rulemaking as a general matter.

1 I'm wary of Congress, too, because the Sherman
2 Act, if you've read the statute, it's pretty sparse,
3 Section 1 and 2 are just two paragraphs, and if you
4 imagine Congress producing some statute like that
5 today, no way. It would go to 2000 pages, and it would
6 have little exceptions in there for this company and
7 that company. There is no way Congress would produce a
8 competition law statute today that would be as useful
9 as the Sherman Act is now, because the Sherman Act has
10 been left to largely judges to figure out how to do it,
11 and they have done it case by case, and they have
12 generated very useful rules out of that approach.

13 So I think -- I think we -- I think our
14 framework is largely sound, though the platform markets
15 that the new economy has generated have some problems
16 that we still need to look at more carefully to try to
17 figure out how to solve these things.

18 MR. ABBOTT: We have technically run out of
19 time, but if anybody wants to add anything very
20 quickly.

21 MS. FOX: Oh, can I add?

22 MR. ABBOTT: Eleanor.

23 MS. FOX: I'm sorry, I have to disagree. I do
24 not think antitrust is in very good shape, and I think
25 that the problem is -- and with apologies to you,

1 Bill -- the problem is Chicago School and the
2 philosophy that's carried it way off the mark. So I
3 just want to say two words about -- I mean, this is Bob
4 Pitofsky's book, and it was ten years ago, How the
5 Chicago School Overshot the Mark: the effect of
6 conservative economic analysis on U.S. antitrust. It's
7 not Republican/Democrat. It's a large span of really
8 important scholars. Everybody should read it again.
9 And this was ten years ago.

10 The Chicago School philosophy keeps even way
11 more overshooting the mark as shown in American
12 Express, and what we have got to do is we need a new
13 center of gravity, and I want to invoke sort of the
14 legacy of Bob Pitofsky. Think Bob Pitofsky. Read his
15 work again. Read his opinions, maybe combined with
16 Justice Breyer -- and Justice Breyer often cites Bob
17 Pitofsky -- Cal Dent, Leegin, American Express.

18 Breyer tries to get back to the mark with
19 clearer rules that respect the forces of competition
20 more than we respect the forces of competition today.
21 And read the Second Circuit opinion in Trinko, which
22 was the law and in my view was correct before the
23 Supreme Court in Trinko, because the Supreme Court in
24 Trinko changed a huge amount, and the Federal Trade
25 Commission, with Section 5, in my view, can take up the

1 slack.

2 MR. CITRON: I would just say very, very
3 quickly, a lot of the things I've said today I think
4 are things that the agencies already do better, already
5 think about, and the courts don't or are missing, and
6 when that's the situation, all I can encourage the
7 agencies to do is to keep pushing.

8 If you have to go to court and lose, lose out
9 loud so that we can go to Congress and say this is a
10 problem, or you can go to judges and say this is a
11 problem, it's something that we have to change going
12 forward. Because if you lose quietly, we have the
13 situation where we continue to overshoot the mark in
14 the same direction among judges who don't really
15 recognize the scientific, economic, policy consensus is
16 against them.

17 MR. CARLTON: And I'll be brief. Five things I
18 would recommend:

19 Don't misuse antitrust by trying to fix
20 problems that antitrust enforcement is not well suited
21 to fix and has little to do with their creation.

22 Second, I'm against rulemaking in general, but
23 I do favor studies of policy areas to enlighten us
24 about our prior beliefs about what works and what
25 doesn't. Do retrospective studies of economic models

1 to tell us which ones work, which don't.

2 As far as whether antitrust is up to the task
3 of dealing with new problems, I think it is, but there
4 are new problems. Pay more attention to data and how
5 control of it can affect competition. View attempts by
6 dominant firms to deprive rivals of data in a harsh
7 way.

8 Pay more attention to what I call the vertical
9 most favored nations clauses. They can be sometimes
10 justified, but we have not paid enough attention to
11 them.

12 And, finally, both agencies should evaluate the
13 competitive consequences of existing and proposed state
14 and federal laws. Thank you.

15 MR. ABBOTT: Thank you. That ends our panel.
16 We have a ten-minute break. Be back in ten minutes,
17 sharp. That would be ten minutes after 12:00. Thanks.

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1 PANEL 2: THE STATE OF ANTITRUST LAW

2 MR. ABBOTT: We are about to start again, the
3 second panel on The State of U.S. Antitrust Law. We
4 are going to cover a lot of the questions we did and
5 get a variety of new perspectives, which is very
6 valuable. Again, I am Alden Abbott, General Counsel of
7 the FTC.

8 Before proceeding, I want to again announce
9 that two of our FTC interns will be handing out
10 questions -- little cards, and people may submit
11 questions. If we don't have time to address the
12 questions audience members have, we are keeping them
13 and we will consider them as we prepare the record, and
14 so don't be concerned. Do feel free to write up your
15 questions. Also we have a cafeteria next to the
16 auditorium that is open until 2:30.

17 Let me start out right again and announce the
18 new panelists. So the next panel will have Debbie
19 Feinstein, who is a partner and head of the Global
20 Antitrust Group at Arnold & Porter Kaye Scholer, LLP, a
21 former director of the FTC Bureau of Competition, and
22 also an Assistant to the Director and Attorney Advisor
23 at the FTC.

24 Michael Kades is the Director for Markets and
25 Competition Policy at the Washington Center for

1 Equitable Growth. Previously, he worked as antitrust
2 counsel to Senator Amy Klobuchar, and previously he was
3 an attorney at the FTC, including as Attorney Advisor
4 for Chairman Jon Leibowitz. I might mention that Mike
5 worked on a number of important pharma matters while he
6 was at the FTC.

7 We welcome again to the panel Professor Bill
8 Kovacic, again, Professor at GW Law School, former FTC
9 Chairman, currently a nonexecutive director of the UK
10 Competition in Markets Authority.

11 Diana Moss. Dr. Moss is President of the
12 American Antitrust Institute and an adjunct faculty in
13 the Department of Economics at the University of
14 Colorado, Boulder. Prior to joining AAI in 2001, she
15 was at the Federal Energy Regulatory Commission where
16 she coordinated the agency's competition analysis for
17 electricity mergers.

18 And last, but very certainly not least,
19 Professor Robert D. Willig, Professor of Economics and
20 Public Affairs, Emeritus, at the Woodrow Wilson School,
21 the Economics Department of Princeton University, and
22 senior consultant at Compass Lexecon. From 1989 to
23 1991, Professor Willig served as Deputy Assistant
24 Attorney General for Economics in the Antitrust
25 Division of the Justice Department.

1 So we are going to follow a very similar format
2 to the first panel, and just for starters, I would like
3 to -- and try to keep it brief -- but get quick
4 reactions to what you've heard. In particular, you
5 know, the keynote addresses, but also some of the
6 commentary on the keynote addresses.

7 Let's quickly go down the ranks. Debbie
8 Feinstein?

9 MS. FEINSTEIN: Well, thank you very much for
10 having me here. This has been an absolutely
11 fascinating morning so far. You know, listening to
12 everybody, it was fascinating because I expected there
13 to be a lot of discussion about all the ways in which
14 antitrust isn't getting it right because they aren't
15 considering all of these other factors.

16 In fact, what I heard is that antitrust does
17 cover all of these things; there's just a huge
18 divergence of views as to whether or not the courts are
19 getting it right. So on the one hand you could
20 completely agree with Professor Hylton that the state
21 of antitrust law is strong in the sense that all the
22 cases we're talking about and complaining about are all
23 ones that are in the courts. They are not getting
24 knocked out on motions to dismiss as being unrelated to
25 the antitrust laws. They are antitrust cases.

1 On the other hand, you could agree with others,
2 including Professor Fox, who says it's wrong in the
3 sense that the decisions didn't come out the way some
4 folks would like them to, but for all the discussion
5 about whether or not antitrust should take into account
6 other factors, something we'll talk about later, the
7 discussion this morning was almost entirely about
8 simply things that are within the box of antitrust.

9 I think that's where we should stay, frankly,
10 for reasons I'll explain later, and I think there's
11 plenty to talk about there, but when you hear the
12 things that we're talking about, that the rules on
13 predatory pricing are wrong, that we should focus more
14 on combinations of big data, well, that can be taken
15 care of by monopolization.

16 When you think about whether we should be --
17 whether, you know, we should be thinking about
18 two-sided platforms or a one-sided platform, that is an
19 antitrust case. It made it to the Supreme Court. That
20 is within the role of the antitrust laws.

21 So to me the question is if antitrust is
22 getting it wrong, if the Supreme Court is making
23 decisions that people don't think are in the best
24 interests, why and what can be done about it? And I
25 think that's something that we'll talk about as the

1 panel goes on, but I think that's where the focus ought
2 to be, which is, you know, if there's a view that we're
3 getting it wrong and that the economy is suffering, how
4 do we right the course?

5 And I have thoughts on that that we can discuss
6 later, but, you know, in focusing the discussion on
7 that rather than should we recreate the body of
8 antitrust to take into account considerations that are
9 far beyond and really didn't end up being what the
10 first panel ended up talking about, I found that
11 fascinating.

12 MR. ABBOTT: Mike Kades?

13 MR. KADES: Thank you, and it's a pleasure to
14 be back at the Federal Trade Commission. It's somewhat
15 like my second home. I'm very honored to be part of
16 this panel.

17 I guess I sort have taken away two things.
18 First, from Professor Stiglitz's presentation, it seems
19 to me he really put out a challenge to the antitrust
20 community and said there's a monopoly problem in the
21 United States, and the failure of the antitrust laws
22 are contributing to that problem. And to me that
23 immediately begs the question, how do you decide
24 whether an institution, the antitrust enforcement
25 institution, is succeeding in protecting competition?

1 So you might sort of -- this might be called,
2 like, the trial lawyer's assessment, which is if I won
3 my last case, clearly the antitrust laws are working,
4 and if I'd lost my last case, clearly the antitrust
5 laws are to blame. We can certainly look into
6 scholarship, and there's lots of articles sort of
7 talking doctrinally, but I think that sort of misses
8 the larger point that Professor Stiglitz is making,
9 which is that there's something gone wrong in the
10 American economy, and we need to think about what the
11 antitrust's role is in that economy.

12 So I am going to propose the water is wet test,
13 which is if plaintiffs and the Government are
14 consistently having to prove water is wet in court, if
15 they are fighting over the most obvious, very simple,
16 straightforward antitrust matters, then probably the
17 antitrust enforcement laws are underdetering.

18 And when you look at the Supreme Court in
19 American Express, if you look at the implications of
20 Trinko, if you look at the implications of, just last
21 year, the FTC spending four days, 1600 exhibits, to
22 block a physician practice merger that went to near
23 monopoly in Bismarck, it looks to me like that's where
24 the antitrust action is in litigation.

25 The cases the Government is litigating are not

1 on the frontier, therein what we call the homeland of
2 antitrust, and that seems to be a very strong
3 indication to me that the antitrust laws, as they're
4 interpreted today, are failing.

5 MR. ABBOTT: Okay, the antitrust laws are
6 failing. Interesting perspective.

7 Professor Bill Kovacic.

8 MR. KOVACIC: Yeah, I enjoyed the earlier
9 segments. They were terrific. I especially liked the
10 second keynote. That was a real highlight for me. So
11 I'm just giving you a quick assessment.

12 One thought about the discussion of aims and
13 what the agencies do and how they think of things, and
14 I've spent time looking at the budget requests of the
15 two agencies going back about 50 years, where each year
16 they have to go before Congress and justify the sums
17 that they'll be given to enforce the law, and those
18 requests, I think, say a lot about the agency's own
19 perception of what their aims are.

20 They're certainly interested in basic questions
21 of economic performance, innovation, pricing, but
22 there's always been a component involving distribution
23 and equity to them. To take the FTC as an example, how
24 do you suppose the Commission has sought funds from
25 Congress to carry out its competition program?

1 It's always identified what were called at
2 different times market basket issues. We're interested
3 in energy, food, healthcare, and a set of other
4 concerns. There's never a budget request that says
5 "We're really concerned about the overpricing of luxury
6 yachts, so we're going to focus a lot of attention on
7 the yacht sector."

8 All of the budget requests of the Commission
9 and certainly those of the Department focus
10 fundamentally on delivering good results to average
11 citizens. So embedded in that I see a basic concern
12 about distribution, about equity. The major program
13 that the Department developed over time involving
14 public procurement, the principal beneficiaries of
15 improvements in public procurement performance that
16 would have come about as a consequence of the
17 Department's anti-cartel program are for the most part
18 people on the second half of the income distribution.

19 So if we ask, has competition law been
20 concerned with equity, with distribution, I would say
21 the way in which the agencies have allocated resources
22 over time would say decisively yes. Now, they have
23 done this in the context of the admittedly amorphous
24 consumer welfare standard, and if you were skeptical of
25 that, you would dismiss it as a slogan that's

1 deliberately designed to obscure difficult policy
2 choices.

3 But under the framework of focusing on
4 consumers first and foremost, they built programs that
5 in many ways encompass a fundamental concern with
6 equity and distribution, without labeling it as such,
7 but that has been the overwhelming center of attention
8 when it comes to formulating budget approaches.

9 The agencies, when they have brought cases
10 outside of that zone, have invariably done it to
11 establish a doctrinal point. Polygram deals with
12 concert performances. Is that a key distributional
13 impact concern? Well, I suppose wealthier people tend
14 to go to those concerts and get tickets, but there was
15 a crucial doctrinal aim there, which was to
16 rehabilitate a rule of reason that had taken a serious
17 blow in California Dental, followed up by other cases
18 to do the same.

19 So if you look at the wide range of cases that
20 the agencies have brought over time, especially those
21 within what might be called their larger zone of
22 discretion for setting priorities, this has always been
23 in the back of their minds, and I think competition law
24 priority-setting has done a good job of having that
25 first and foremost in their minds in deciding what to

1 do, even though the technical tools that are used might
2 focus more and more specifically on this large category
3 of concern called consumer welfare.

4 That attentiveness to the concerns of average
5 citizens, especially those with perhaps less than
6 average means, I think has been a perhaps not explicit
7 but a very visible element of what the agencies have
8 done.

9 MR. ABBOTT: Okay. Diana?

10 MS. MOSS: Yes. Thank you very much for
11 inviting me here today. It's been a terrific
12 discussion so far, and I'm actually surprised but
13 heartened to hear more consensus on some key underlying
14 issues, but still some areas of disagreement. So I
15 view that as progress being made in our community and
16 the antitrust community, the policy community, to deal
17 with these issues moving forward.

18 I guess a few take-aways from this morning's
19 conversation. One is, you know, I think that we have a
20 debate going on in the antitrust community over the
21 perils of high concentration. These warning signs have
22 been around for a long time, as Professor Stiglitz
23 noted, back even to the seventies. There is a very
24 interesting debate going on between economists in the
25 antitrust community about whether more aggregate

1 measures of concentration are actually relevant to
2 antitrust analysis.

3 So, you know, my view on that -- I have just
4 written an article coming out in The Antitrust Magazine
5 on this -- is for the IO economists who engage actively
6 in this debate not to be naysayers or to put their
7 heads in the sand, but to actively engage and figure
8 out ways we can map over high levels of aggregate
9 concentration to what's going on in antitrust markets,
10 because relevant markets in antitrust, many antitrust
11 markets are very highly concentrated. We should be
12 figuring out ways to add to the debate, to develop a
13 constructive agenda moving forward. The labor
14 economists and macroeconomists are way ahead, way ahead
15 of what's going on in the IO field.

16 Second, what I'm hearing today really fits
17 nicely or neatly, if you will, into a concept of the
18 antitrust laws that has been driven by static analysis
19 versus dynamic analysis. If you count the number of
20 times you've heard "dynamic" up here already today,
21 it's a lot, and that says something.

22 So we have approached antitrust in this country
23 for many years in a very static way, but we have lost
24 track of the dynamic effects of mergers, in building
25 market power, in accumulating market power. We have

1 lost track of the fact that avoiding false-positives
2 and using decision theory is a very static approach to
3 doing antitrust.

4 There are many other examples, even down to
5 looking at mergers and looking at static price effects
6 on one hand versus dynamic efficiency effects on the
7 other hand. So these things don't match up, and I
8 think we're seeing the tension and the adverse outcomes
9 that are coming from a misalignment of using antitrust
10 in a static way, with a static vision, versus a longer
11 term dynamic vision.

12 And then, finally, I think there are definitely
13 policy needs and prescriptions on the table here,
14 absolutely. We need to be asking, what lines can we no
15 longer cross? Lines have been crossed. That's why
16 we're having the declining competition problems we're
17 having now.

18 So do we want to think about requirements,
19 requirements, for example, to show efficiencies, to
20 require companies to show efficiencies in merger cases?
21 Do we want to think about requirements that savings,
22 cost savings, be passed on to consumers? Do we want to
23 think about the effectiveness of remedies? And this
24 links back to the importance of doing merger
25 retrospectives, as Dennis was saying.

1 And do we want to think about a broader set of
2 presumptions in addition to the structural presumption,
3 for example, a vertical merger structural presumption?
4 There's a whole -- presumptions on predation? There's
5 a whole host of lines I think that have been crossed
6 where we need to give some deep thought to policy
7 prescriptions for addressing policy responses.

8 MR. ABBOTT: Bobby?

9 MR. WILLIG: Oh, thank you. I'd like to use my
10 opening moments to respond more granularly, I think, to
11 Professor Stiglitz -- henceforth, Joe, I've known him
12 forever -- and I know that he is wildly prolific and
13 wildly stimulating, and so it would take me and the
14 rest of us days, if not years, to fully respond to his
15 30 minutes presentation, and that's sort of the rate of
16 exchange between him and the profession. He upsets a
17 field, and he fixes it, and then he moves on to another
18 field, and he just takes days to do what the rest of us
19 take an entire lifetime to do. So I need to rush
20 through this, but I'll continue on these themes for the
21 next hour, if I'm allowed to.

22 So big themes. Joe says that changes in the
23 economy and changes in economics as a field have
24 progressed very importantly in the last, he said, third
25 of a century, and those changes should be reflected in

1 changes in antitrust. In a way, that's the biggest
2 theme that I took away, and I would like to comment on
3 those first.

4 So a major part of the changes in the economy
5 from my point of view have been the increasing
6 prevalence of economies of scale, also economies of
7 scope, and I would like to point out that this is not a
8 bad thing in itself, because increase in scale
9 economies is really a concomitant of the fantastic
10 innovations that we've seen, the increases in
11 productivity, the technological progress, the infusion
12 of technology into a wide variety of sectors.

13 It also means -- and here I think Joe and I are
14 on the same page -- an increasing inapplicability of
15 the old-fashioned, beautiful model of competitive
16 equilibrium, which Chicago did not invent but respected
17 more than others, perhaps. So it's only a bad thing in
18 terms of if you still want to rely on your old
19 competitive equilibrium theory when it comes to policy.

20 Joe, are you still -- are you here? Yeah, hi,
21 Joe. The lights are blinding. Joe, this means that
22 the law of one price is dead. You know that. You
23 probably taught that to me. It means we can't expect
24 marginal cost pricing, and it's not even a desideratum
25 any more because you can't cover the fixed cost that

1 underlies scale economies if we hold ourselves to
2 marginal cost pricing.

3 We know, as a matter of economic theory, that
4 in the presence of important economies of scale,
5 nonconvexities in the economy, which arise from scale
6 economies and also from information problems, as Joe
7 has taught the rest of us, means that we need price
8 discrimination or at least differential pricing. We
9 need nonlinear pricing. We need some of the very kinds
10 of business practices that at least some of us, in too
11 easy discourse, we think should be desiderata for
12 competition pricing, but now complex pricing is an
13 absolute necessity to undergird industries that rely on
14 innovation, that rely on all kinds of fixed costs. And
15 these are good things, not bad things, but we have to
16 recognize the role that complex pricing plays in the
17 modern economy that we have. So more on that later.

18 Second, Joe says changes in economics as a
19 field have not been fully reflected in antitrust, and
20 in a way I agree and in a way I don't agree. I mean,
21 it's amazing how our field -- you say IO is a dead
22 field, but, of course, new, great ideas are coming out
23 all the time, and, of course, there's a small lag
24 between the ideas and them being testing academically
25 and their influences on policy, although it was just,

1 what, one year ago that the idea of merger analysis
2 through bargaining theory hit the American Economic
3 Review, and here's the Department of Justice fully
4 embracing it in the AT&T-Time Warner case?

5 I mean, talk about fast adoption of new ideas,
6 to the credit I think of the Department of Justice for
7 picking up on that idea. By the way, also
8 congratulations to the judge for fully understanding
9 the theory and then doing his own weighing of the
10 evidence. So I think he did all that appropriately,
11 because the process was good. I don't know about the
12 conclusion, but the process was surely good.

13 In the 1990 Guidelines, Joe, information as the
14 perspective totally underlies the 1990 -- a long time
15 ago -- perspective on coordinated effects, all that
16 information, in part thanks to the prior work of Joe
17 Stiglitz and others, so policy staying abreast of new
18 economics.

19 Unilateral effects in the Guidelines? That's
20 certainly 2010 as well. They started game theory on
21 the basis of Nash equilibrium and how that would be
22 disturbed/altered because of merger effects. Relevant
23 markets in the old Guidelines based on price
24 discrimination, this is not new to antitrust policy.
25 Antitrust policy tends to keep up with economics as far

1 as I can see it. So I'm disputing Joe's point of view
2 on that.

3 Many more modules, but one more. Joe said --
4 and I'm quoting -- that "anticompetitive practices
5 should be presumed illegal unless there's strong
6 cognizable efficiencies" -- he didn't use the word
7 "cognizable," but we know what he meant, "cognizable"
8 is important -- but how does Joe think that he knows or
9 administrative processes know what is anticompetitive
10 without a holistic analysis of the effects of the
11 conduct?

12 This will be a theme that we'll come back to,
13 but it seems to me that the Supreme Court in AmEx, for
14 example, got right that there's lots of situations
15 where the assessment of anticompetitiveness has to be
16 holistic. Call it a two-sided or an n-sided market, I
17 don't know, but this is not a fresh thought.

18 We have been doing this for a long time with
19 the approval of the community when it comes to RPM,
20 when it comes to exclusive territories, when it comes
21 to Kodak concerns about the after-market, holistic
22 effects, and if you read the Court in sort of a
23 pleasant mood, that's what they're urging when it comes
24 to two-sided markets as well. So I will leave it at
25 that for now, but thanks.

1 MR. ABBOTT: Okay. Thanks very much.

2 You've heard the responses to questions from
3 the first panel. I'd like to briefly touch again on
4 the consumer welfare standard, which has been discussed
5 in various matters. Does it make sense to talk about
6 the consumer welfare standard as a dominant guiding
7 lodestar for U.S. antitrust? Anybody have any
8 additional things to add to what's already been said?

9 Mike?

10 MR. KADES: I guess I will sort of in some
11 sense maybe question the premise, which is sometimes I
12 think this debate over the consumer welfare standard
13 obscures larger issues, and part of that's because the
14 more I hear it talked about, the less I know what it
15 means. Are we talking about the way Judge Bork said it
16 or the way Judge Posner, the way Professor Hovenkamp?
17 And this matters, and so then people are talking at
18 cross-winds.

19 Are we talking about how the consumer welfare
20 standard in theory is used or how it applies in
21 practice in cases? Those are two very different
22 questions. And so I kind of go back to the way I -- so
23 I think a better question is where I started, which is
24 how do we decide whether or not the antitrust laws are
25 affecting competition? Because one thing, I think the

1 antitrust laws, when properly defined and interpreted,
2 they're good at stopping the unjustified accumulation
3 or abuse of monopoly power.

4 I think that question is focused and can be
5 answered, and I think the evidence weighs heavily that
6 the answer is no. But I do want to end with one part
7 about the consumer welfare standard. Also, I think it
8 also leads to confusion. So there's a big debate right
9 now, if you have a merger, for example, that creates
10 monopsony power and lowers wages, is that covered by
11 the consumer welfare standard? And people, like, argue
12 over this.

13 I think the answer should be absolutely.
14 You're creating market power and reducing competition
15 and creating dead weight loss. I don't understand how
16 that is not encompassed by the antitrust laws, but the
17 very fact that we have spent 40 years talking about the
18 consumer welfare standard means for a long time people
19 like me -- maybe I'm a group of one -- that's what we
20 just sort of thought about consumers.

21 So back in 2008 or 2009, Peter Carstensen came
22 into my office when I was an attorney advisor and he
23 tried to tell me about the problems about buyer power,
24 about labor monopsony, and you know what, he was right,
25 and I should have listened to him, and I didn't,

1 because I think the -- and I think it's important as
2 part of these proceedings, which is something
3 Commissioner Slaughter talked about, is an honest
4 self-assessment, particularly for of those of us in
5 government, of what we did right and what we did wrong.

6 And so I'll sort of just leave it there, but I
7 do sort of think that the consumer welfare standard, I
8 think that debate actually obfuscates the real issues
9 often more than it illuminates them.

10 MR. WILLIG: Alden?

11 MR. ABBOTT: Yes, Bobby.

12 MR. WILLIG: Yeah, thank you.

13 I'm a little confused about that phrase.

14 "Consumer welfare" is a good pair of words, and to me
15 if it means neglecting monopsony issues and worker
16 welfare in labor markets, then it's a misnomer, because
17 it's the wrong term then.

18 In I think both sets of Guidelines, 1990, 2010,
19 there is a small paragraph that says all of the
20 analysis in these Guidelines, which is written as if
21 it's about the product market side, should be applied
22 as well to the buyer side when it comes to monopsony
23 power. So at least in the Guidelines, there's the
24 right respect shown for worrying about mergers' effects
25 on buy-side markets, and I would like to see the phrase

1 "consumer welfare" be extended to the other side of the
2 market with the same full force. And if it doesn't do
3 that, then I agree with those who think there's a
4 failure of embracing the consumer welfare standard too
5 narrowly.

6 On the other hand, if consumer welfare and
7 worker welfare mean let's not pay attention to the
8 accretion of more jobs as a good thing because the
9 economy needs more jobs, well, then, I applaud holding
10 us to a consumer welfare and worker welfare standard,
11 because I think that is a misuse of antitrust, a misuse
12 of economic policy.

13 If it means let's not pay attention to
14 political influence in doing merger analysis, I applaud
15 that as well. Let's stick to the welfare standard.

16 If it means worrying about inequality, well,
17 more about that later, but monopsony definitely is an
18 appropriate challenge to equality because the
19 inequality that results from monopsony power is the bad
20 kind of inequality, holding people down instead of the
21 good side applauding it when people enrich themselves
22 by providing better products and better productivity.
23 So I'm confused about the term, but those are my
24 feelings about it.

25 MR. ABBOTT: So an interesting observation, and

1 I have heard it from others as well. I think the term,
2 "consumer welfare standard" may mean different things
3 to different people and perhaps, therefore, is not
4 terribly helpful to debate.

5 Does anybody have any final thoughts on that?

6 MR. KOVACIC: Alden?

7 MR. ABBOTT: Yes, Bill.

8 MR. KOVACIC: I think if you took from Bobby's
9 comment, you would have a good set of specifications
10 that I think clarify what a very useful definition of
11 the term would mean, and your emphasis, Bobby, on how
12 concerns about monopsony have, indeed, featured in
13 earlier policy guidance, they are there, along with the
14 cautions about what a notion of worker welfare might
15 mean if you included it to protect and freeze in place
16 all employment possibilities that exist now and shield
17 them from changes that might take place in the face of
18 a merger.

19 As you know, one discussion today about taking
20 on worker welfare and employment effects suggests that
21 that should be, front and center, a consideration in a
22 whole range of cases. I mean, here's an argument
23 that's made in a common cartel case.

24 Small -- relatively small businesses, they get
25 together to rotate bids or to set output levels, and a

1 defense that they would raise would be we are trying to
2 make sure that all of our small businesses can stay in
3 business and that there is a relatively even flow of
4 work across the span of the sector. And who are we
5 doing it for? We are doing it for our workers.

6 At this point, in a DOJ criminal case, that
7 defense would be stricken as irrelevant, and the
8 Supreme Court has said a number of times that we don't
9 take that into account. If you took on that argument,
10 you'd fundamentally change the examination of cartel
11 cases. You would change the prohibition on cartels to
12 take into account defenses based, for example, on
13 employment effects or other effects as well.

14 I'd add to Bobby's list, you know, again, an
15 emphasis of what's dropped out of sight, and that is
16 the larger concern about SMEs as an end in itself and
17 the way, since the 1970s, the Supreme Court has
18 abandoned the language of egalitarian antitrust, as
19 expressed perhaps best in Alcoa.

20 Imagine how the American Express case might
21 have been litigated differently. Dennis puts in his
22 testimony. His colleagues advance all of the
23 efficiency arguments related to the transaction. And
24 the Department stands up and says, "Judge Leon, I want
25 you to read the last page of the Brown Shoe merger

1 decision from 1962, here it is, where the Court
2 acknowledges that there can be real benefits
3 economically from vertical integration and vertical
4 mergers.

5 And the Court says, "We acknowledge those,"
6 then comes to the famous phrase, "but we cannot
7 overlook the clear intent that Congress had in 1950 to
8 preserve a more egalitarian business environment and,
9 at the cost of some efficiencies, to disregard the
10 benefits that we've just described."

11 The Department might have stood up and said,
12 "Your Honor, we want all of the efficiency arguments
13 stricken. Brown Shoe is still binding."

14 The Supreme Court has never repudiated this in
15 a merger case. Maybe its point of view has been
16 questioned.

17 But if the Department wanted to go all in to
18 prevail in the case, they might have said, "We bring
19 you back to what the Supreme Court had to say about
20 efficiencies as a defense and about the preservation of
21 other values. All of this discussion about
22 efficiencies is beside the point."

23 And as a matter of jurisprudence, that wouldn't
24 have been a crazy argument to make. It would have
25 repudiated a lot of government policy-making since, but

1 the bare terms of the text are right there.

2 And the DOJ could have said, "I just want to
3 remind you, in the hierarchy of authority in the United
4 States, the Supreme Court is at the top of the pyramid.
5 You, Mr. USDJ, you're at the bottom. You're obliged to
6 follow them."

7 Would Brown Shoe have knocked out all of that
8 evidence? That view of the aims of the antitrust laws
9 has changed dramatically.

10 MS. MOSS: Alden, can I just add one comment on
11 the consumer welfare standard? The reason we were up
12 here talking about consumer welfare -- and the
13 community has been entrenched in discussing consumer
14 welfare for the last two or three years -- is because
15 there were some very public statements made early on
16 that consumer welfare only goes to price effects.
17 That's just wrong. It's wrong. It's a misinterpretation
18 or misunderstanding of what the standard does.

19 The standard is actually quite flexible and
20 appropriate in many cases. It goes to price effects,
21 nonprice effects, quality, variety. It could go to
22 choice. It could go to innovation. It can be applied
23 at any market, anywhere in the supply chain; an output
24 market, an input market, a labor market. It can
25 address a great deal of scope along the supply chain

1 and depth within markets in terms of price and nonprice
2 dimensions of competition.

3 The problem is this, that the consumer welfare
4 standard has been interpreted in a cramped way in many
5 cases, and it has also been interpreted in a very
6 static way, which goes to my earlier point about the
7 need to consider more dynamic effects, using a consumer
8 welfare standard, and looking at the effects of
9 successive mergers in creating concentration and
10 harming consumers over a longer period of time. And
11 there are a lot of other examples that go to the
12 dynamic use of the standard as opposed to the static
13 use.

14 MR. ABBOTT: Thanks for that.

15 Let's jump forward to the issue of
16 presumptions. On the last panel we talked a little bit
17 about this issue of structured presumptions, the limits
18 of antitrust, and structured rules. We have on the
19 panel today someone who has long experience as a
20 practitioner and as an enforcer at the FTC. Perhaps,
21 Debbie Feinstein, do you have any thoughts on
22 presumptions?

23 MS. FEINSTEIN: Sure, and I think it covers
24 some of the issues that we have been talking about.
25 You know, is there a presumption that vertical

1 transactions are procompetitive? You know, in the
2 sense that there's certainly a recognition that there
3 can be efficiencies from them, it's something that
4 people look at, but when we come to any particular
5 vertical transaction, when I was at the agency, there
6 wasn't a presumption that it was procompetitive and we
7 had to overcome that presumption in order to bring a
8 case.

9 It was, look, lots of vertical transactions are
10 unproblematic. That's fine. We're not looking at lots
11 of them. We're looking at the one before us, and we
12 are going to look very hard at whether or not this is
13 actually procompetitive.

14 You know, Diana said, you know, should there be
15 a rule that we require parties to prove up their
16 efficiencies? There is a rule that we require parties
17 to prove up their efficiencies. The agencies are --
18 you know, look very, very hard at that issue, and when
19 you look at how the courts have treated it, the courts
20 have totally bought into the notion that efficiencies
21 better be real in merger cases, and they better be
22 passed on, so that the notion that we're somehow
23 missing that just sort of puzzles me.

24 MS. MOSS: Hey, Debbie, can I just interrupt
25 for a sec? I want to clarify that.

1 When I say "prove up efficiencies," I don't
2 mean in the merger investigation context. I mean when
3 the companies consummate their deal, then make them
4 prove up their claimed efficiencies, that they actually
5 materialized in their business practices. That was
6 what I meant.

7 MS. FEINSTEIN: Yeah, and that's something that
8 we do by looking at, you know, the next transaction. I
9 mean, that's -- you know, another point to be made is I
10 am all for merger retrospectives. The agencies do many
11 merger retrospectives all the time just in the course
12 of their business, of their work.

13 So I can think of an example of a particularly
14 controversial case that occurred before I got there --
15 I am not going to say which one -- but there was a lot
16 of consternation about whether or not the merger should
17 have been challenged, and there were a mix of opinions
18 on it.

19 Fast forward to the time I got to the agency,
20 and the same industry was before us, and we were very
21 prepared to hear that we had gotten it wrong last time,
22 and we're talking about, okay, if we hear that we've
23 gotten it wrong last time, what are we going to do
24 about it? Are we, you know, going to go back and
25 challenge that? What are we going to do not only about

1 the case before us, but the case that we had?

2 And what we heard is customer after customer
3 saying, you know, "We told you we thought that it was
4 going to be good for us. It's been better for us than
5 we thought it was going to be. It shocked us. We
6 didn't expect that." And they said, "And we can show
7 you. Let us show you what our contracts and our terms
8 looked like beforehand and what they look like now."
9 And we learned that, okay, we had gotten it right. At
10 a time when I wasn't there, they had gotten it right
11 beforehand.

12 So the notion that the agency isn't reflective
13 or isn't able to figure out whether or not efficiencies
14 are occurring, whether or not past transactions are a
15 problem, doesn't mean that they get it right every
16 time, but it does go to this notion of is there this
17 constant learning.

18 Finally, one other point just to weigh in on
19 the consumer welfare standard and the worker welfare
20 standard, and that's -- you know, worker welfare is one
21 issue that arises out of monopsony, but there are lots
22 of others that are counter to at least short-term
23 consumer welfare, right, because there are lots of
24 monopsony problems where it's a wealth transfer. It
25 doesn't affect the output, and, you know, to block

1 something like that might lead to not having a passdown
2 of prices that would go to consumers.

3 Is that a problem/is that not a problem is an
4 issue worth discussing, but the notion that monopsony
5 is only about worker effects on monopsony isn't right,
6 and you have to think about all of monopsony if you're
7 going to incorporate all of that into the consumer
8 welfare standard.

9 MR. ABBOTT: Bill, any thoughts on
10 presumptions?

11 MR. KOVACIC: I echo Debbie's observations
12 about how actively, over time, I see the agencies
13 working to shape those in the right way. I go back to
14 Bobby's observation about Merger Guidelines. In many
15 ways Merger Guidelines have been a soft law device to
16 change presumptions, and you see the dramatic change
17 over time in the way in which those have been cast.

18 In their own way, in 1982, then again in 1992,
19 2010, each a major adjustment in the way in which
20 things were formulated, and that reflects to me a
21 constant effort to upgrade the existing product by
22 taking on new theories, new learning, but to provide a
23 very manageable framework in which it can be applied.
24 And I'd say the broad adoption and emulation of those
25 documents over time is a testament globally to how well

1 the agencies have done that.

2 I can think of other areas in which the same
3 kind of reflection and adjustment has taken place.
4 California Dental put a big hole in the framework of
5 the rule of reason. That was a serious setback. What
6 was the institutional response at the FTC? To reclaim
7 that ground. How? By choosing cases and thinking
8 about cases as vehicles for moving the boundaries that
9 had been set.

10 The first vehicle was Polygram, a second
11 parallel vehicle was Schering, the third vehicle was
12 RealComp. When you take the amalgam of those over
13 time, you have a formula for -- call it the quick look,
14 call it inherently suspect -- you have a way for
15 ordering the examination of evidence and data that
16 allows you to sort out behavior that arguably has
17 detrimental effects and condemn it without looking at
18 the universe and all it contains. So I think the
19 agencies have been attuned to doing that.

20 I would underscore, though, that it doesn't
21 happen simply by accident, and if there are areas in
22 which you want to move the boundaries, the stakes of
23 the law to take account of existing doctrine or to
24 incorporate new thoughts, that has to be a program of
25 conscious effort where you sit down and ask, "Where

1 would we like to move the fence? How do we do it?"
2 That should be a common conversation between at least
3 the Department and the Commission, to decide what those
4 boundaries are, and to think about choosing cases that
5 enable you to do it.

6 In short, it has to be a conscious process of
7 evolution and change, very conscious in guidelines,
8 very conscious in a number of routine merger decisions,
9 certainly conscious in the case of Polygram, Schering,
10 and RealComp. It doesn't happen by accident, and it
11 starts by thinking about where you think you have to
12 make adjustments and looking for the specific instances
13 in which you can do that.

14 MR. ABBOTT: Mike, do you have anything to add
15 on presumptions?

16 MR. KADES: So I think it's important to sort
17 of distinguish agency practice and where the law is.
18 So I entirely agree with both what Bill and Debbie are
19 saying, and I think Dennis said it last time, about the
20 importance of the agency pushing back on rules and
21 doing studies, trying to develop the right rules.

22 At the same time, it's important to acknowledge
23 the three cases Bill just mentioned were three cases
24 that should have been easy to decide. There wasn't a
25 real efficiency defense. In Schering, there was not a

1 market power defense. There was not -- and yet, let's
2 take Schering -- and as a disclosure, I worked on
3 Schering, and --

4 MR. ABBOTT: You worked on Schering.

5 MR. KADES: -- and lots of pay-for-delay cases,
6 right?

7 When the Commission lost that at the Court of
8 Appeals, it set off eight years where the predominant
9 legal rule was that a patent holder in a pharmaceutical
10 case can basically pay as much money as it wants to its
11 generic competitor as long as they agree to stay off no
12 longer than the patent expires. For eight years, the
13 Commission had to spend massive resources to convince
14 the judiciary that that should not be per se legal.

15 In that time period, there were hundreds of
16 those settlements. Conservatively, the cost of those
17 settlements probably were in the range of 30 to 50
18 billion dollars to consumers. Finally, in 2013, when
19 it got before Justice Breyer, he was, like, "I don't
20 understand. How is this so complicated?" And he
21 writes a decision that says, "No, the rule of reason
22 applies." What's happened since then?

23 There were all these concerns beforehand that
24 if you had a too stringent rule, settlements would go
25 away, generic companies would be afraid to even

1 challenge patents, and brand companies would stop doing
2 R&D. This is all of the sort of standard Frank
3 Easterbrook, we are concerned about overenforcement,
4 not about underenforcement.

5 And what did we see post-Actavis? The number
6 of patent settlements in the two years afterwards,
7 records both years. The number of Paragraph IV filings
8 has -- generics challenging patents has continued to go
9 up. And this one I have not researched thoroughly, but
10 I'm pretty confident no branded company has made a
11 public statement to its investors that we have reduced
12 R&D because the Supreme Court in Actavis took away our
13 right to pay off our potential competitors.

14 So the very -- so the reason we had a ten-year
15 battle with massive harm because we underestimated how
16 bad the false-negative would be, how bad
17 underenforcement would be, and overestimated how bad
18 overenforcement would be, and that's where I see the
19 problem with antitrust law today, that the courts
20 systematically make that decision wrong, and, yes, the
21 agency does a great job pushing back, but that is
22 expensive, and those are resources, once used, can't be
23 used anywhere else.

24 MR. ABBOTT: Okay, very interesting.

25 Let's move on to the question of rules,

1 competition rules, which as we mentioned in the first
2 panel has been raised by Commissioner Chopra. One
3 interesting issue somebody from the audience raised is
4 this issue of so-called Chevron deference, judicial
5 deference to agency interpretations of statutory
6 ambiguities, which may be on the way out.

7 I don't know whether or how important that
8 really is to the question, but does -- do our panelists
9 have any thoughts on competition rules? And let's
10 start with Diana.

11 MS. MOSS: Thanks, Alden.

12 So I think the jury's a little bit out on the
13 advisability or the attractability of using
14 rulemakings, FTC rulemakings to advance or codify rules
15 that would bear directly on various competitive issues.
16 I think one question is how could they even be done at
17 the FTC level.

18 I'm a former federal regulator and probably
19 went through three or four or five major rulemakings at
20 the FERC in a really short period of time. They are
21 massive efforts, and then the industry needs a lot of
22 guidance on how those rulemakings should be
23 interpreted, what's guidance, what's not guidance, and
24 it creates an administerability problem, as Bill
25 Kovacic likes to say.

1 I think there are other ways -- and I am going
2 to agree with Dennis Carlton here -- on how the
3 agencies can help shape and guide enforcement and
4 provide transparency and input to the community, and
5 that would be to use, to the full extent of their
6 ability and their authority, to conduct market studies,
7 the FTC certainly can do stuff like that; to do merger
8 retrospectives where they study not only merger
9 outcomes but also the effects of remedies and the
10 effectiveness of remedies. The FTC already does that.
11 They have now done two studies on their divestiture
12 remedies. This is really important information that
13 we're now in a position to really cull and consider
14 when it comes to looking at the effectiveness of
15 antitrust enforcement, particularly in merger
16 enforcement, looking back.

17 I also think, as a more dramatic proposal,
18 whether -- and I like Bill's idea, I am going to agree
19 with Bill Kovacic now -- that having the ability to do
20 market analysis and an agency to take actions to
21 address market distortions that arise from
22 anticompetitive conduct, where there are systematic
23 problems or systemic problems, that is worth
24 considering, absolutely worth considering. And as Bill
25 pointed out, there are a number of other jurisdictions

1 who have this authority and who have significant
2 authority under those regimes to actually affect how
3 markets are structured and how conduct in those markets
4 occurred.

5 So, you know, one thing the FTC might want to
6 do is put out an NOI or a query on what people think
7 about doing rulemakings. I think there would be really
8 important input from the antitrust community on the
9 pros and the cons, but more importantly the
10 effectiveness of rulemakings and how rulemakings would
11 factor into the enforcement process.

12 MR. ABBOTT: Bill Kovacic, as a law professor,
13 how do you think an appeals court might react to some
14 rule interpreting unfair methods of competition and
15 applying it to a particular practice?

16 MR. KOVACIC: I think in practice Chevron
17 deference is a mirage. I think that you get the
18 deference you earn and that if you plan on tipping the
19 court by walking in simply by saying, "We enjoy what
20 the Europeans would call the margin of discretion,"
21 you're delusional. My view is that courts defer when
22 they are persuaded that deferring is a good idea. So I
23 would never bet a program on enjoying that element
24 of -- that benefit of the doubt.

25 How do you get them to agree? I think two

1 ways. One is you do have to marshal evidence to
2 support whatever your initiative is, be it a rule if
3 you do that, and the FTC has defended countless rules
4 before the courts on the consumer protection side, or
5 you have to create a brand that is convincing to them.

6 I am convinced that agencies have reputations.
7 They do have brands. In part, what they are doing when
8 they go in is saying, "On matters of doubt or
9 uncertainty, we are the experts, and the expertise is
10 not imaginary or hypothetical, it is genuine." And how
11 do you build that brand and that image so that when you
12 walk into the courtroom, there's a halo above your head
13 before you say a word?

14 It's doing all of the other things and using
15 all of the other policy tools we've been talking about.
16 It's doing empirical work, so you put it before the
17 court and say, much more than you, we have looked at
18 this. We have done the kind of work that Michael and
19 his colleagues helped do on generics that helped turn
20 the tide a bit, by gathering information and publishing
21 data on what was happening with individual settlements.

22 You hold and convene events like this, where
23 you ask the larger world, educate us about what's going
24 on. You reflect on it. You publish articles, papers.
25 You give speeches. I think every time the agency -- a

1 member of the board goes to speak or a bureau director,
2 you have to realize that you are either elevating or
3 depressing the stock of the agency. Everything you do
4 shapes the impression, especially in this city with the
5 court that we appear before here, they form impressions
6 of the agency on bases that go well beyond the
7 appearance in specific cases.

8 So if you build that brand and that reputation
9 and you support the individual initiatives that you're
10 working on with significant evidence, I think you can
11 persuade even a significant group of intervention
12 skeptics, of regulatory skeptics, that you do, indeed,
13 have the benefit of the doubt.

14 But, again, that is not an accidental or
15 spontaneous process. That requires a conscious
16 commitment by the institution to pick the matter, be it
17 a rule or a case, that you think is a good vehicle to
18 proceed with, to think, have we built the surrounding,
19 supporting evidence to gain support, and are we doing
20 things day-in and day-out that raise the brand and
21 create a reputation for capacity and knowledge?

22 I think in a lot of ways, my experience here at
23 the FTC, the FTC has done that, but I think to go ahead
24 and take on more difficult challenges, if you wanted to
25 set presumptions with respect to when a dominant

1 enterprise can buy a promising new startup, and you
2 want to go beyond looking at the records and files of
3 the company, if you want to create such a presumption,
4 there the court's going to say, "You have the power to
5 do it. What's your evidence?" And what evidence will
6 we put on the table to do that? And that will be the
7 big challenge.

8 And you might want to start with a smaller
9 prototype matter rather than the rule that changes the
10 universe and everything it contains to show that you
11 can do it, because the FTC, arguably, has never done
12 it.

13 MR. ABBOTT: Anybody have anything to add on
14 rulemaking?

15 MS. FEINSTEIN: Yeah, I just think what Bill is
16 saying is the cart/horse issue, right? The Commission
17 could have done a rulemaking on reverse patent
18 settlements. I know there was discussion within the
19 building on doing it -- not when I was there but
20 because people in the building asked me what I
21 thought -- and you have to pick the right time to do
22 it. You have to have had enough experience, enough
23 empirical studies, and enough examples where you
24 studied them, but not so many that you have already
25 gone to the Supreme Court and you're basically in a

1 situation where you're overturning the Supreme Court
2 decision by rulemaking, because I don't think that
3 would be well received.

4 So it's intriguing in principle how you would
5 ever actually do it, because you have to have looked at
6 a number of cases, and you have either brought those
7 cases and won them, in which case why do you need a
8 rulemaking because you're obviously having good
9 success, or you have lost those cases, and if you're
10 losing the case on the facts, how are you going to
11 convince the court on the facts that they ought to
12 abide by your rulemaking? So I just see a practical
13 issue that it's hard for me to figure how you overcome
14 it.

15 MR. WILLIG: I would like to vote in favor of
16 not rulemakings now but more guidelines in the areas of
17 conduct, exclusionary conduct, two-sided markets,
18 n-sided markets, Section 2/Section 5 conduct generally.
19 I think the economic profession is ready to contribute
20 to that. I think the IO field is ready because we have
21 a plethora of interesting theories, and we have gone
22 partway toward looking for empirical evidence, signs
23 that an exercise of intervention is needed or is not
24 needed, and it's a tough job, but it's the job that I
25 think we might all be ready to do.

1 It's necessary for business guidance. It's a
2 good idea for staff guidance. It's a good idea to
3 elevate the credibility of the agencies in this very
4 murky area. And I think it is a murky area still.

5 MR. KOVACIC: Well, I would say amen to that.
6 That is, if you look at the tremendous soft law
7 influence that Merger Guidelines have had, I think you
8 can replicate that in other areas. It happened with
9 the 1995 DOJ/FTC Intellectual Property Guidelines.

10 MR. WILLIG: Absolutely.

11 MR. KOVACIC: There's an obvious feedback
12 effect into the courts. Again, even courts that are
13 skeptics about intervention but are faced with hard
14 problems are interested in proposed solutions. They
15 have no obligation, of course, to take on the solutions
16 suggested or the framework suggested in the guidelines,
17 but you can look at a number of significant areas where
18 that would be useful.

19 The agencies tried it with competitor
20 coordination, made some progress, but there was some
21 sensitivity about saying too much about matters that
22 were in the courts, so they hesitated. But you could
23 imagine a number of areas where I think guidelines as a
24 form of soft rulemaking can have tremendous effect, and
25 to sit down and decide, where could we make the most

1 impact in doing it?

2 MR. WILLIG: And intra-agency cooperation, as
3 you were speaking for before, Bill.

4 MR. KADES: So I just wanted to echo a little
5 bit what both Bill and Debbie were saying. In some
6 sense the answer to your question is utilitarian. Is
7 there a rule out there that the FTC can do that is
8 better than the enforcement option? And I think it's
9 important to remember that in rulemaking, the FTC is
10 going to have a lot of discretion.

11 It's not just that they can ban things. They
12 can set burdens of proof. They can set presumptions.
13 Does that rule have the right evidentiary basis that
14 it's going to be persuasive? And here the FTC has the
15 ability to do a 6(b) study to enforce that, but are
16 there going to be risks? Yes. But as someone who, you
17 know, spent a long time litigating antitrust cases,
18 those have big risks, too, and maybe when -- you know,
19 and, therefore, it's not a good enough reason to sort
20 of abandon -- not consider a tool just because there
21 will be risks.

22 MR. KOVACIC: I will give you my example of a
23 missed opportunity to do this with respect to conduct,
24 and that was resale price maintenance. Leegin takes
25 place. Leegin says that there are instances in which

1 vertical restraints, resale price maintenance, could be
2 harmful. We started an initial effort internally to
3 say, can't the Federal Trade Commission elaborate this?
4 That is, might there be a place here to do some
5 guidelines? We have a set of hearings, a limited set
6 of hearings, and then the thought was, can we draft our
7 guidelines about how the Leegin screens and the Leegin
8 factors might be applied going ahead?

9 Sadly, disappointingly, that fell through the
10 cracks. That did not galvanize the interest of the
11 entire board to proceed with that, but if you thought
12 for a moment who might be good to provide that
13 elaboration, that ideally I think would have been the
14 Federal Trade Commission to do that.

15 And, thus, what have the two federal agencies
16 done in the field of resale price maintenance since
17 Leegin, which was a while ago? Chris Varney issued a
18 speech when she was at the Department of Justice in her
19 first year, and the FTC issued an order modification
20 approval in *Nine West*, an RPM case. Otherwise,
21 nothing. That's an area where the agency might have
22 gone ahead with guidelines, might have thought let's
23 bring the vertical restraints case to test what Leegin
24 should mean. Instead, there's been nothing there.

25 Now, I realize that RPM does not -- certainly

1 by the discussion that we have had today and perhaps
2 before -- does not seem to be the salient issue that's
3 firing the imagination of the larger competition
4 community, but it is stunning that since Leegin, that
5 has been the sum of the response of the two agencies.
6 That is an area where the FTC and DOJ could have said,
7 what do we think the high ground is for RPM? And where
8 might we go looking for cases?

9 MR. WILLIG: I have a slide deck that does
10 that. I'll send it to you.

11 MR. KOVACIC: Okay, okay.

12 MR. ABBOTT: Okay. I think, unless anyone has
13 something to add, the first panel we discussed AmEx
14 briefly. There did not seem to be any support for the
15 majority opinion in AmEx. Does anyone want to support
16 the majority opinion in AmEx?

17 MR. WILLIG: I do. My support for the decision
18 is a support for the idea of -- and I just came to this
19 word in preparing for this -- holistic analysis. So
20 we've got lots of different practices, vertical
21 practices, and I think the AmEx practice is broadly in
22 that category, and some element of that practice
23 appears superficially to be anticompetitive or
24 noncompetitive, like antisteering, that cuts off one
25 form of competition at the cash register. Think about

1 in RPM, that cuts off a certain form of competition.
2 Think about territorial exclusives, that those had
3 their day in terms of debate. They do eliminate some
4 forms of competition.

5 There's endless varieties of vertical
6 restraints that have some elements of curtailing
7 competition which also have well known positive effects
8 on the entire ability of that brand or of that offering
9 to be competitive in the broader marketplace, and we're
10 used to that in a lot of domains.

11 And reading the Supreme Court decision, I
12 wouldn't have written it quite that way, and our
13 guidelines wouldn't write it exactly that way, and I
14 wouldn't put quite so much emphasis on the two-sided
15 nature of the market, because I agree that that's an
16 easy slogan to throw around, but in my ideal
17 guidelines, I would say the thing that makes the
18 two-sided market something that must be taken into
19 account is that the good side and the bad side are
20 inextricably linked, and we talked about that in terms
21 of Merger Guidelines and efficiencies.

22 If it is the finding of the agency or of the
23 court that the good and the bad really have to go
24 together, and you can't have the good without the bad,
25 then the requisite analysis is holistic, and we

1 shouldn't be very quick to say, "Oh, I see a bad thing
2 about this," and then the burden shifts to the other
3 side to point out the good.

4 I think it's the agency's responsibility and
5 the court's responsibility to take a holistic view of
6 the practice, good and bad. And with a smile on my
7 face, I would say a pleasant interpretation of the AmEx
8 decision is a push in that direction.

9 MR. ABBOTT: So, Mike?

10 MR. KADES: I mean, I'm glad that sort of Bobby
11 spoke up here, because I think this is exactly what's
12 gone wrong with the antitrust laws. Let's be clear on
13 where the Supreme Court came down. They came down in
14 saying the Government failed to prove market power,
15 because they didn't do the entire analysis, including
16 showing an output effect.

17 My question is, when the Government had proved
18 all that, what would be left to the antitrust -- what
19 defense is left? If they proved both that prices went
20 up and output went down, what's left to that case? But
21 apparently the Supreme Court thinks there's still
22 something the defendants could raise.

23 Second, American Express, through its
24 nonsteering, restricted merchants accounting for 90
25 percent of all credit card transactions from engaging

1 in steering, and the Supreme Court, at the end of the
2 day, said we don't really think that's a market effect,
3 because that's what your market power determination is.

4 So we can argue about whether their steering
5 provision was good or bad. American Express didn't
6 want to argue about that, because they knew they were
7 going to lose. So they found a way to argue a failure
8 to prove monopoly power, and I think anyone who is not
9 deeply versed in complicated economics and an antitrust
10 technocrat would look at that decision and say, "That's
11 wrong."

12 This is not a case about whether American
13 Express was able to eliminate a form of competition
14 from the marketplace. Check, it did that. It's about
15 whether that type of restraint should be allowed or
16 not.

17 MS. MOSS: Can I just add to what Michael is
18 saying? And one observation from AmEx is that it
19 really, in the worst form, creates a new rule for when
20 to consider a two-sided market in an antitrust case,
21 and, I mean, this doesn't go -- this doesn't negate the
22 possibility that, in fact, we have two-sided markets in
23 many instances, but the opinion sets up an impossibly
24 vague test, which is, well, we'll consider two-sided
25 markets when the tipping effects are strong, and we'll

1 consider one-sided markets when the tipping effects are
2 weak.

3 Those are the kinds of rules that are almost
4 impossible for antitrust enforcers and courts to
5 investigate, to adjudicate, and to come to some sort of
6 consistent outcome, and that's what the courts are all
7 about, is creating some sort of consistent outcome.

8 So the economists, I think, are going to have
9 to do a lot of work figuring out, well, what's a strong
10 tipping effect and what's a weak tipping effect,
11 particularly in the context of creating the assumption
12 or the presumption that it should be defined as a
13 two-sided market versus a one-sided market.

14 This decision has not done antitrust any good,
15 any good whatsoever, other than acknowledging the fact
16 that in some industries we have two-sided markets, and
17 eventually antitrust will have to deal with that. But
18 given that vagueness and impossibility of applying that
19 rule, without creating a whole other set of debates, I
20 don't think the extendability or the portability of the
21 AmEx outcome to other two-sided market cases is going
22 to go very far.

23 MR. ABBOTT: Anyone else?

24 Okay, let's jump now to IP antitrust. We have
25 already heard a little bit on pay-for-delay, but there

1 are obviously other issues which were raised on the
2 first panel, the so-called standard essential patent
3 issues about refusals to license or alleged holdups,
4 but there are other issues as well, including mergers
5 and contracts in high technology markets, which may
6 involve intangible intellectual property.

7 Does anybody have any general comments as to
8 whether the state of antitrust law right now is dealing
9 more or less well or adequately with challenges of
10 intellectual property transactions, or are changes
11 needed? And if changes are needed, in what specific
12 areas?

13 What about Bobby?

14 MR. WILLIG: Thanks. So I have a peculiar
15 idea, and this is a great forum to air it. The whole
16 pay-for-delay area, which as we've all said is very
17 complicated and hasn't been handled very well by the
18 community, and if you read Actavis, talk about criteria
19 that don't really exist in terms of administerability.
20 Large payments, what the heck does that mean? The idea
21 that I have is that most of those cases start with
22 patent litigation, so there's a court that's involved
23 in resolving the patent issues. Then there's a
24 settlement of that case with lots of side effects.

25 Why shouldn't there be a public interest

1 standard for that settlement, that the court that's
2 adjudicating the patent litigation should have to look
3 at the settlement and decide whether that settlement is
4 in the public interest or not? And there could be open
5 hearings on that question, and the FTC could spend
6 whatever time it chooses to taking a position on that,
7 and the parties could take a position on that.

8 But why not adjudicate that in the same court
9 that was hearing the patent litigation? Because you
10 might think that that judge already has a sense about
11 the facts surrounding the dispute and the strength of
12 the patent and so forth. So I just wanted to throw
13 that out when we had FTC people around here.

14 On the SEP issues, I was really interested in
15 hearing Dennis on this this morning. He was saying he
16 would like to see more of those disputes settled at the
17 level of the SSO, the standard-setting organization,
18 and that's an appealing idea to me except that I know
19 that the SSOs are populated, when they're working well,
20 by all sides of the markets, users as well as producers
21 of the technology, and it's hard to see how the SSO
22 could wind up in the adjudicative role when it comes to
23 whether or not the SEP is performing up to the
24 standards.

25 But I would like to see the SSOs take a more

1 detailed look at what FRAND means to them in their
2 context and actually be pushed to lay out those
3 criteria in a more complete way. I have seen some SSOs
4 do that and others just say, oh, well, FRAND is the
5 solution, without having any idea what that means.

6 And I personally would like to see FRAND
7 standards take more recognition of the absence of the
8 applicability of sort of a commodity market, so the
9 idea of the way royalties and prices ought to work, and
10 to take more account of the idea that, look, this is
11 all about recovering or the prospect of recovering the
12 fixed cost of the R&D.

13 And so what we mean by discrimination or
14 nondiscrimination should take the need for differential
15 pricing into account, nonlinear pricing, in ways that
16 are more sophisticated and more attuned to the
17 economics of those kinds of markets, and I would like
18 to see the SSOs take that on before we get to the role
19 of the antitrust agencies, which should not be cut off,
20 but I'd like to see the SSOs take a stab at it first.

21 MR. ABBOTT: Mike, any reaction?

22 MR. KADES: I agree with everything Bobby said
23 on pay-for-delay. No.

24 First of all, I don't think I said and I don't
25 think people at the FTC think pay-for-delay is all that

1 complicated. In fact, when you come across any
2 anticompetitive activity, the modeling is very strong
3 that the incentives will always derive to
4 anticompetitive results.

5 So, two, I don't think people agree -- I don't
6 agree that Actavis is that hard to understand, and I
7 think the proof's in the pudding. Like I said, Actavis
8 occurred, the number of settlements went up
9 dramatically, but the number of potential pay-for-delay
10 settlements over the next few years dropped
11 dramatically. I think part of that is due to the
12 Supreme Court, and I think part of that is due to the
13 strong settlement the FTC got in the Cephalon case,
14 where we went back in, got disgorgement, and sent a
15 signal that engaging in this kind of activity is going
16 to be unprofitable.

17 I don't think it's the role of the FTC to have
18 to police every single patent settlement, and I would
19 like to just add on this point -- I mean, I have heard
20 a lot about the FTC should be doing lots of studies,
21 should be apparently judging every single patent
22 settlement in court. Are we planning to increase the
23 FTC's budget by 100-fold? I mean, right, part of the
24 issue is every time when someone says the FTC needs to
25 study an issue more, where are those resources coming

1 from?

2 And then finally, just on innovation, I just
3 want to add, one of the things I think that gets missed
4 in the innovation debate is that competition can drive
5 invasion, and so I think it's interesting right now --
6 maybe right now or today, at the Searle conference, the
7 big industrial organization conference at Northwestern,
8 one of the papers being discussed is a paper called
9 "Killer Acquisitions," a fascinating paper that seems
10 to suggest that pharmaceutical companies are
11 consistently buying potential competitors and shelving
12 innovation, and that suggests that maybe there's
13 another whole area of merger enforcement that we need
14 to be much more concerned about.

15 But I have to say, again, the court's -- that's
16 not the kind of theory I think the court's going to be
17 particularly attracted to, so we are probably going to
18 have to go through what Bill Kovacic says, spend a
19 decade studying it and spending lots of time, and maybe
20 by the time I retire, then somebody else can be
21 explaining how that battle was worthy but shouldn't
22 have taken so long.

23 MS. MOSS: Can I just add one more thing on
24 this issue?

25 I do a lot of work in agricultural

1 biotechnology, and what we're seeing in ag-biotech with
2 patented transgenic seed, crop seed, is a lot of what
3 we saw in pharma, with patenting second-generation
4 drugs -- or second-generation seed in this case --
5 making very minor modifications to the product,
6 repatenting it, and then forcing consumers, in the case
7 of seed farmers, on to the new product, the newly
8 patented product.

9 So whether you call it product hopping, hard
10 switches, soft switches, it's raising a really serious
11 background issue in patent -- in the patent system and
12 I think calls for a serious relook at how patents are
13 issued and potentially questions for patent reform.

14 But this is one area -- because of the very
15 important close intersection between IP and competition
16 law and how patents can be used to shape or control
17 competition to exclude rivals, particularly new
18 entrants, I am stunned in talking on conferences and
19 with people at how little the antitrust community is
20 conversant with patent law and, conversely, how
21 inconversant the patent community is about antitrust
22 law.

23 And so there needs to be some effort -- and I
24 think the FTC is a great venue for doing this -- of
25 bringing those two groups together, because it's part

1 of a multitool toolkit, where you have got antitrust
2 and you have patent law, IP law, and these folks need
3 to sit down and talk together about how policies made
4 on the patent side can potentially affect outcomes in
5 antitrust enforcement.

6 MR. KOVACIC: Alden?

7 MR. ABBOTT: Bill.

8 MR. KOVACIC: I would like to follow on Diana's
9 comment.

10 Fifteen years ago, the FTC had that
11 conversation. Fifteen years ago, the FTC devoted a
12 tremendous amount of effort, along with the Department
13 of Justice, to doing a basic examination of the
14 rights-granting process. It convened proceedings like
15 this starting late in 2001, early 2002, examined
16 testimony and presentations by a large number of
17 experts in the field, and the purpose of the
18 undertaking was to identify root causes.

19 There was a concern that competition law too
20 often, especially in the form of abuse of dominance
21 cases, monopolization cases, was following behind to
22 correct problems that basically originated in the
23 rights-granting process, and I recall Dennis' comment
24 about how the scrutiny and the quality of the
25 rights-granting process is essential to the proper

1 functioning of the IP regime.

2 The FTC, the Patent Office as well, and DOJ
3 collectively convened these proceedings. The FTC
4 ultimately ended up writing the report in 2003, called
5 "To Promote Innovation," and it recommended a host of
6 changes to the rights-granting process. A number of
7 them have been taken on. Others have shown up in
8 citations in Supreme Court decisions, which reflect a
9 modification and adjustment of the interpretation of
10 the existing patent laws.

11 This was a major investment in a couple of good
12 practices, looking at root causes, soliciting this
13 larger range of perspectives, and seeing how a tool
14 other than simply antitrust enforcement might be
15 applied. I hate to offer, especially with Michael's
16 caution, glib recommendations to the FTC about other
17 things you ought to be doing, but 15 years after this
18 study, it wouldn't be a bad time to come back on this
19 question and ask, are we happy with the way that things
20 have unfolded? A lot of that expertise already exists
21 in-house. It's present. It's available.

22 I would add, too, that I'm not sure in the
23 larger community that the FTC gets any credit for that.
24 That is, how does the community evaluate the
25 performance of the agencies? Well, how many cases did

1 you bring? How many cases? How many cases did you
2 win? How many cases did you bring?

3 This was an effort to achieve the kind of
4 longer, deeper policy results that could not be
5 achieved with a case but will never show up on the
6 scoresheet as a litigation event. This was an effort
7 to move the needle elsewhere.

8 I would suggest that the competition law
9 community is mainly captured by flashy objects called
10 big cases, and this kind of investment in research and
11 development and policy change is not widely respected,
12 but, arguably, this is where a major investment had to
13 be made. I think it was a great investment at the
14 time. It wouldn't be a bad time to come back on it 15
15 years later and ask, have things moved in the
16 rights-granting process in the way that one hoped that
17 they would?

18 And by the way, I think this is an example of
19 how the agencies are really interested in dynamic
20 innovation-related changes going back quite a while
21 ago. This was a recognition that innovation really
22 matters.

23 MR. ABBOTT: Let me jump forward quickly.
24 Another topic considered by the first panel -- did you
25 have anything to add, Debbie, or not? Okay.

1 So it was brought up privacy -- issues about
2 big data, privacy, data security, data protection,
3 which are being examined under consumer protection law.
4 There's more and more talk in some quarters about
5 applying antitrust law to these issues, particularly
6 involving big platforms. Does antitrust have a role,
7 and, if so, what road blocks, if any, exist to applying
8 antitrust fruitfully in these areas?

9 Who would like to start?

10 MR. WILLIG: I have a simple perspective on
11 this, too simple, I'm sure, but it seems to me it's
12 pretty obvious these days that data sets and
13 collections of information are important business
14 assets. They're special assets. They have consumer
15 protection issues surrounding them, which really ought
16 to be worked by the FTC and others, but in the
17 antitrust context, these are assets, and antitrust has
18 treatments of assets.

19 When we look at combinations, vertical or
20 horizontal, we worry about the use of assets and how
21 they could be used more anticompetitively because of a
22 business combination, and so those same concerns are
23 applicable when those assets are data and collections
24 of information. So I think we should use our regular
25 principles on the antitrust side and be ready to apply

1 them to those particular and peculiar assets.

2 MS. MOSS: Can I just back it up one step
3 behind what Professor Willig just said? And that is to
4 throw out the idea that we need to give some more
5 thought to what -- you know, what tool in the toolkit
6 is -- where does the privacy problem really reside?
7 What kind of problem is it? And then what are the
8 tools -- if it's a multitool problem, then we can --
9 then we can then think about how to deploy antitrust or
10 regulation or other tools to address it.

11 So if you think really from first principles,
12 privacy could be an economic -- it could be a market
13 failure, right? It could be asymmetric information,
14 for example. The platforms have way more information
15 on you through their data collection and processing
16 capabilities, using artificial intelligence, than does
17 the hapless consumer, right? If that's the case, then
18 that may be a call for economic regulation. I'm not
19 saying it is, but it's one frame in which to consider
20 the problem.

21 Another way to think about it is as a social
22 regulation problem, right? We just think of privacy as
23 a basic protection, like health and safety, and we want
24 to have basic protections in place to protect
25 consumers, okay? Once we exhaust all those

1 possibilities or frame out those possible theories,
2 then we get to antitrust.

3 Absolutely, data can be an asset; it can be a
4 strategic competitive asset. So we have to consider
5 data sets, but more important, it's the value added
6 through data processing capability I think is where the
7 real action will be, because data processing capability
8 is where the value add in the supply chain is, and
9 that's where the strategic -- that's where a lot of the
10 strategic value is going to be in assessing the
11 competitive effects around the consolidation of
12 horizontal data sets in a horizontal merger, for
13 example, or vertical combinations.

14 So I think we are going to have to step through
15 this bigger analysis of, well, what is the privacy
16 problem? It's likely to be a combination of a
17 regulatory issue but also an antitrust issue, but given
18 the framework we have in place, I think we have the
19 tools for antitrust to consider data to be an asset in
20 any type of combination or a conduct case, for example,
21 using data to exclude or frustrate rivals from access
22 to the market.

23 MR. ABBOTT: Debbie, do you have some thoughts?

24 MS. FEINSTEIN: Yeah, just a couple of things.

25 One, I'm not sure why privacy is a competition issue.

1 HIPAA isn't a competition statute. We know how to deal
2 with privacy issues quite well. We can do it through
3 consumer protection. We can do it through statutes.
4 I'm still puzzled. It could be a form of nonprice
5 competition on which two companies compete and which
6 could be lost. I haven't seen that case yet. Usually
7 the concern is one company is good on privacy, the
8 other company is bad on privacy, and the merger of
9 them, the bad on privacy one might take over. I still
10 don't see how that's a competition issue.

11 That's like saying a merger might defeat my
12 favorite flavor of ice cream, but unless there are
13 entry barriers to companies who do the same thing --
14 because we're assuming that there's not a competition
15 issue that we're dealing with, that it's just companies
16 who do two completely different things -- unless there
17 is some barrier to entry that I'm missing, I really
18 struggle to see why that's a competition issue.

19 On big data, I don't see the difference between
20 big data and little data in terms of most of the
21 competition issues. I can name you half a dozen cases
22 where data was the issue, whether it be a horizontal
23 case or a vertical case. The only thing that might be
24 new is we might now be worried about conglomerate
25 issues, where companies don't compete but they both

1 have big stores of data, and to the extent, as Dennis
2 said, that that might lead to an entry barrier in
3 something, but then it just seems to me we define the
4 market as the data, and the company's got a monopoly
5 over a certain kind of data.

6 So I just think the tools are there. We just
7 need to figure out where the cases are that actually
8 require us to take action, but I don't see as much new
9 under the sun as other people seem to. Maybe I'm
10 missing something.

11 MR. KOVACIC: Alden?

12 MR. ABBOTT: Yes, Bill.

13 MR. KOVACIC: I agree with Diana and Debbie,
14 that the FTC does have all the tools. It's the one
15 major authority that has the threefold mandate, the
16 privacy mandate, the consumer mandate, and the
17 competition mandate, and I think the challenge really
18 is, as Debbie was just saying, to think what's the
19 right tool. Diana was talking about this as well, to
20 pick the right one.

21 I want to underscore something that would be a
22 bad practice, and that's to use merger review to
23 leverage decisions that arguably should come through
24 separate privacy-related matters, and there are great
25 temptations to do that, because merger control gives

1 you leverage. You can't make them wait forever, but
2 they can wait for a while, and while they're there, you
3 can pull out a list and say, "By the way, while you're
4 here, I've got some other things I'd like to talk to
5 you about. And if you work these out with me, you go
6 through the line faster. If you don't, get back in
7 line with the others."

8 There can be a real temptation to do that.
9 There's a lot of pressure that has been supplied in
10 things like Google DoubleClick, Google AdMob. There
11 was enormous pressure from different advocacy groups to
12 use the merger review as the occasion to impose privacy
13 obligations that arguably would arise under a privacy
14 regime.

15 A real concern I would have about what's taking
16 place in a number of European jurisdictions is they are
17 using leverage to effectuate privacy-related matters.
18 That could change with the GDPR, which relaxes the need
19 to do that, because it puts a much more robust
20 enforcement mechanism in place, but to use the fines
21 associated with abuse of dominance to say, "I want you
22 to make changes or I'll land on you with this," and you
23 ask, "Well, where are the privacy regulators? What are
24 they doing here?"

25 I think that the great benefit for the

1 Commission is it has wonderful tools to work in this
2 space, including information-gathering and data
3 collection and analysis. The temptation to be resisted
4 is to not be absolutely clear about which tool is being
5 used and why, and not to use merger review, which
6 creates leverage, to extract concessions. If a private
7 firm used leverage like that, we would be very upset
8 about it.

9 MR. ABBOTT: Anything else?

10 Okay, very quickly, I think we have ten minutes
11 left, according to my watch, but I'd like to very, very
12 quickly touch on the vertical issue. I think we've
13 heard a bit about that.

14 Is there any support on the panel for a
15 Vertical Merger Guidelines or Vertical -- new Vertical
16 Restraints Guidelines, as was suggested earlier? Do
17 you think that would help the quality of antitrust
18 enforcement in that area?

19 MR. WILLIG: I'm all for it. Let's do it.

20 MR. KOVACIC: The Vertical Merger Guidelines
21 expiry date passed a long time ago, along with the
22 "best if used by" date. It is an important, valuable,
23 crucial moment to step forward and renovate those
24 guidelines, and I would do the same with -- I think a
25 previous speaker mentioned retail price maintenance. I

1 would do the same there, too. That was a really good
2 idea.

3 MS. MOSS: AAI is actually working on
4 developing model vertical guidelines to the extent we
5 can be helpful to the agencies and stimulate discussion
6 in the community. I would add that any discussion of
7 vertical guidelines, which is very appropriate in the
8 wake of AT&T-Time Warner, and we will see what happens
9 in CVS-Aetna, which in my view poses even more
10 serious -- it poses the serious vertical concerns.

11 But part of any discussion about vertical
12 guidelines I think should include a discussion of
13 vertical presumptions, much like we have the structural
14 presumption in horizontal mergers and actually more
15 recent support for the structural presumption in
16 denying -- where the agency is challenging large
17 mergers, SYSCO-U.S. Foods, Baker Hughes-Halliburton,
18 that was abandoned, the insurance mergers.

19 So the structural presumption is back. We will
20 see what happens in Sprint-T-Mobile, but on the
21 vertical side, part of the big question I think is the
22 importance of setting the landscape in explaining why a
23 vertical merger can be anticompetitive by looking at
24 upstream and downstream market concentration, depending
25 on the theory of harm.

1 So we are seeing extremely concentrated markets
2 in many of the markets in which vertical mergers are
3 occurring. I think it's high time for everyone to
4 start thinking not only about the guidelines, but about
5 what a structural presumption would look like in a
6 vertical context.

7 MR. ABBOTT: Okay. I want to quickly switch
8 gears just so we get one quick question in from the
9 audience to the whole panel. Do you have any doubt
10 that naked wage-fixing or nonpoaching agreements should
11 be per se illegal, even if it's clear that no harmful
12 effects will be passed on to end consumers?

13 MR. KADES: Before I answer it, can you just
14 reread it?

15 MR. ABBOTT: Do you have any doubts -- it's
16 about wage-fixing or no-poaching agreements, even if
17 there's no effect to -- to -- on consumer welfare.
18 Obviously there is an effect on the workers. Should
19 those agreements be per se illegal?

20 MR. KADES: I mean, I'll go first. Absolutely.

21 MS. FEINSTEIN: Yes, yes.

22 MR. KADES: I think the agencies have both
23 shown under the current administration a renewed --
24 should be applauded for looking at this issue and
25 pushing cases in this area.

1 MR. ABBOTT: Okay, very good.

2 MR. WILLIG: When we have a per se rule, we
3 need a characterization step first, right?

4 MR. KADES: Yes.

5 MR. WILLIG: I am always worried about the
6 in-house training. So my employer teaches me a lot
7 about the employer's own practices, I learned a lot
8 about the business, and then I want to go to a
9 competitor and use that same information against my
10 first employer.

11 And presumably that causes problems, and that
12 causes all kinds of restraints in my employment
13 contract, and so I'm a little bit worried about just an
14 offhanded approach that says you can't have an employer
15 who constrains the employment opportunities of their
16 employees without worrying about that kind of thing.
17 So maybe that's a characterization issue.

18 MR. KOVACIC: That would certainly be, my
19 presumption would be, an illegality, and with
20 characterization, BMI always gives the defendant an
21 opportunity to advance the plausible, cognizable
22 efficiency justification. So if, as these cases are
23 pursued, defendants have them and they come forward
24 with them, BMI will give them a chance to talk about
25 it.

1 MR. ABBOTT: Okay, very good.

2 In the last few minutes, let me give each
3 panelist an opportunity to make some comments, add
4 anything to his or her prior comments or make some
5 general observations.

6 Debbie?

7 MS. FEINSTEIN: So I would like to answer the
8 last question that was asked of the last panel, because
9 I think it's the most important one, which is where do
10 we go from here? What should we do?

11 I'd give the FTC clearer disgorgement
12 authority. It best makes new law when it has the
13 threat of a fine or monetary penalties, because
14 otherwise it's too easy for companies facing a
15 complaint to say, "All right, we don't want to go
16 through a lawsuit with the FTC, we give," and I've sat
17 in the room plenty of times where it's, like, "Dang, we
18 really want to keep litigating this because we want to
19 make the law on this issue clear." But when we've
20 gotten all the relief that we can possibly get, that's
21 a very hard thing to do.

22 If the threat of litigation were higher and,
23 therefore, either we could get more benefit by getting
24 disgorgement or parties would be more inclined to
25 settle, either one of those would have a better

1 deterrent effect, enable the Commission better to get
2 redress for consumers and/or force more cases into
3 court. That could have some effect, and I think it's
4 something worth thinking about.

5 The second thing is resources and resources and
6 resources, and I think -- and I can say this now, I
7 think the Bureau of Competition would have been
8 horrified if they heard me say this when I was the
9 director -- but when I was asked once, "Come up with a
10 plan if I gave you another \$2 million for the Bureau,"
11 I said most of it should go to the Bureau of Economics
12 and not to work on individual cases. Although it would
13 be great, the agency needs more economists, but to put
14 a group together that could do more empirical studies
15 using the 6(b) authority, because I thought it was, you
16 know, a very important thing to do.

17 MR. ABBOTT: Mike?

18 MR. KADES: So in preparing for this panel and
19 reading the comments, I keep thinking about this movie,
20 which is somewhat timely relevant, because it's about
21 World War I, which the 100th anniversary of its ending
22 will be in a couple months, called "Paths of Glory."

23 All right, so this movie takes place in two
24 places. You have this French infantry battalion on the
25 front lines, they have been there forever. They charge

1 up over the hill, they all die, and then they get
2 reinforcements and they do it again, and they're
3 fighting -- their whole life is about these five, six
4 square feet of no man's land.

5 At the end of the movie, Kirk Douglas -- so
6 it's a great movie, you should go see it -- he goes to
7 Paris to plead for his troops, and he gets to Paris,
8 and the French general's staff is having this huge
9 ball, just what -- you know, sort of classic Belle
10 Epoque, everyone's happy, everything's fine, and that
11 juxtaposition is something, I think, that I feel is
12 what's going on in antitrust law today, that people are
13 bringing up legitimate criticisms, and there's a
14 tendency to either say one of two things.

15 One, well, no, no, no, antitrust law actually
16 can deal with that problem; or two, we really need to
17 study it even more. I think that's a danger, and I
18 think if you look, yes, the Guidelines have talked
19 about mergers that harm workers' wages, but until 2010,
20 the agencies never looked at it. And that's not by way
21 of criticizing the agencies. That just means there is
22 learning to be had here.

23 In 2000, the agency -- Congress raised the
24 level of HSR. There's another really important paper
25 that's come out that's suggested that the effect of

1 that may have been to spur a bunch of anticompetitive
2 mergers just below the HSR guidelines.

3 And to Bill's point, I think it would have been
4 great if we had done something on RPM, but the problem
5 is we were doing hospitals, we were doing
6 pay-for-delay, we were doing IP. If we would make the
7 law less lenient towards business conduct, the FTC
8 would be able to do a better job on the more difficult
9 issues.

10 MR. KOVACIC: I would like to see the FTC
11 embrace, as it has in the past -- I find the -- there
12 seems to be some notion that there was a golden era of
13 antitrust, when it was all great and the concentration
14 was under control. That's a myth. When you look at
15 the criticism occurring from the very beginning, the
16 dominant focus of criticism has been it has been a
17 failure.

18 So we're not -- if we talk about how we're
19 doing now, the question is, compared to what? And
20 compared to what period was it a lot better? I think
21 there are a lot of terribly unrealistic assumptions
22 given the experience and the commentary about it that
23 you're going to have a wildly more robust program than
24 you have now, and it's going to be wildly more
25 successful than it is when you put the experience in

1 context.

2 That said, that's the realism. The ambition is
3 to take the tools that you have and do better, and
4 there are distinctive tools here. As Debbie said,
5 there are remedial refinements that could be useful.
6 There's a better way to take the capability to do good
7 research and analysis and bring it to bear on lots of
8 these difficult issues and advance the doctrinal
9 frontier.

10 There's the possibility of using the
11 administrative adjudication mechanism to do that, and
12 if that's not used robustly, the whole rationale for
13 having the Commission disappears, and then you can peel
14 apart the agency and parcel out the pieces to the
15 others so that -- the U.S. has a specialized trade
16 court. It's called the Federal Trade Commission, and
17 that, arguably, should be an important forum for making
18 the kinds of refinements that we're talking about here.

19 To do that effectively, my admin law suggestion
20 is you have to change the Sunshine Act. The Sunshine
21 Act disables the effectiveness of collaboration. I
22 don't see how administrative adjudication,
23 administrative decision-making, collective
24 decision-making can succeed if that stays in place.

25 And ultimately, you do have to go and get --

1 for dominant firm stuff, you have to get people like
2 Steve Breyer to change his mind. Barry Wright, joining
3 Trinko as he did. Ocean State, Town of Concord.
4 That's Harvard. Sorry.

5 MS. MOSS: So one take-away from this really
6 good discussion today I think is that -- or one
7 perspective -- is that, you know, the antitrust laws
8 are pretty adequate. They're flexible. They're
9 durable. They have been around for a long time.
10 They're not super-specific. They have given
11 significant latitude to adjust and morph over time or
12 consider different situations over time, and couple
13 that with the fact that the consumer welfare standard
14 if, and only if, it is interpreted to the full extent
15 of what the standard can capture in terms of price,
16 nonprice effects, so quality, innovation, choice,
17 variety, all these things, and it is interpreted in a
18 more dynamic context to avoid the pitfalls that we are
19 now suffering from from a very static view of or
20 measurement or conception of consumer welfare.

21 If you put all that into place and then take it
22 to the next major observation, which is the courts
23 haven't done a good job of enforcing the antitrust
24 laws, and so we've got okay laws, and we've got a good
25 standard, but the courts aren't enforcing the laws and

1 viewing the standard appropriately.

2 So we now have a sick patient. We have a sick
3 economy. We have sickness associated with declining
4 competition, as measured by any number of metrics, high
5 concentration, growing inequality gaps, lower rates of
6 market entry. So we don't have a healthy situation
7 here. Something clearly has gone wrong.

8 So whenever that happens, I don't think you
9 don't -- you don't keep feeding the patient the same
10 medications that have not brought the patient to
11 health, but instead you start considering other
12 options, other policy options, other types of reforms,
13 and in this case reforms can be reforms lite --
14 L-I-T-E -- not reforms heavy, not junking the laws, not
15 wholesale reforms, getting rid of the standard and
16 putting in a public interest standard, but reforms that
17 would be actually very effective.

18 And those reforms really cover the gamut on the
19 use of the agencies and the agencies' resources,
20 exploring Section 5, for example, unfair methods of
21 competition, looking at doing more robust studies,
22 merger retrospectives, and learning from those types of
23 studies, but also considering taking the extra step and
24 considering, are we ready to think about more
25 presumptions, different presumptions that can be

1 embedded in how we go about looking at these cases, but
2 also thinking about requirements.

3 Are we to the point where we should really be
4 mandating the fact that a merged firm, once it
5 consummates, should prove up its claimed efficiencies,
6 and say, "Hey, I actually got my efficiencies from my
7 merger." I think enforcers should see that. Enforcers
8 should also see the fact that cost savings were passed
9 on, actually passed on to consumers, as we've seen and
10 many judges opine in many merger cases.

11 So I think these are -- that's one way to view
12 the whole picture in terms of where we are now.
13 There's certainly lots of room for policy research and
14 for legal and economic and institutional
15 multidisciplinary research to move this along, but
16 clearly something has to change.

17 MR. ABBOTT: Okay.

18 Bobby?

19 MR. WILLIG: Yeah. Well, I am back on my theme
20 of it's time to get serious about guidelines, and the
21 reason I say that is in the past I think the economics
22 community, when faced with a serious challenge, has
23 more or less declined, in part because our toolkit of
24 theories of templates was much more limited than the
25 outpouring of feelings that people have about things

1 going wrong. We didn't really have models that could
2 stand up to those feelings of the stress about business
3 conduct.

4 I think that's changed. I think now we have a
5 very broad toolkit, maybe too broad, for templates for
6 how to think about the kinds of business practices that
7 trouble the community, and it's time to sit down and
8 shop through our library of theories and force
9 ourselves, with the agencies and with the lawyers, to
10 look for what the signs of evidence are appropriately
11 used to call a particular template about bad practices
12 into court, into interventional activity.

13 I don't think we've done that enough, but I
14 think pushing ourselves to write guidelines that say
15 this is the evidence that would make this theory be
16 real and apply to that set of facts, put that forward
17 will help to shape business conduct and also help to
18 shape the activities, intervention activities of the
19 agencies, and I think we're ready to do that now.

20 MR. ABBOTT: Great panel. Thank you, everyone,
21 and I'll close by saying that that's all, folks.

22 (Applause.)

23

24

25

1 PANEL 3: MONOPSONY & BUYER POWER

2 MR. ADKINSON: Good afternoon. Welcome to
3 the final panel of today, Monopsony and Bargaining
4 Power in Merger Enforcement. Immediately following
5 this panel, Commissioner Ohlhausen will be giving
6 closing remarks.

7 I am Bill Adkinson, an attorney advisor in
8 the Office of Policy Planning, and I am the moderator
9 for this panel. I plan to ask questions and not make
10 substantive comments, but to the extent that I say
11 anything, it does not reflect the views of any
12 Commissioner or the Commission.

13 We would encourage any interested party to
14 submit comments on this or any other issue that we are
15 having hearings on, and you can find information on how
16 to submit comments on the hearing website.

17 We hope to have time for questions. If you
18 have a question, please write it down on a card that is
19 provided by FTC staff and then pass it to FTC staff.

20 The bios for our distinguished panel are
21 provided in the announcement. I will simply identify
22 them briefly. We have Mary Coleman, Executive Vice
23 President, Compass Lexecon; Scott Hemphill, Professor,
24 New York University School of Law; Joseph Miller,
25 Partner, Crowell & Moring; Sandeep Vaheesan, Policy

1 Counsel, Open Markets Institute.

2 And to start us off, we have a short
3 presentation on the treatment of buyer power in merger
4 enforcement by Peter Carstensen, Professor of Law
5 Emeritus at the University of Wisconsin Law School.
6 Peter?

7 MR. CARSTENSEN: Thank you very much. It is
8 a great pleasure and an honor to be here to talk about
9 mergers as affecting buyer power. I would note that
10 unlike what would have happened in a discussion of this
11 sort 10, 12 years ago, Professor Stiglitz, at the
12 beginning of our discussions this morning, referenced
13 monopsony issues. They recurred. And Michael Kades,
14 my former student, finally confessed to error in not
15 listening more ten years ago when I first tried to talk
16 to him about buyer power.

17 And I think that is symptomatic that in the
18 last decade, we have seen an enormous increase in
19 recognition and awareness of these issues in health
20 care, in employment, in agriculture, and I would say in
21 input supply markets more generally, these issues are
22 coming to the fore.

23 At the same time, there is still a great deal
24 of what I would call ambivalence to be tactful about it
25 for the moment, an unusual stance on my part. But in

1 the *JBS-Swift/National Beef* merger, the DOJ focused, I
2 will say, on the buyer power issues, but they included
3 a sell side issue.

4 In the *Cigna/Anthem* case, they included a
5 major buyer side issue. The judge did not consider it.
6 Judge Kavanaugh's -- I almost called him Justice; I
7 guess that is not quite the case yet -- dissent focused
8 on that issue in ways that I found a little
9 disconcerting. On the other hand, it is really
10 interesting to go back and look at the Justice
11 Department's brief on the buyer power issues at the
12 trial court level. Very impressive.

13 At the FTC, in both *Sysco-U.S. Foods* and in
14 *Albertsons-Safeway*, buyer power was not referenced in
15 those cases at all, as far as I can tell. Although I
16 know it as a matter of fact to have been a major
17 concern of competitors of Sysco.

18 In the *Scripts-Medco* and the *Caremark* cases
19 on pharmacy works, the FTC statements rejected any
20 significant concern over buyer power by employing what
21 I think of as a narrow consumer welfare definition.

22 Now, interestingly, when it comes to gas line
23 cases involving the collection services, which involve
24 almost a pure wealth transfer issue, remarkably enough
25 the FTC saw a problem. Again, the ambivalence of what

1 is involved.

2 And this comes in part, I think, out of the
3 discussions that went on all through the morning of
4 what are the goals of antitrust and is there something
5 -- there is something that people keep talking about as
6 a consumer welfare standard. I understand a consumer
7 welfare goal. I began really to wonder what is this
8 standard that is out there that people were talking
9 about because I sure have not heard about it.
10 Certainly, narrowly-defined consumer welfare would say
11 that a specific Supreme Court case like *Mandeville*
12 *Island Farms* was just plain wrong.

13 Only in a consumer welfare frame, narrowly-
14 defined, would one be concerned if there was exclusion
15 from the market as in *Toys"R"Us* or such pervasive
16 monopsony that overall supply, not just a particular
17 supplier or a submarket supply, but overall supply was
18 adversely affected.

19 I think we are seeing a sea change now. And
20 we heard it on the panels this morning. Herb
21 Hovenkamp, for example, has discovered that buyer power
22 -- who discovered, I should say, he has discovered
23 buyer power issues, especially in labor. So in his
24 defense of the consumer welfare goal or standard, he
25 has now said, well, it is actually a term of art, by

1 which I think he means it should not be taken
2 literally. It means something else, which we are not
3 going to define.

4 Scott Hemphill has used the idea -- and his
5 co-author -- used the idea of a trading partner welfare.
6 I, along with Eleanor Solomon and others, have talked
7 about protecting and enhancing the competitive process
8 as better ways to think about it.

9 My point here would be that having goals that
10 recognize the potential adverse effects of buyer power
11 is important in terms of striking the right enforcement
12 balance. If you are concerned, as I think the FTC has
13 been for too long, only with consumer effects, you are
14 not seeing the whole picture.

15 I would end this discussion of goals by
16 pointing out that antitrust law was adopted in
17 substantial part because of concerns for the way
18 farmers, in particular, were being exploited by the
19 beef trust, the railroad trust, the wheat trust, and
20 even the whiskey trust. So that from the get-go -- and
21 I am thinking now of cases as early as the 1905 *Swift*
22 case in the Supreme Court down to, thank goodness,
23 Section 12 of the new merger guidelines, there is a
24 recognition that mergers or conduct that causes adverse
25 effects on the buyer side are themselves subject to the

1 antitrust laws.

2 The articulated goals of antitrust need to be
3 made to fit that. And that becomes a problem when we
4 start looking at merger analysis, because it has
5 undermined, I think, a willingness to focus more
6 generally on the nature of the issues that are
7 presented.

8 We have fundamentally a continuum from
9 classic monopsony, a single buyer, through various
10 kinds of oligopsonies to what I would characterize as
11 unilateral buyer power. Some of this is called
12 bargaining power. But -- my page is in the wrong
13 number. I do not know why.

14 One of the problems, again, is adjusting
15 business reality to the theories of economists. I love
16 economists. But they do not always seem to know that
17 businessmen are rational actors. So a monopsonist will
18 not act irrationally by exploiting the monopsony by
19 driving down output if it can get the same benefits
20 from its monopsony power from other ways.

21 So, again, the abstractions of economic
22 theory do not help when we have really not worked
23 through how particular kinds of buying practices are
24 carried out in ways that may harm producers, even if
25 they do not have a significant adverse effect on

1 consumers. This leads to our standard kind of
2 framework.

3 Initially market definition -- again, the new
4 merger guidelines are helpful on this. They point out
5 that these -- our market definition has to focus on the
6 choices the seller has.

7 Product markets can be very narrow as a
8 result of sunk costs. If you own a poultry house, I
9 got to tell you, there is only one thing you can do is
10 raise chickens in that poultry house. And if your
11 buyer goes away, you are going to be bankrupt. Some
12 producers maintain the capacity of having multiple
13 product lines. That is a really important way, when it
14 is feasible, to accomplish the right kind of goal.

15 Geographic markets can be quite different
16 from the downstream selling markets. They can be much
17 broader. Some inputs can travel thousands of miles at
18 very low costs. Other products -- inputs can only
19 travel a short distance. Again, my favorite topic
20 right now, poultry. A chicken can live about 100
21 miles. After that, you have a serious problem on your
22 hands. On the other hand, once the poultry has been
23 processed, it can be shipped long distances.

24 So you need to have markets that are
25 relevant, you need to consider the possible adverse

1 effects. The first is the problem of exploitation.
2 Lower prices is the usual one that is considered. I
3 think it is very important to understand that those
4 effects will vary substantially depending on the
5 options.

6 A monopsonist in one market that has access
7 to supplies, competitive supplies in other markets may
8 be very, very exploitive in the market where it has its
9 monopsony power. That would look totally irrational in
10 terms -- if you thought it had to get all of its output
11 from that particular location.

12 Risk transfer is relevant here. Make your
13 supplier incur other risks rather than telling them you
14 are going to cut purchases. There is what is called a
15 waterbed effect. Illustrated, Standard Oil forced the
16 railroads to not only give it rebates, but forced the
17 railroads to compensate it for its competitors'
18 shipments. Remarkably enough, Standard Oil wound up as
19 a monopoly. It used its buyer power of railroad
20 services to adversely effect its competitors, as well
21 as enriching itself. And indeed, the exclusionary
22 practices, the *Toys"R"Us* type of factors, are an
23 additional concern, the capacity to engage in fairly
24 wide tacit collusion among buyers to allocate
25 producers so that each buyer creates more unilateral

1 buying power.

2 Lastly and very significantly, individual
3 buyers with more than 20 percent of the market, of an
4 input market, are likely to have significant unilateral
5 power, regardless of the structure of the rest of the
6 market. We know this from the *Toys"R"Us* case. We know
7 this from an E.U. study, U.K. work and French studies
8 in retailing.

9 So my suggestion here is that we have a
10 series of concerns that need to be addressed where if
11 you stand back and look at what buyers can do -- it is
12 called bargaining. There are all kinds of ways to
13 structure those transactions to exploit producers and
14 to advantage the buyers.

15 There are reasons for additional concern in
16 my view. One is the durability of buyer power. It was
17 discussed a little bit in one of the morning panels
18 about seller power, but it is even harder to overcome
19 buyer power because the producers that are the victims
20 need to vertically integrate downstream in some way,
21 need to call forth new entry in ways that is going to
22 be very difficult.

23 There is also a related problem of the weak
24 incentive of buyers to -- I am sorry, no, I said it
25 right, the weak incentive of buyers to challenge each

1 other's exploitive behaviors. That is, they have a
2 major incentive to collude. There are very few reasons
3 not to collude, because what you are doing is you are
4 driving down the price of the input. What market you
5 are selling in, lower input costs increase your
6 potential profit.

7 Another thing that bothers me is the fact
8 that the impact is often in remote markets. You ask
9 cheese producers, do you care that the price on the
10 Green Bay Cheese Exchange is being manipulated, they
11 say, well, no. Why? Because when the price of cheese
12 goes down, the price of milk goes down. The people who
13 bore the burden were the dairy farmers.

14 So my suggestion, and this is a somewhat
15 stronger one than in the article I published a few
16 years ago, we should be presuming illegal mergers that
17 involve an HHI above 1600 and a change of more than 200
18 HHI. The higher the post-merger HHI implies a lower
19 need for a change in the HHI.

20 This means that I do not buy into the mirror
21 image nonsense that I hear. Buyer power -- I mean, the
22 mirror, if there is one, is the mirror in a fun house,
23 the thing that distorts figures. You got to understand
24 the nature of the incentives, the way buyer power
25 operates in order to have rational and reasonable

1 standards.

2 And that leads me to my second policy
3 prescription, which is we should be presuming illegal
4 any buyer merger resulting in a more than 400 HHI
5 post-merger. That is roughly 20 percent of the supply
6 market. Any such buyer is going to have substantial
7 independent power. And, again, I may be told,
8 certainly some people have maintained, that there may
9 be relatively few mergers that would involve that level
10 of concentration in a supply market. Any such merger
11 should be challenged. That means you need to get input
12 data of a sort that we do not always have.

13 Assuming that we have -- or I should say the
14 problem with detailed proof is that it is hard to get
15 in buyer side cases. A seller is going to look at the
16 situation and not be willing to testify for two
17 reasons. One, if the merger goes through, it is going
18 to have a seriously irritated major customer. And if
19 the merger does not go through, it is going to have two
20 seriously irritated customers. That undermines your
21 willingness to testify.

22 There are also some serious data issues.
23 Theory -- empirical data might suggest that there is
24 going to be very little negative impact on output
25 initially. That is the consumer welfare standard, and

1 I put that in quotation marks, tells me that I should
2 not be concerned about that. To make that case to
3 courts is going to be difficult until we get some more
4 general understanding of that problem.

5 I want to end up by suggesting a couple of
6 what I think of as hard cases. Consider two firms that
7 want to merge that are either not direct competitors in
8 downstream markets or are minor competitors and for
9 which this merger will be in some way a significant
10 step forward in either economies of scope or scale, but
11 because they both buy the same input in some relevant
12 market in substantial quantity, they are going to have
13 significant adverse effects in that market.

14 How much tradeoff do we do? I think that is,
15 for me, a very difficult problem. I tend to be of the
16 school "shoot first and worry about efficiency later,"
17 but that is, again, not going to be favored by a lot.

18 There is also -- and I adverted to it
19 earlier -- evidence that you can expand production or
20 will expand production or promise to expand production
21 by driving prices down and this is -- the example is,
22 if you cut the compensation of farmers or workers, one
23 of the things that they have to do in order to sustain
24 their income is to increase their output. Rather
25 perverse result it seems to me, but, again, it is a

1 major problem in these cases.

2 I am absolutely delighted that the Federal
3 Trade Commission, ten years after I was telling Michael
4 that we should have more focus on this, has included
5 not only this session, but there is going to be a later
6 one specifically on the buyer power in labor. And I
7 think that it is very important that this have a
8 broader salience in antitrust and competition policy.

9 Thank you.

10 (Applause.)

11 MR. ADKINSON: Thank you. Not only an
12 excellent introduction but on time.

13 Now, we are going to have opening statements
14 by each of the other panelists, starting with Mary.

15 MS. COLEMAN: Thank you, Bill, and thank you
16 for inviting me to participate on this panel.

17 I think a good starting point to keep in mind
18 when we think about these issues, and I think colors is
19 how people think about these issues, is that typically
20 in the antitrust world we think sort of simplistically,
21 lower prices are good and higher prices are bad. So,
22 you know, as we will talk about in this session, as
23 Professor Carstensen has discussed and others will, you
24 know, it can be the case that while mergers may drive
25 input prices down, that can be bad and it can result in

1 competitive harm. But we also know that generally
2 lower input prices will provide incentives for firms --
3 downstream firms to lower prices and potentially expand
4 output.

5 So I think at issue here is that there is a
6 distinction here between the buyer side and the sell
7 side, in that when you are looking at sell side
8 mergers, if you are thinking about harms versus
9 benefits, the harms cause prices to go up; the benefits
10 cause prices to go down. So they work in different
11 ways. It allows you, in some sense, to distinguish
12 them a little better.

13 Whereas on the input side, typically, you are
14 thinking about prices going down either from a
15 competitive harm or from potentially competitive
16 benefits. It makes it a little more difficult, I
17 think, to distinguish the effects.

18 Now, if we think about a merger where we have
19 evidence, assuming we do, that it is likely to result
20 in lower input prices, the question is, how do we
21 decide whether it is good or bad? And what side would
22 we want to err on if we have uncertainty?

23 One could think about this and say, oh, well,
24 if we have evidence that efficiencies are what are
25 driving down the input prices and that is good; if we

1 think it is lost competition, that is bad. But I think
2 that is a little too simplistic. One, I think it is
3 frequently going to be difficult to distinguish between
4 the efficiency and the sort of lost competition
5 effects. I also think that, in many cases, you may
6 also have an issue as to what extent do you expect it
7 to result in lower prices downstream and maybe expanded
8 output in that sense. So I think it requires a little
9 bit more thought on how you look at things.

10 For an economist point of view, you know,
11 when we look at antitrust issues, you frequently start,
12 you may not end there, but from sort of a total welfare
13 standard, and at least many economists would. On that
14 sort of a standard, you really would on output effects.
15 And if you felt that there were not likely to be
16 reduced output upstream, as part of the transaction,
17 then you probably would not worry about it very much.

18 But, you know, as Professor Carstensen said,
19 we talk about some, this consumer welfare standard,
20 which has a somewhat broad -- or people think of it as
21 having a broader distinction than a total welfare
22 standard. If we think of it on the sell side, a lot of
23 times what we think on that side is we think, okay, we
24 will worry about a merger if prices are going to
25 increase, and if they do not -- and so we focus more on

1 efficiencies, for example, that might cause prices to
2 decrease, but not pay so much attention to ones that
3 might cause prices to increase.

4 However, on the buy side if we try and apply
5 that, it is a little trickier because, again, you have
6 prices going down in sort of both situations. I think
7 even a consumer welfare standard would sort of say
8 output up, that is good; output down, that is bad. And
9 the question would be, if you are not -- if you do not
10 think there may be any effect or you are not really
11 sure, which way do you go? I think a lot of that has
12 to do with the priors of whether you think it is very
13 likely that these input prices caused some sort of
14 harm, the types of things that Professor Carstensen is
15 saying, or it is more likely the lower input prices are
16 going to be passed along and they sort of increase
17 output and expand sales downstream.

18 Finally, I just want to quickly talk about
19 one of the questions as posed by the session, of
20 whether we think there need to be significant increased
21 enforcement efforts in this area and sort of along the
22 lines that Professor Carstensen is proposing and whether
23 particularly you have a need for vigilance at much sort
24 of lower levels of concentration than we are typically
25 used to.

1 I think a big question there is, what
2 evidence do we have that we have broad-based sort of
3 competitive harm occurring, that we are missing mergers
4 that are causing competitive harm? There will be some
5 cases we are going to capture them because there is a
6 down sell side issue as well, so then we do not really
7 have to worry about it. It is really only when there
8 is a unique buy side issue that we have to worry about
9 it. And what I -- you know, there is a lot of
10 literature out there on sort of harms. But there is
11 not any real consensus on how big these harms are. And
12 so until we sort of have a better sense of how
13 broad-based it is, I think we need to have some concern
14 about moving resources to this.

15 And I think one last point is, a big issue is
16 one, there is no free lunch, that basically if we take
17 more resources into the buyer side, we are going to
18 take resources away from somewhere else. So having an
19 idea that there is actually something to go after I
20 think is important.

21 And two, we really -- a lot of the tools we
22 use on the sell side are not necessarily going to --
23 some will move to the buy side, but a lot of them will
24 not particularly if we are looking at things like labor
25 markets and stuff like that because they work very,

1 very differently than a lot of the sort of product-type
2 markets that we look at.

3 Thank you.

4 MR. ADKINSON: Thanks, Mary.

5 Scott?

6 MR. HEMPHILL: Great. So first, thanks to
7 the FTC and the organizers, Bill, for the opportunity
8 to talk about these important issues together.

9 First by way of disclosure, I have been
10 retained as an expert in litigation where
11 anticompetitive harm has been alleged due to enhanced
12 exercise of monopsony power.

13 So with that out of the way, I would like to
14 start by just emphasizing something we have been
15 talking about, the consumer welfare standard, and my
16 view that as it now stands, it is fully adequate to
17 handle mergers and other conduct that is harmful to
18 sellers. Now, for that to be true, you have to come
19 along with me with the second proposition, which is
20 that the phrase "consumer welfare" should be taken as
21 seriously but not literally. After all, we recognize
22 harm all the time to parties that are not consumers.
23 If competing producers of an intermediate good decide
24 to merge, we worry about the harm to purchasers of that
25 good without necessarily worrying about whether there

1 is a follow-on pass-through effect to final consumers.

2 Or closer to the subjects of this panel just
3 think about a bidding ring. It is the seller who is
4 harmed in the first instance, not any purchaser. Yet,
5 we would have no hesitation, I hope, in sending the
6 conspirators to jail when they get together in their
7 bidding ring.

8 Our interest in the harm to sellers is
9 confirmed by, as Peter mentioned, the Merger Guidelines
10 and by Supreme Court cases like *Mandeville Farms* that
11 was mentioned and the old buy side predation case,
12 *Weyerhaeuser*.

13 Now, all of this is to say that no one should
14 take references to consumer welfare in a judicial
15 opinion or elsewhere as a limitation to harm to
16 consumers. And so the upshot of that is that
17 defendants are just wrong when they insist that some
18 harm to final consumers must be demonstrated in a
19 particular case. I think this is a form of
20 misdirection that is inconsistent with the
21 long-standing traditions of antitrust.

22 This also means that when analysts criticize
23 antitrust for being narrowly obsessed with consumer
24 prices, they are off-base, too. I think that is
25 attacking a strawman. Antitrust already has that

1 broader focus.

2 Now, I think these mistakes arise in part
3 because admittedly the phrase "consumer welfare" is a
4 bit confusing. It works well for the typical case
5 where sellers are getting together and thereby harming
6 their trading partners, in that case the buyers. As
7 Peter mentioned, I would propose that to handle the
8 atypical cases, we should consider a different phrase,
9 "trading partner welfare." This is not novel to the
10 paper with Nancy Rose. This is something that has been
11 kicking around for a while. But I think it is worth
12 advocating and kind celebrating in a sell side case
13 that the two coincide. Consumer welfare and trading
14 partner welfare get you to the same place.

15 In a buy side case, though, the trading
16 partner welfare, and I will say standard just because
17 it is typical to do so, clearly labels the harm to
18 sellers that it is attributable to reduce competition
19 among buyers.

20 So taking a step back here. You know, what
21 is at stake? Why should we be paying attention to
22 monopsony? After all, in a lot of cases, there is
23 going to be a sell side harm, too, in addition to the
24 buy side harm and we will just resolve the sell side
25 case without getting to the buyer side, I think, pretty

1 frequently. And that has contributed to the relative
2 absence of buy side case law.

3 But I think there are two reasons to pay
4 attention. One, if we are not on the lookout, we are
5 going to miss some important instances of
6 anticompetitive harm. So I think it is great that
7 Peter now has lots of fellow travelers trying to root
8 out important cases to bring. I will be interested to
9 see what the labor panel later in this series of
10 hearings reveals in that regard.

11 But, second, I think it is important to
12 recognize that in some instances the defense of a
13 particular transaction, a merger let's say, is, in
14 fact, premised on the party's enhanced monopsony power.
15 It is premised on the enhanced ability to squeeze the
16 sellers through reduced rivalry of the buyers. To me,
17 that is the wrong approach. Where the enhanced ability
18 to squeeze is premised upon reduced rivalry, we should
19 immediately recognize and understand that that is a
20 core antitrust harm, and we should resist transmuting
21 that harm into a purported benefit in favor of the
22 transaction.

23 And I anticipate we might not all agree on
24 that particular proposition, so I will stop there.

25 MR. ADKINSON: Thanks, Scott.

1 Joe?

2 MR. MILLER: Thanks. And thanks, Bill, and
3 the FTC for inviting me. This is a very useful
4 discussion.

5 So when Bill first called to ask me to be on
6 the panel he asked me to bring my perspective as a
7 former enforcer. So I spent a good bit of time at the
8 Justice Department, half that time as the Assistant
9 Chief in the section that covered health care, and so
10 brought a number of these cases, *Arizona Nurses*, one of
11 the United monopsony cases. There was a case against
12 Michigan Blue Cross that the deal fell apart, but these
13 all had some monopsony concerns in them. And then
14 there was, obviously, the *Anthem-Cigna* case that was
15 after I left.

16 So as a former enforcer, now I am
17 representing mostly health care entities before the
18 agencies, I see a lot of these sorts of issues. You
19 know, what to make of it? So as an enforcer, the
20 theoretical discussions are fine. This was actually
21 the most cogent set of remarks on this topic that I
22 have ever heard. So this was really a well stated way
23 to frame these issues.

24 But if you are investigating a merger, it is
25 a little messier. So how do you tell if you have a

1 merger and you are looking upstream whether you are
2 doing the world any good or whether you are potentially
3 doing the world some harm? So if you look at a merger
4 and you sort of assume or look or you have some
5 testimony or evidence that it is going to reduce input
6 costs, the price you pay for your inputs, that tends to
7 flow downstream. Not always.

8 I think everybody understands there is a
9 theoretical way that reducing prices paid for inputs
10 can be harmful. But if you are looking at it -- and
11 mergers tend to be messy -- in terms of the way the
12 facts come out, not sort of in a tidy little appellate
13 opinion, but you are talking to a lot of people who are
14 telling you a lot of things, how do you know if you are
15 doing the right thing?

16 The way that the FTC has looked at this in
17 the PBM mergers is to more or less explicitly say they
18 are more concerned with looking downstream. And so
19 PBMs getting together, there is I think some concern
20 that there would be a reduction in the prices paid for
21 pharmaceuticals. There is obviously other potential
22 efficiencies that can come out of that; same thing with
23 health plans.

24 So they buy health care services. They can
25 arrange them and they can selectively contract in a way

1 that is really the basis of the hospital program,
2 right? The ability of health plans to selectively
3 contract means hospitals are competing to be in the
4 health plan, which means consumers benefit. So you are
5 looking at that interaction and saying there is a way
6 that our intervention could potentially harm that and
7 how do you tell.

8 FTC has kind of taken a pass on all this in a
9 statement on the PBM mergers. DOJ had treated it in a
10 rather subtle way until the *Anthem-Cigna* case, by
11 saying, you know, there is such thing as upstream harm,
12 but they are very, very careful to say that is a
13 predicate to downstream harm. So if physicians get
14 paid less, they did not allege that as a count in and
15 of itself. It said, instead, that will result in lower
16 quality health care. There was always a quality count
17 involved.

18 And so, you know, ask yourself why that is.
19 I think it is because there is a concern to over-deter
20 what is generally thought of as good, which is lowering
21 input cost because it does tend to flow downstream.
22 Again, you can look and say, you know, not in all
23 cases, there are theoretical concerns that you may be
24 doing harm. But there is a rough analogy here to, I
25 think, a predation case, which I think has some

1 theoretical basis and, you know, will be recognized by
2 a court as stating a cause of action.

3 Same thing with monopsony. You can go to a
4 court and you will get past Rule 12. But you have to
5 worry, as an enforcer, that you are doing the right
6 thing, and I think this sort of explains it.

7 We will talk I think a little later about the
8 *Anthem* case and how this is a little different. But I
9 think that, as an enforcer, those are sort of some of
10 the issues that get caught up in monopsony versus
11 downstream.

12 MR. ADKINSON: Thanks very much.

13 Sandeep?

14 MR. VAHEESAN: Thank you to Bill and thanks
15 to the FTC for inviting me to participate on this
16 interesting panel.

17 One of the major and still underappreciated
18 trends in American society over the past 40 years is
19 the emergence of a major gap between labor productivity
20 and wage growth. During the postwar era, productivity
21 and wage growth tracked each other quite closely. So in
22 a given year of median labor productivity increased by
23 4 percent, median wages also increased by approximately
24 4 percent.

25 Between 1973 and 2017, however, median labor

1 productivity grew 6.2 times faster than median pay. So
2 in other words, we have seen a steady increase in
3 productivity, but wages have only grown modestly.
4 Workers have become substantially more productive, but
5 they have been unable to reap the benefits. This is,
6 in large measure, a story of strong employers and weak
7 employees.

8 As significantly different trends in other
9 nations show, this was not inevitable. It was a
10 product of conscious legal and political choices. I
11 would argue, among others, antitrust enforcers bear
12 some blame for this current power imbalance between
13 workers and employers.

14 So, first, strong employers. Most local labor
15 markets in the United States are highly concentrated.
16 Indeed, according to the Azar, Marinescu and Steinbaum
17 article, a troubling number of local labor markets are
18 pure monopsonies and that workers have only one actual
19 prospective employer. This problem is especially acute
20 in rural and ex-urban areas. Millions of workers, as a
21 result, have few potential places to work and are at
22 the mercy of employers. This concentration has
23 material effects. Indeed, it is associated with
24 significantly lower wages.

25 The monopsony problem extends behind the

1 confines of discrete labor markets as understood by
2 antitrust enforcers and scholars. Concentration at one
3 level of a supply chain can have ripple effects
4 upstream, to the detriment of works. For instance,
5 powerful retailers, think Amazon or Walmart, exercise
6 power over their suppliers and apply downward pressure
7 on input prices.

8 Under the thumb of large retailers,
9 suppliers, in turn, seek to contain costs by cutting
10 wages and benefits. And recent research by Nathan
11 Wilmers has found that this ripple effect up supply
12 chains explains at least some of the wage stagnation we
13 have seen since the 1970s.

14 Unfortunately, antitrust enforcers have
15 failed to grapple with this problem, and by all
16 appearances, have assumed that labor markets are
17 generally competitive. For example, a merger has never
18 been stopped solely on labor market grounds.

19 Turning to the other half of the equation,
20 weak employees. Most individual workers lack power in
21 labor markets. The unionization rate in the private
22 sector is under 7 percent today. In contrast, during
23 the postwar era, collective bargaining was an important
24 contributor to the egalitarian distribution of income
25 and wealth. In our more recent three-decade period,

1 the big business-led destruction of collective
2 bargaining rights is an important contributor to
3 resurgent inequality.

4 And antitrust enforcements have compounded
5 this problem. They have impeded organizing an
6 important and growing sector of the labor force,
7 independent contractors, who are estimated to be about
8 20 million in today's economy. Unlike workers who are
9 classified as employees, independent contractors are
10 not entitled to an antitrust exemption and legally
11 cannot engage in many forms of collective action.

12 Exploiting this somewhat artificial gap in
13 the scope of the antitrust exemption, the FTC has
14 brought cases against, among others, ice skating
15 coaches, public defenders, and organists, and has also
16 weighed in against collective bargaining rights for
17 home health aids and ride-sharing drivers.

18 So at present, the FTC protects strong
19 employers and targets weak workers. The net effect of
20 the FTC's actions is to tilt labor market power further
21 in favor of employers. Going forward, I hope the FTC,
22 as well as the DOJ, invert these priorities and target
23 strong employers, including through merger law, and
24 allow all workers to organize.

25 Thank you.

1 MR. ADKINSON: Thanks very much, Sandeep.

2 I should give a plug for our -- I think it is
3 October 16th, we are having a couple of panels that
4 will continue the discussion on some of these labor
5 issues and I encourage people to attend or watch on
6 webcast.

7 So now, I would like to move to a discussion
8 of some of the main issues in this area. There are
9 three broad issues we are going to try to cover in the
10 time we have. First, we are going to consider briefly
11 the question of how merger analysis should address the
12 potential for mergers to enhance monopsony power and
13 whether current enforcement policy adequately addresses
14 those monopsony concerns.

15 And I wanted to ask our economist to first
16 start us off on that.

17 MR. COLEMAN: Sure. So I have been asked to
18 talk about monopsony power and here I am talking about
19 classical monopsony power, which I will define in a
20 moment what that means. One of the reasons, we are
21 doing it briefly is because I do not think there is a
22 lot of controversy here, at least of whether if you
23 found that a merger actually creates or significantly
24 increases classic monopsony power, would that raise
25 competitive concerns? And I think there would be

1 pretty common agreement that, yes, it would and it
2 would be something that you would want to go against.

3 And so basically, when we are defining
4 monopsony it is essentially, from Peter, the flip side
5 of monopoly, but it truly is. It is a situation where
6 you have one or a few large buyers facing a large
7 number of sellers and these buyers face what we would
8 call an upward sloping supply curve, meaning this as
9 prices go up -- I am sorry, you would need to raise
10 prices in order to attract more supply.

11 So in that situation, the buyer will
12 understand that if I actually restrict my purchases
13 below competitive levels that will drive input prices
14 down and I will increase my profits. And so the reason
15 why there is sort of no real controversy here is that
16 it is clear that restriction on output is like the
17 restriction of a monopolist on output, that you are
18 reducing output below competitive levels and you create
19 a deadweight loss and you have reduced efficiency in
20 the economy. And there is no real issue that there may
21 be in other cases, if it really is a true monopsony, of
22 worrying about, well, will prices -- those lower input
23 prices be passed down because -- they will not because
24 the whole notion is you have restricted output, so you
25 would not then expect downstream prices to go down

1 because there is less product.

2 It may be that you do not actually see a
3 downstream effect because the buyer may have sort of a
4 small geography where it has input power buyer but does
5 not have downstream buyer power. But that still does
6 not mean there is inefficiency because even if this
7 firm is an inframarginal supplier, the fact that it is
8 reducing its output and replacing, by definition, by
9 some with higher costs, then that is an inefficiency
10 for the economy.

11 So I think in terms of whether there is an
12 effect -- and, certainly, my understanding is, you
13 know, whether you could bring it in the courts, it is
14 not an issue. The main issue I think is -- goes to
15 what Sandeep was saying and others were saying. It is
16 a question of whether it is a significant issue. And
17 you actually see a lot of cases that have monopsony
18 power that we are sort of not picking up. But I think
19 as just a practical matter of if you would bring a
20 case, then I do not think there is a lot of controversy
21 there.

22 MR. ADKINSON: Thank you, Mary.

23 I wanted to ask if other panelists would like
24 to opine briefly on the monopsony as an area for
25 enforcement cases, I guess, both in terms of whether

1 those cases are good cases to bring, as Mary describes,
2 and also the question of how extensive we would expect
3 them to be.

4 MR. HEMPHILL: Just briefly. If we can find
5 some of those, we should definitely be bringing such
6 cases. This is a softball to throw forward into the
7 hearing next month with respect to labor, whether --
8 and this is a question that applies both to classical
9 monopsony and to bargaining power, what is the killer
10 case that should have been brought that was not brought
11 because there has not been enough attention to these
12 issues? What does that look like?

13 I take the point that there is not many of
14 them that are brought. But what is the case that -- I
15 mean, regular merger, sell side merger, all of us have
16 ideas about cases that maybe should have been brought
17 that were not. But on the labor side, what is the case
18 that should have been brought?

19 MR. ADKINSON: Joe?

20 MR. MILLER: And to pick up on a couple of
21 points. Again, from the perspective of a staffer of an
22 enforcer, if you have got a case that has both
23 downstream effects and upstream effects, so potential
24 monopsony counts -- I mean, if the case is going to
25 settle, that is fine. You can put it in and, you know,

1 sort of -- you do not really get to put your proof, the
2 theoretical issues get, you know, perhaps a paragraph
3 in CIS, no big deal.

4 If it is going to get litigated and you have
5 a downstream case and an upstream case, the practical
6 incentives are not to bring the upstream case. With
7 the exception, again, maybe we will talk with about
8 *Anthem*. You know, why is that? Well, you still only
9 get one injunction. Even if you prove two cases, you
10 still get the one injunction. If you bring more counts
11 than you actually need to get the injunction, you are
12 making your life a lot harder than it needs to be. You
13 are confusing a judge who does not really care very
14 much about antitrust law and, you know, that seems kind
15 of obvious if you pause on it for a
16 minute.

17 If you have only an upstream case and you are
18 willing to litigate it, you know, that is the one that
19 I think we are talking about, that is a hard case. I
20 mean, you are walking in front of a judge, again you
21 are asking for what, a month of her time when she does
22 not have a month to give to you, never heard of
23 antitrust before or maybe has seen one case, maybe some
24 opt-out litigation, but it is going to be relatively
25 unappealing for someone who has a docket

1 to move. You are going in front of the judge and
2 saying, you know, good news, judge, we get to make some
3 law together. I can point to no case that is like this
4 one. None that has been litigated, and you can say --
5 point to the Court of Appeals and say, this is like
6 that case.

7 You get to, instead, make up some standards,
8 make up some laws, say this is really like the same
9 thing as a downstream case except with a mirror and it
10 is really the same thing and the economics are a little
11 complicated and different. So, here, you know, let's
12 go. You know, not that you cannot do it, but I think
13 it helps explain why you do not see very much in this
14 area that is not tagged along with a settlement.

15 Maybe you can say, Bill, when it is a good
16 time to talk about *Anthem* because I think that is a
17 special case worth some discussion.

18 MR. ADKINSON: Okay. Sandeep?

19 MR. VAHEESAN: So I believe going forward the
20 agencies should examine the labor market effects of
21 mergers. And we're not talking about a trivial or
22 academic problem. Research shows labor market
23 monopsony has tangible effects on wages and other terms
24 of employment and so anticompetitive mergers can have
25 adverse labor market effects.

1 One hypothesis I have heard is protecting
2 product market competition could mean indirectly
3 protecting labor market competition, but I think there
4 are several reasons to be skeptical of this assumption.
5 For example, in agricultural mergers, the buy side and
6 sell side, as Peter alluded to earlier, can often
7 indicate very different geographic markets. And in
8 labor markets, given the limits on commuting distances,
9 we should generally assume that labor markets have a
10 smaller geographic scope than the relevant product
11 markets.

12 I find the Silicon Valley wage suppression
13 case to be an interesting example illustrating this
14 point. So this case involved Adobe, Apple, Google,
15 Intel, Intuit and Pixar, companies we typically do not
16 think of as head-to-head competitors in product
17 markets. But interestingly, in spite of that, these
18 companies were competing for the same pool of labor and
19 saw an advantage in conspiring to reduce wages. So I
20 would argue that we do need to look at labor markets
21 separately and apart from product markets in merger
22 analyses.

23 MR. ADKINSON: Peter, could you offer some
24 closing comments on this?

25 MR. CARSTENSEN: I hope so. First, data,

1 data, data. As I understand it, HSR does not ask for
2 any data on input components in firm's sales and that
3 some stuff I have seen suggests that many firms are
4 in the at least 8 to 10 percent acquisition of relevant
5 input commodities. I agree with Joe that if you are
6 going to litigate a case that has a good sell side, no,
7 I am not going to deal with the buy side as well.

8 But, again, notice that there may be issues
9 if you are going to settle that case with remedies
10 where you really want to know things, especially the
11 sort of things Sandeep is raising about where your
12 labor force is coming from, where your inputs are
13 coming from. We need to build the data to identify
14 where we have potential cases or where the buy side
15 issues need to be taken account of as you engage in
16 some kind of a settlement.

17 MR. ADKINSON: Great, thanks very much.

18 Now, we are going to turn to the more
19 difficult and interesting question of how should merger
20 analysis address the potential for mergers to enhance
21 bargaining power rather than monopsony power? And does
22 current enforcement policy adequately address those
23 concerns?

24 And I, again, would like to start off by
25 asking the economist to explain a little bit about

1 bargaining power as a concept distinct from monopsony
2 power.

3 MR. HEMPHILL: All right. So I think Mary
4 and I are going to split this up. I am going to start
5 on the sell side, because it is a little easier, and
6 then Mary is going to get to do the buy side mirror
7 image or symmetry or flip or however you want to call
8 it.

9 So the first thing to recognize in the
10 bargaining context is that we are no longer in the
11 world of atomistic sellers. We are in a world of
12 bilateral bargaining, a hospital with some power facing
13 a payer, an insurance company, with some power, let's
14 imagine. This kind of thinking, bargaining theory, is
15 at the heart of the FTC's hospital merger program.
16 *ProMedica* is maybe the most prominent example, but, you
17 know, there are a bunch on this vein.

18 The underlying model here is a Nash
19 bargaining model. Upstream and downstream firms,
20 hospital and insurance company, are negotiating over
21 whether the hospital's products are included in the
22 bundle of inputs offered for sale by the insurance
23 company and at what price. And the model supposes that
24 the parties, the hospital and the insurance company,
25 are bargaining over the division of surplus from

1 reaching an agreement, compared to the alternative of
2 the deal failing.

3 This bargaining outcome is influenced by two
4 factors. First, relative bargaining power. And that
5 determines the fraction of the surplus from agreement
6 that each party manages to hold onto. And it is common
7 to assume that the surplus is split in half and so Nash
8 bargaining is sometimes called the "split the
9 difference" model. But the analysis is not reliant on
10 that particular split -- any split between zero percent
11 and 100 percent is possible. The actual division depends
12 on any number of factors, relative bargaining
13 proficiency, patience, and so forth.

14 The second factor, and where the action is,
15 bargaining leverage. And as bargaining leverage
16 affects the magnitude of the surplus and derives from
17 each party's outside option, right, their BATNA, if you
18 want, their walk-away value if the parties fail to
19 strike a deal.

20 Now, this theory, as I mentioned, becomes
21 very important for thinking about health care mergers.
22 I said I am going to do sell side. So I am going to
23 imagine a merger of hospitals, where we would normally
24 analyze this by asking whether the merger worsens the
25 outside option of the insurance company and thereby

1 increases the hospital's bargain leverage in its
2 negotiation with the insurance company, because the
3 insurance company can no longer play one hospital off
4 against the other to be the last hospital in the
5 network.

6 Now, the outside option changes because if
7 the insurance company fails to reach a deal, now it is
8 missing two hospitals from the provider network instead
9 of just one. So by worsening the payer's outside
10 option, the merged hospitals are in a better position
11 to push for a higher price.

12 Now, here is the important thing to notice
13 compared to classical monopsony. The harm on payers
14 here is imposed without necessarily reducing the
15 payers' purchases from the merging suppliers. In the
16 first instance, there is a transfer that we are
17 recognizing without there necessarily being any output
18 effect.

19 So I will stop there and then let Mary talk
20 about the buy side.

21 MS. COLEMAN: So Scott has just laid out the
22 sell side, and the buy side argument is pretty similar,
23 except in this case -- and I had -- was using hospitals
24 and insurance in my notes, too, not shockingly given
25 some of the issues that have come up here. But the

1 idea would be instead of a merger of two hospitals, now
2 you have a merger of two insurance plans. And prior to
3 the deal, a hospital negotiating to come in the network
4 might be resisting reduced, you know, reimbursement for
5 its services that the insurance company wants to impose
6 or maybe terms or conditions that it does not like
7 beyond just the price because these are usually
8 complicated contracts.

9 And one of the reasons it may be able to do
10 that is, say, well, if I don't take you, insurance
11 plan A, I can go to insurance plan B and that still
12 gives me a lot of customers and I am an attractive
13 option for plans and for patients. So that will work
14 for me.

15 Post-merger, now, I do not have B to offer.
16 I may only have a couple of other options and that may
17 make it harder for the hospital to resist these lower
18 prices or terms that it does not like.

19 The issue here is -- and I agree with Scott
20 that in bargaining models it is sort of uncertain what
21 the effect on output could be. There could be no effect
22 if you sort of had pretty efficient contracts to begin
23 with. Lowering the prices can increase, you know,
24 output or it could reduce output. And it is sort of
25 true on both sides. You sort of think a little bit

1 more on the input side reducing prices, you may be more
2 likely to have these differing effects on output. But
3 it is unclear.

4 And so the other issue I wanted to address,
5 too, is that, again, while the mechanism of sort of the
6 effect is the same, you know, what the effect on the
7 outside option is may be very different than on the sell
8 side. In some cases, it may be very similar because
9 you are talking about the same sorts of products and
10 the same sorts of options. In other cases, it may be
11 the options that the sellers have for selling to
12 outside of the buyer are very different from the
13 options that the buyer has downstream.

14 So again, while the mechanism is the same,
15 sort of what you have to look at to figure out what the
16 effect is is likely to be -- may be very different.

17 MR. ADKINSON: Thanks so much.

18 Now, I would like to ask more about the
19 history of such claims involving bargaining power
20 analysis in mergers. In particular, the extent to
21 which agencies have challenged mergers based on
22 concerns regarding enhanced buyer power, either
23 explicitly or implicitly or the extent to which they
24 have suggested that they are reluctant to do so.

25 I guess for that I would like to start with

1 Joe, please.

2 MR. MILLER: Sure. As I mentioned before,
3 most of my practice right now is in health care. When
4 I was at the DOJ, I did a significant amount of health
5 care merger work there, too. So maybe I will run
6 through some of that history.

7 So the first time you see this in a merger
8 case, at least that I am aware of, is *Aetna-Prudential*
9 in 1999. I think Marius Schwartz gave a very good
10 speech about this to try to explain what it is, seemed
11 like a really nice way to handle it. It is the first
12 time this came up. DOJ explained itself, you know, as
13 to what the concern was. The case settled. You know,
14 did not have to get that sticky with it. So that was,
15 I think, '99, something like that, '98, '99.

16 It goes quiet until there was a series of
17 health plan mergers that I can promise you was getting
18 everyone's attention. Not many of those cases -- not
19 many of those transactions wound up being cases, but
20 they all got seriously investigated around 2005, 2006,
21 2007. Settled some cases against United Healthcare.

22 One of those involved a monopsony or buy side
23 claim for physician cases -- for, I am sorry,
24 physicians. And so there you get the first time since
25 *Aetna-Prudential*, DOJ talking about this. So I will

1 just sort of give you a little insight into that.

2 As you are going through from a staff
3 perspective and looking at that, it is much less
4 theoretical than this discussion. Calling doctor
5 groups and saying these two plans would like to merge,
6 if they merge and they depress your wages or depress
7 the prices that they pay for you, the reimbursement,
8 what options do you have?

9 Then you go through and you start doing a
10 guidelines kind of analysis. Can you shift more toward
11 some other set of suppliers, Medicare, for instance, to
12 defeat that price increase? You do your market
13 definition analysis. There is some geographic market
14 stuff in there. You get enough people saying, no
15 really cannot, they make up too big a percent of my
16 practice, and then you sort of, you know, start
17 thinking maybe a little more about a price
18 discrimination market, you know, can they target these
19 particular groups of physicians? You get to the point
20 where nobody really wants to litigate that and it
21 settles. Fine.

22 So there you go a little further than I think
23 than you saw from, you know, *Aetna-Prudential*. Had
24 some insight into it, maybe it was no further, but at
25 least it was interesting to me.

1 The *Michigan Blues* case, so there they were
2 doing a merger to something like 90 percent, acquiring
3 a rival health plan, and I do not exactly know sort of
4 what the thinking was, but the market definition seems
5 to hold up. A merger to 90 percent is more or less
6 going to get you sued. And, you know, the deal fell
7 apart. So there was no complaint there. But if you
8 look at the press release, I do not think there was a
9 closing statement, but there was a public statement and
10 there was a monopsony concern there, too. Again, that
11 did not really get aired out all that much.

12 Until we get to *Anthem-Cigna*, and here this
13 is really interesting. So when you look at all the
14 history here -- *Anthem, Pru, United, the Michigan Blues*
15 case, all the public statements -- what you see, as I
16 mentioned a few minutes ago, is an allegation. It
17 violates Section 7 because of the buyer power, because
18 of the upstream harm, but the effect that comes from
19 that is lower quality downstream. So harm to patients
20 is really what they were talking about. That was the
21 alleged effect. The lower reimbursement was a
22 predicate fact, not stated as the harm itself.
23 Downstream you get lower quality.

24 I guess we could have another separate
25 discussion as to how you draw that causal line. Leave

1 that aside. But that seemed to be what you might think
2 of as a policy that you could at least infer from what
3 the DOJ had done.

4 Not so much in *Anthem-Cigna*. *Anthem-Cigna*
5 was both a litigated case, had an upstream and a
6 downstream count, willing to actually litigate the
7 upstream count as a standalone when they did not have to.
8 Again, they had two downstream counts, you know, only
9 in Richmond and the national accounts that could stand
10 on their own, yet still did the upstream count. They
11 were facing the same incentives that I talked about
12 before. Why? Why would they do that? I do not know;
13 I was not there.

14 But what makes sense is, there were very,
15 very large asserted efficiencies in that case, so much
16 so that if you did not have a way to combat the
17 efficiencies you might lose the downstream counts, too.
18 So you had to think of a way to deal with the
19 efficiencies as a way to not lose the entire case, even
20 though if you were to assume they had a strong
21 structural case and they had more evidence, more
22 refined evidence than market shares on the downstream
23 harm to self-funded employers.

24 The monopsony count is a way to do that. So
25 if you talk about the cost savings and you talk about

1 the efficiencies being, you know, less money going to
2 physicians, and that is good, DOJ found a way to say
3 that is not good, that is bad. You pay less to
4 physicians, you pay less for the inputs, for the
5 medical services of some sort. That is, in and of
6 itself, a bad thing. That completely counteracts or,
7 you know, seriously undercuts the efficiencies
8 argument, even aside from the more typical arguments of
9 merger specificity, and it is not going to happen here
10 and, you know, you are not going to be able to both get
11 the benefits of this and be able to pay them less.

12 The reason you get the benefits downstream is
13 you are paying the physicians more to collaborate with
14 you. So there is all that kind of factual fight that
15 the District Judge found in favor of the Justice
16 Department. But, you know, of course you cannot know
17 if you are going to win that one. So that is
18 potentially another explanation for why you saw it
19 litigated in *Anthem-Cigna* where you maybe have not seen
20 it before.

21 So those are sort of two competing
22 hypotheses. One is that there is a change in policy.
23 Now DOJ is willing to look only at upstream and
24 allege that as a harm, in and of itself with out it being
25 a predicate to downstream effects, you know, or this was

1 maybe case-specific as a way to deal with the
2 efficiencies in that case, which they felt they had to
3 do.

4 MR. ADKINSON: Sandeep, would you consider
5 elaborating on the labor sector more generally with
6 respect to that?

7 MR. VAHEESAN: Sure. So as the research has
8 shown, labor market concentration is real and it is
9 associated with lower wages. So I believe going
10 forward, this should be a priority area for agencies.
11 But, admittedly, there are some challenges. Since this
12 has not been an area of emphasis, there are significant
13 costs of learning. The agencies need to have a better
14 understanding of labor market dynamics. So for
15 example, what is the geographic scope of labor markets
16 and what lines of work fall into a relevant product
17 market.

18 Admittedly, the learning will take time, but
19 the agencies can draw on external expertise, including
20 from academics and other government agencies. And,
21 also, I recognize that resource constraints are real,
22 but I argue this is more about priorities. The
23 agencies today investigate and sue ice skating coaches
24 and public defenders for engaging in concerted action.
25 I hope in the future they reallocate these resources

1 towards mergers with buyer side implications, including
2 implications in labor markets.

3 MR. ADKINSON: And, Peter, could you
4 elaborate more on some of the other sectors of
5 interest?

6 MR. CARSTENSEN: Sure. Except to say, hmm,
7 we have not done much, but it has been consistent.
8 That is, I mentioned in 1905, a principal reason for
9 the Supreme Court's decision was the cartel that was
10 driving down the price of beef cattle. My grandfather
11 was a beef cattle raiser and a victim of that
12 oppressive buyer cartel.

13 And in other words, we have seen that going
14 forward, 1918, there is a big consent decree in meat
15 packing that works in part to facilitate market
16 development, so that we have a continuing concern on
17 this branch with exploitation of producers, period,
18 full stop.

19 What Joe highlighted in terms of the health
20 care is an interesting kind of split not just recently,
21 but it is long standing. And I referenced in my more
22 general comments, the tension in the FTC's view of gas
23 collection, which is a pure wealth transfer puzzle, but
24 they saw anticompetitive effect there. But when it is
25 retail pharmacists, oh, the heck with them. Let them

1 be exploited because we think that the -- how they can
2 believe this, I don't know -- that these huge pharmacy
3 benefits administrators are going to share the wealth
4 with the innocent little consumer. But I would leave
5 that one to the FTC to explain.

6 We have had this -- this kind of tension
7 really is post that wonderful consumer welfare
8 standard, where we do not really look fully at a buyer
9 effect. And in the ag area, there was the *Continental*
10 *Grain* case in the '90s, the 1990s not 1890s -- I have
11 not been around that long -- where again, the effect
12 was strictly on wheat farmers in the Midwest, if you
13 are going to eliminate competing buyers. And, again,
14 it was settled by a consent decree which arguably was
15 not very effective because of the problem of preserving
16 a sufficient number of buyers. You know, my proposed
17 standard of HHI, 1600 or more, you really have a
18 problem you need to look at very closely.

19 They have done very little in poultry for
20 various -- I know they have looked, but, again, the
21 seller market in poultry is very, very competitive
22 until the guys found a way to collude in large numbers
23 recently. But they do not look effectively at the buy
24 side of what it does to poultry growers who contract
25 with farmers -- with integrators.

1 In pork, again we have seen a little bit of
2 focus on the issue, but not enforcement. So that I
3 would say we are sometimes seeing examinations, but if
4 the downstream market seems to be competitive, even
5 though it is totally unrelated to where you are growing
6 your wheat or growing your chickens, we are not seeing
7 nearly as much focus on effects.

8 But where there is a focus on effects -- and
9 this is the contrast with what Joe's talking about in
10 terms of health care -- where there is a focus on
11 effects, and I am thinking *Continental Grain* in
12 particular, it has really been on the adverse effect on
13 the producer, independent of any kind of buyer concern.
14 And that was certainly the *JBS Swift* case, at least on
15 the beef -- the beef buying side, was, again, pretty
16 much a pure monopsonistic concern for how we are going
17 to -- how the wealth will be allocated between
18 producers and buyers and recognizing the need to
19 increase the number of buyers, or at least in that case
20 preserve the number of buyers as a way of ensuring a
21 reasonable split of results.

22 I think that there are some issues, and,
23 again, Joe has nicely framed them, that need really to
24 be subject to more serious review within the agencies
25 and more broadly about the scope of our concern.

1 I want to drop a brief footnote to my dissent
2 on whether you should be separating monopsony, pure,
3 from various forms of buyer power. Since the ultimate
4 bargaining power operator is the monopsonist. So that it
5 is not -- and Scott knows this from a series of e-mails
6 from me -- this is not, I think, a useful place to draw
7 the line.

8 MR. ADKINSON: Thanks, Peter.

9 I would like to now ask the panelists to move
10 to the policy and enforcement issues surrounding
11 basically the question that Peter posed fairly starkly
12 about what enforcement policy should look like in this
13 area. What would be the benefits and costs of
14 increasing enforcement? Or otherwise put, should we be
15 more worried about under-detering conduct or
16 over-detering conduct? What difficulties would
17 enforcers face in determining the likely competitive
18 effects of the potential for increased bargaining power
19 by a merger to harm competition? Should merger
20 enforcement policy focus on protecting consumers from
21 market power or to protect all market participants from
22 market power?

23 Those three interrelated questions and any
24 others that go to the broad question of how we should
25 change policy if at all in this area.

1 MR. CARSTENSEN: Do you want us just to go
2 down the line?

3 MR. ADKINSON: Peter, you are already --

4 MR. CARSTENSEN: I have had my shot. I think
5 others can shoot back.

6 MS. COLEMAN: So my basic view is, in terms
7 of this area, is I think it -- Scott sort of said,
8 well, what have we missed and is there evidence that
9 there are significant mergers that have caused
10 significant harm that are being missed. You know,
11 without that, I do not see why there is a need to
12 change standard practices. There are certainly mergers
13 that both agencies have gone after that are concerned
14 about buyer power. They recognize that issue.

15 But the question is, are we missing something
16 really important? And I think the key thing is making
17 sure that it actually ties to mergers. Sandeep brought
18 up some of the literature on labor markets and
19 monopsony power. I have looked through some of that.
20 There are lots of critiques of that literature, to
21 begin with, first, whether it actually really does show
22 that monopsony power is causing lower wages in a
23 significant degree in labor markets. But I think the
24 other key thing is whether you can tie that to actual
25 mergers that have occurred that have caused these

1 issues.

2 And the resource cost is a significant issue.
3 It would be very -- and especially with knowledge of
4 labor markets -- it would be a very costly endeavor to
5 try in most mergers to figure out what are the right
6 labor markets, what are the right ways to look at
7 geography, product market, and how do we figure out
8 quickly whether it is an issue or not? Because it is
9 not something that you can actually say, oh, well, this
10 town is a labor market. It may be for some industries,
11 it is probably not for most. For some labor
12 participants, they are going to have a lot of options
13 because their skill set is not very specific and then
14 in other cases, they will have very specific skill
15 sets.

16 So I think without having a significant
17 empirical record that mergers have -- we have missed a
18 lot of mergers that have caused significant harm,
19 investing a lot of resources into the area that would
20 take away for others, I think, you know, raises an
21 issue. And I would correct -- Sandeep's right on this.
22 If there is an issue then it will definitely take some
23 time to develop tool sets because the ones we have in
24 many of these areas will not work very well. Some,
25 they will work well. You know, the classic bargaining,

1 they will work well potentially because it is the same
2 issue. In a lot of other markets, the way that the
3 interaction occurs is going to be very different.

4 MR. HEMPHILL: Okay. So taking the questions
5 in reverse order, for those who are keeping score who
6 remember the three questions, so the third one is
7 enforcement. Should it be about protecting consumers
8 or all market participants? My answer to that should
9 be clear from earlier remarks. I think it is all
10 market participants, not just consumers. I am
11 interested in what other people think on that.

12 As to the difficulties in enforcement, I
13 think there is a conceptual problem and there is a
14 practical problem. The conceptual problem is, there is
15 not a decided, broadly understood answer to the
16 question, is a transfer enough, right? Or do you need
17 an output effect in some downstream market or, in
18 between, is it enough to at least have some quantities
19 change in the -- some distortion in the input supplied?

20 Now, my view is that a transfer is enough,
21 and I think that is the best read of the case law. But
22 whatever the right answer is, it would be really nice
23 to get an answer. And, right now, I think there is
24 some ambiguity between the DOJ and between FTC. I do
25 not think this is entirely nailed down.

1 There is a pair of practical problems, I
2 think, that emerge. One we already talked about, which
3 is when the compensation to a supplier goes down, what
4 happened? Was it because of a true efficiency? Was it
5 because of a squeeze attributable to reduced rivalry?
6 Is it attributable to some third thing that's neither
7 of those, because those two are not actually exhaustive?
8 That can make a difference in the analysis depending on
9 what your criteria is to begin with.

10 Second practical problem, if it turns out
11 that a transfer is not enough to state a harm, then we
12 are in the complex situation where the saved resources
13 on the buy side, when handed over to the sell side, is
14 argued as a source of efficiency. And those cases can
15 be, I think, quite complex indeed.

16 So the practical difficulties of enforcement
17 depend, in an important way, on what we think the rule
18 is. So being settled about what the right rule is, I
19 think, an important goal.

20 And then, finally, in terms of costs and
21 benefits, I cannot resist saying one benefit beyond
22 deterrence is a clarification of the law. This is
23 connected to my earlier comment. So I kind of want to
24 invite everybody to take Joe's invitation, try to seize
25 this opportunity to make some law together, the agencies

1 and the judge in tandem. Because I think this is an
2 area where having clear rules of the road would really
3 provide a lot of assurance and certainty to parties
4 going forward.

5 MR. MILLER: I was being facetious. Maybe it
6 was a little subtle. Well, now I am being facetious.
7 So --

8 MR. HEMPHILL: I did not take you to actually
9 invite everyone to take that opportunity. Your
10 skepticism, I think, is probably well reflected in the
11 record.

12 MR. MILLER: Okay, very good. So increasing
13 enforcement, I think, you know, let's not lose sight of
14 conduct cases and what the agencies have said over the
15 last, say, year or two. Put out a guide for HR
16 professionals, which seems a little, you know, bland
17 way to sort of describe it. But it contains some
18 interesting policy statements, right? So, you know, it
19 sort of signals to the world, we are starting to take
20 this more seriously, where we are going to be looking
21 for this sort of case.

22 The cases that Sandeep had talked about, I
23 think, you know, spurred some of this. *Arizona Nurses*
24 I worked on a little bit. Same kind of thing. Those
25 cases are relatively easier than merger cases if you

1 have the facts. So, there, you are less concerned
2 about deterring potential good behavior if all you are
3 doing is literally colluding to depress wages. You
4 know, that, I assert, is not a hard case. So much
5 so that that DOJ has, repeatedly in speeches, said that
6 they have grand juries open. They are now treating
7 this as a criminal violation. And so let's sort of
8 acknowledge and then maybe set aside conduct cases are
9 maybe a different sort of discussion than merger cases.

10 With merger cases, the transfer point that
11 Scott just made is kind of how it is teed up. So you
12 ask -- one of the fun things about working at an agency
13 is you have these lunchtime discussions, the economists
14 sort of come in and draw welfare loss triangles and you
15 have arguments whether transfers of wealth as a result
16 of transaction are enough if you cannot think of any ^
17 welfare loss. So trying to come up with hypotheticals
18 about where that is going to be the case. Demand is
19 perfectly inelastic. There will be zero units, fewer
20 purchases as a result of the price going up. Price
21 goes up, everybody pays it. Everybody pays it.

22 And then you sort of struggle to say, well,
23 we do not really have to deal with that. There are
24 always going to be welfare laws that you can at least
25 sort of say it may not be big compared to the transfer,

1 but it is going to exist, you know, fine.

2 And then you sort of think about, well, if it
3 is only a downstream case, you know, and you do only
4 allege a transfer, are you going to get kicked out of
5 court? Would you win that on a Rule 12 motion? Not
6 that you get them too much in merger cases. But, you
7 know, I think most people in the agencies would say,
8 yeah, I will fight that case. Transfer alone violates
9 Section 7. You know, flip it. Is Peter right or is
10 the idea of a mirror image really not true. You know,
11 then it gets a lot harder.

12 And the reason it gets a lot harder is, you
13 do worry whether you are going to take something that
14 looks like it does state a cause of action and could be
15 a violation and wonder what the other effects are going
16 to be, wonder whether you are going to get downstream
17 harm as a result of stopping this. I think it is a
18 real concern. I think it is a real concern because,
19 you know, as Mary said, I do not think we have great
20 tools.

21 To take issue with something that Peter said
22 in his opening remarks, HHIs of 1600, HHIs do not carry
23 much water ever now, except as a screening mechanism.
24 You cannot look at an HHI, I mean, you can say it
25 to a court because that is what the law says, but I

1 think, you know, internally, I do not think that that
2 is going to get you very far.

3 If you are writing a prosecution memo saying
4 we should sue these folks, I have defined a product and
5 geographic market, I have identified competitors, I
6 have added up their shares, and guess what? It is over
7 a threshold, let's go. I do not think that case gets
8 out. I think you need much more sophisticated
9 economics in practice than that. I am asserting this,
10 I cannot prove it to you.

11 So if you think of it as the same thing even
12 when the economic tools are not as well developed for
13 monopsony or buyer power, except maybe in the case where
14 you have the Nash bargaining model fitting very nicely, I
15 do not know that the share presumptions, no matter where
16 you set them, are going to be a great answer.

17 MR. ADKINSON: Thanks.

18 Sandeep?

19 MR. VAHEESAN: Responding to that point, the
20 lower courts still respect the *Philadelphia National*
21 *Bank* presumption --

22 MR. ADKINSON: Sandeep, can you get nearer to
23 the microphone, please?

24 MR. VAHEESAN: Sure. So the lower courts
25 still recognize the *Philadelphia National Bank*

1 structural presumption. So it is good law. I agree
2 with Joe that enforcers need more than the structural
3 presumption, but we should not discount the continued
4 relevance of the presumption either.

5 As to who the antitrust laws protect, I think
6 the legislative histories are quite clear. The
7 antitrust laws are intended to protect all market
8 participants. And *Mandeville Island Farms*, 70 years
9 ago, said consumers, workers, competitors and suppliers
10 are all entitled to antitrust protection. So legally,
11 the question has been decided. And even a case like
12 *Weyerhaeuser*, hardly a favored case of mine, said that
13 injuries to sellers can be sufficient to establish
14 antitrust liability.

15 And looking at a discrete point that has been
16 brought up by several panelists, there is maybe an
17 implicit assumption that maybe buyer side mergers can
18 be saved if there are downstream benefits. But I would
19 argue that the law is clear. *Philadelphia National*
20 *Bank*, *Brown Shoe*, and *Procter & Gamble* said, there is
21 no efficiencies defense. And *Philadelphia National*
22 *Bank* went even further and said, there is no
23 out-of-market efficiencies defense. If we care about
24 the administrability of merger law, we should support
25 rejecting an efficiencies defense because it calls for

1 all sorts of complicated quantification and balancing
2 of often unlike effects.

3 And I also say there is a good reason -- a
4 good policy reason to reject an efficiencies defense.
5 I think too many contemporary business models are
6 dependent on exploiting workers and suppliers. So
7 Amazon, Uber, and Walmart are some examples. So the
8 assumption is, for example, it is okay to erode labor
9 market standards provided some of the labor costs are
10 passed through to consumers, at least in the short
11 term.

12 So how is this relevant to merger policy? I
13 think that the enforcers should expressly reject the
14 idea that squeezing workers and suppliers through
15 enhanced buyer power somehow redeems otherwise
16 anticompetitive buyer side mergers. In other words,
17 they should expressly come out against these business
18 models that rely on robbing Peter to pay Paul.

19 MR. ADKINSON: Okay, thanks very much.

20 Those statements I thought actually worked
21 very well as sort of bottom line closes on this issue
22 as well. So what I propose to do, given the hour, is
23 perhaps ask Peter to give two or three minutes on a
24 response to the overall comments that were made and
25 then ask for one-minute closes from each of the

1 panelists.

2 MR. CARSTENSEN: This has been, again,
3 fascinating for somebody who has been laboring in this
4 field for more than a decade but waiting for more
5 serious discussion. Whenever I come in contact with
6 really good minds, I have learned an awful lot here.

7 I want to go back to kind of those three
8 issues that Bill raised. Are we concerned just with
9 consumers or with all markets? Again, with Scott, it
10 is all markets. You have to take that view. That
11 leads me to then point out the risk you are concerned
12 about, increased prices to consumers, well, it may
13 occur because you have a market that is not functioning
14 correctly.

15 And I pick up on Sandeep, but it is much
16 broader than just labor issues. It is not an
17 efficiency in any sense that public policy should
18 concern itself with that you have driven down the price
19 of labor below a reasonable market price. I concede I
20 do not know what the reasonable market price might be.
21 I am concerned then that we not confuse exploitation of
22 buyer power, in whatever form, with an actual
23 efficiency gain.

24 We turn then to the death of merger law as I
25 learned it back from 1968 to '73. You figured out the

1 market shares and you went and condemned the undue
2 increase in concentration because it was likely -- and
3 that is what the statute says -- may substantially
4 lessen competition; tend to create a monopoly. It does
5 not say, prove that it will have a particular effect.

6 So the nice discussion here of, oh, I have to
7 put in everything including the kitchen sink on top of
8 the market shares is exactly the wrong way, it seems to
9 me, to be looking at the problem. We don't know what
10 the effect is likely to be, in any particular case. We
11 know in general that if you increase concentration on
12 the sell side, it is going to result in higher prices,
13 a reduced output, loss of innovation. We know on the
14 buy side it has the adverse effects that I have already
15 discussed.

16 Let's keep it simple and administrable. I
17 honor Bill Kovacic on this. Let's use some standards
18 that will be workable, will be understandable, that
19 even businessmen -- well, I should say even economists --
20 might be able to understand, and not get ourselves hung
21 up in elaborate efforts to prove the existence or
22 nonexistence of a particular competitive effect.

23 Most important of all, we really need more
24 serious consideration of buyer power issues. I am on
25 board with the fact that we do not have enough

1 information. I think revising the Hart-Scott-Rodino
2 questionnaire to get some of that information would be
3 extraordinarily helpful as you begin to look at these
4 issues.

5 MR. ADKINSON: Mary?

6 MR. COLEMAN: There is so much to respond to
7 that, I am not sure I could do it in a minute. But,
8 first, I mean, just a couple of reactions to what both
9 Sandeep and Professor Carstensen have said. I mean,
10 the concept that we should ignore efficiencies in
11 antitrust and merger analysis is astounding to me. It
12 is the whole point of antitrust is to encourage
13 efficient markets. So to ignore efficiency seems to be
14 an amazing concept to do, especially in merger
15 analysis.

16 In terms of going back to relying on market
17 share screens, that ship has sailed and I do not think
18 you are going to see that in court cases. So I agree
19 with Joe that if you tried to bring a case just based
20 on shares, especially in an area that has not been
21 addressed before, it is just not going to work and I do
22 not think it should because I think you should actually
23 have a theory of what the actual competitive harm is
24 and be able to show what you think the effect is.
25 Whether it is we get to a point where we are just

1 focused on transfers at least then you are actually
2 showing an effect or whether you are focused on output.

3 And, finally, to me, I agree you do not
4 necessarily have to show ultimate consumer harm and
5 that should be the fact. But I do think it should be
6 sort of a guiding principle, what are you expecting
7 ultimately to occur? You know, a lot of the bargaining
8 models, we said both firms have market power. So if it
9 is a transfer, you know, we should care about that in
10 many cases, I agree.

11 But what if it is a transfer -- so someone
12 really big and two smaller guys get together and create
13 some bargaining power and actually bring prices down,
14 and then that allows you to reduce prices downstream?
15 That might be something you want to encourage. The
16 trickier cases are when they are sort of both big and
17 then what do you do?

18 MR. ADKINSON: Thanks.

19 Scott?

20 MR. HEMPHILL: So just to underline one or
21 two things that have been said. The main thing I want
22 to leave you with is that when we think about buy side
23 harms we should stay focused on a central issue that
24 sellers are worth protecting under the antitrust laws
25 just like buyers and we freely acknowledge this in

1 really simple cases, like a bidding ring, and that we
2 should equally acknowledge this in more complex
3 cases.

4 And that, you know, though it is very
5 frequently, maybe always the case, as we have heard
6 from Peter, and in a different way, to some degree from
7 Joe, it is very common, maybe always the case, that
8 there is, in addition, some output distortion or input
9 distortion or some other harm beyond the transfer that
10 economists could parse for us that is not an essential
11 part of the case any more than it is an essential part
12 of the case in a sell side case.

13 MR. ADKINSON: Thank you.

14 Joe?

15 MR. MILLER: So I think this is the right
16 forum for this sort of discussion. So I think bringing
17 a lot more of these cases before the theoretical
18 underpinnings are really clarified is not going to be
19 particularly helpful. I think the FTC has the power to
20 do this. And I am glad that it does.

21 So, you know, out of this I expect more
22 research, more discussion, more publications, and maybe
23 we will sort of find in all that that the enforcement
24 level is just right or maybe we have been missing
25 something. But I do not think we have the tools right

1 now to really answer that question.

2 It reminds me a little bit about when I was
3 studying law. Raising rivals' costs was a theory that
4 had not really taken hold. It was much debated. There
5 were some rather sort of enforcement-minded folks who
6 really thought that it should be pushed; others were
7 skeptical. Over time, more literature worked its way
8 into cases. Now, I think it is relatively accepted by
9 courts and part of mainstream.

10 Last time I was at one of these fora, I heard
11 a panel on cross-market mergers in hospitals, which it
12 you are a market participant seems to be something that
13 everybody believes. But, you know, you cannot
14 demonstrate economically. Maybe that will be the same
15 thing, maybe it will not. I think of this as the same
16 thing. More discussion, maybe not ready for more
17 vigorous enforcement, but a worthwhile panel.

18 MR. ADKINSON: Thank you.

19 Sandeep?

20 MR. VAHEESAN: So I believe calculating
21 monopsony systematically going forward requires
22 jettisoning consumer welfare. At a minimum, the
23 language of consumer welfare is very hard to square
24 with buyer side concerns. How do workers and suppliers
25 fit under consumer welfare? They are not consumers or

1 purchasers. They acknowledge that there may be an
2 accepted term of art among specialists, but it is
3 deeply confusing to a lay observer.

4 And since we are talking about public law
5 advancing public ends, goals that only specialists can
6 understand should give us real pause. And,
7 furthermore, I feel that so long as we are in the
8 consumer welfare framework, antitrust will continue to
9 be used against independent contractors and others
10 trying to organize against monopsony power. After all,
11 workers' collective action can lead to higher prices
12 for consumers.

13 So I believe if we want to take the monopsony
14 threat seriously, we require new language and new
15 philosophy that antitrust is antimonopoly; a body of
16 law that, as Congress originally intended, controls the
17 power of big businesses over consumers, workers,
18 competitors and suppliers.

19 MR. ADKINSON: Thanks very much.

20 Please join me in thanking our panel for
21 really an excellent discussion.

22 (Applause.)

23

24

25

1 CLOSING REMARKS

2 MR. ADKINSON: We are honored to have closing
3 remarks now by Commissioner Maureen Ohlhausen.

4 Maureen's extraordinary career at the FTC began as a
5 member of the staff at the Office of the General
6 Counsel, including heading up the Office of Policy
7 Planning and culminating in serving as a Commissioner
8 and then Acting Chairman.

9 Thank you for your service, Commissioner
10 Ohlhausen.

11 (Applause.)

12 COMMISSIONER OHLHAUSEN: Well, thanks so much
13 for having me here to close out a very interesting day.
14 I am also about to close out a very interesting career
15 at the FTC next week. After six years as a
16 Commissioner and more than 12 years in other roles at
17 the agency, I can offer some broad perspectives on what
18 the agency is meant to do and how to tell whether we
19 are succeeding in that role the way Congress intended
20 at our creation.

21 Now, these are issues that I have spent many
22 years thinking about from my early days advising
23 Commissioner Swindle to my time working on the FTC at
24 100 report as Director of Office of Policy and Planning
25 under Chairman Bill Kovacic, to my time as a

1 Commissioner. In particular, as Acting Chairman of the
2 agency, I had good cause to reflect seriously again on
3 what we do at the FTC, our institutional strengths, and
4 how to leverage successfully those strengths for the
5 good of consumers and the country in the years ahead.

6 And I am pleased that Chairman Simons is also
7 thinking deeply on these topics and getting
8 wide-ranging input through this series of hearings. I
9 sincerely hope these insights -- the insights the
10 Commission gains through this process will help ensure
11 the FTC future success.

12 But how should we define success as an
13 agency? In an influential article, former Chairman
14 Kovacic and Professor David Hyman identify the three
15 most important factors to predict long-term agency
16 success, consistent political support, policy coherence
17 and capacity, and capability to handle the agency's
18 mission. I believe these factors are important as the
19 Commission considers the path ahead.

20 As a threshold matter, an agency needs
21 consistent political support, or as Kovacic and Hyman
22 call it, political implications. They note that this
23 is the most important of the factors for success. In
24 their words, an agency is doomed if it lacks a
25 supportive constituency or if the performance of its

1 duties generate crippling political opposition. More
2 broadly, an agency will not be able to operate
3 effectively if its structure raises serious doubts
4 about its legitimacy or increases the vulnerability to
5 political pressure that the performance of its duties
6 will arouse.

7 Now, this first factor speaks directly to the
8 FTC's origins and the stability of its structure as a
9 bipartisan entity. Now, the FTC was born from early
10 20th Century dissatisfaction with the way the
11 Department of Justice was enforcing or not enforcing
12 the Sherman Act. And as many of you know in the Gilded
13 Age years, preceding the FTC's creation, the country
14 underwent a massive wave of corporate consolidation.

15 In the decades straddling the turn of the
16 20th Century, there were 42 deals producing companies
17 controlling over 70 percent of their respective
18 industries. During the peak of this merger boom from
19 1898 to 1902, at least 303 companies disappeared each
20 year, and in 1899, over 1208 were merged out of
21 existence. For several years, the government offered
22 essentially no meaningful response.

23 Now, the leadership of the DOJ was not
24 entirely to blame for this situation. It was a product
25 of many factors, including an underdeveloped

1 understanding about the economic implications of
2 corporate consolidations, political indifference and a
3 Supreme Court that had expressly called into question
4 whether the Sherman Act applied to mergers. These
5 circumstances triggered an era of public agitation that
6 aided President Roosevelt in expanding the antitrust
7 laws, pushing to establish the Sherman Act's coverage
8 of consolidations and culminated more than a decade
9 later with Wilson's signing of the FTC Act and Clayton
10 Act.

11 I believe the current debate about
12 concentration and the role of antitrust reflects a
13 similar era of public agitation. It also calls for a
14 deep understanding of the institution, the FTC, that
15 arose out of this similar era 100 years ago.

16 Now, interestingly, the turn of the 20th
17 Century consensus for additional competition
18 enforcement did not lead to uniform vision for a new
19 competition agency. Rather, two camps formed. The
20 first believed Congress should create a new agency to
21 be a law enforcer similar to DOJ, but politically
22 independent and with flexible substantive jurisdiction
23 to allow it to proactively shape business behavior.

24 The second camp, on the other hand, wanted to
25 move away from the DOJ model and create an independent

1 policy body similar to Roosevelt's new Bureau of
2 Corporations within the Department of Commerce and
3 Labor. This policy agency would have special power to
4 work with the business community, research competition
5 issues, then issue reports and regulations and
6 guidelines that would help shape industry's conduct.

7 The FTC was created as compromise between
8 these two views. We are an independent, bipartisan,
9 policy-oriented, research-based enforcement agency.
10 The bipartisan design insulates us to some extent from
11 being buffeted by political winds. Combining this
12 bipartisan leadership with the agency's research and
13 policy functions results in a relatively steady and
14 disciplined stewardship of our merger review mandate
15 and conduct enforcement, which other than some notable
16 missteps about 30 years ago, has often been a source of
17 broad political support over the last few decades.

18 And I assume this support is at least in part
19 because even the out-of-power party continues to have a
20 serious voice in U.S. competition policy and
21 enforcement decisions. Indeed, during my 15 months as
22 Acting Chairman, the Commission could only take action
23 if there was bipartisan agreement. And, notably, we
24 were able to continue an active enforcement and policy
25 agenda and had over 500 unanimous votes.

1 This leads me to the next most important
2 factor for agency success: Policy coherence. The
3 FTC's design offers strong policy coherence because of
4 its dual mandate for competition and consumer
5 protection. These are different but equally important
6 complementary tools for the agency to help promote
7 fairness in our markets and therefore promote consumer
8 welfare. Each tool protects consumers in different
9 ways and each has its limitations, allowing one to
10 offer relief where the other cannot.

11 Competition is the first line of defense. A
12 competitive market is a welfare-enhancing one for
13 consumers. Aggressive competitors fight for consumers
14 using price and quality as their weapon, including the
15 quality of service. They work hard to protect their
16 reputations because they know that a dissatisfied
17 customer can easily turn to alternatives.

18 But there are limits to this. As former FTC
19 Chairman Tim Muris once wryly observed, the commercial
20 thief loses no sleep over its standing in the
21 community. Some companies engage in fraud, dishonesty,
22 unilateral breach of contract or other conduct that
23 hurts consumers with little regard for their
24 reputations or the possibility of being put out of
25 business.

1 Because the competitive market sometimes
2 cannot discipline these behaviors, we also use our
3 consumer protection authority. But these missions are
4 aligned, which allows the agency to apply them
5 cohesively and imbues all Commission staff with the
6 sense of common purpose, to protect consumers. I hope
7 this singular focus on consumers will continue at the
8 Commission in future years, particularly because it has
9 been a proven linchpin of policy coherence and cohesion
10 throughout the agency's history.

11 So we come to the third factor, agency
12 capacity and capability. Now, capacity refers to
13 resources, which in large part hinge on an agency's
14 credibility with Congress. Capability, according to
15 Kovacic and Hyman, is slightly different, turning on
16 whether an agency has the tools to make good decisions
17 and does so.

18 And I will focus the remaining few minutes of
19 my remarks explaining why, based on our design
20 protocol, the agency has been doing exactly what it was
21 meant to do: identifying competition problems in the
22 economy; developing proof of the problems; debating the
23 evidence of harm and proper courses internally; and
24 then leading by example outside the agency with every
25 advocacy, enforcement, and regulatory tool at its

1 disposal. And our efforts have paid off, though
2 sometimes it takes a while. But that is often the risk
3 of leading.

4 The agency's design gives it the singular
5 ability to identify a potential competition problem in
6 the market, develop empirical research to determine
7 whether the problem actually exists and then plan and
8 execute a multi-year advocacy and enforcement agenda to
9 rectify the problem. In other words, the FTC is
10 designed specifically to lead others in the continuous
11 development of competition law to accurately reflect
12 changing economic conditions.

13 It is in the agency's DNA, so to speak, from
14 the open-ended drafting of our statutory authority in
15 Section 5 of the FTC Act to our research and
16 report-writing authority in Section 6 of the Act, which
17 permits us to gather and compile information and make
18 public such portions as are in the public interest.

19 Now, the Commissioners sometimes disagree
20 about how the agency should pursue its mandate, but
21 that debate, too, and the necessary negotiation and
22 compromise that come with the Commission structure is
23 another invaluable part of our Commission design. It
24 is among the reasons studies have shown that the
25 agency's merger enforcement does not wax and wane with

1 the election cycles in Washington, D.C.

2 For example, although you may be surprised to
3 hear it, the number of our competition enforcement
4 matters actually tied historic levels during my tenure
5 as Acting Chairman, despite it being a time of
6 pronounced political change.

7 Using this process over the years, the FTC
8 has made vital contributions in doctrinal gray areas.
9 On the merger side, the agency has notably introduced
10 new concepts or new ways of analyzing hospital mergers,
11 potential competition issues, and dynamic markets.
12 Now, our merger work involving cluster markets is one
13 such example. The notion that hospital mergers
14 indicate a cluster of inpatient services is now so
15 widely accepted it is rarely litigated.

16 But the Commission has also recently
17 challenged cluster markets outside hospital mergers, as
18 in our 2015 successful challenge of the Sysco-U.S.
19 Foods merger, and then again in 2016 in our winning
20 challenge in Staples-Office Depot/OfficeMax. And while
21 I was Acting Chairman earlier this year, we alleged,
22 and the District Court subsequently found, that
23 Wilhelmsen's proposed acquisition of Drew Marine likely
24 would reduce competition in a cluster market of marine
25 water treatment chemicals.

1 On the conduct side, the FTC has been at the
2 forefront of developing invitations to collude, the
3 proper extent of competitor collaborations in cases
4 like Polygram and, of course, reverse payment
5 settlement agreements. The agency also has had a major
6 impact on developing the outer bounds of antitrust,
7 particularly with respect to the scope of exemptions
8 and immunities like Noerr and State Action, topics on
9 which I have been particularly active.

10 Antitrust doctrine evolves and ideas can and
11 should be debated in settings like these hearings. But
12 debate alone is an insufficient ground for action. To
13 make good decisions, the agency must test new ideas
14 empirically and develop proof of actual competition
15 problems in the economy. If there is such evidence, it
16 should then consider the tools to best address it.

17 Notably, most of our doctrinal contributions
18 have depended on the broad use of all of our agency
19 functions -- research, advocacy, administrative
20 litigation and federal court enforcement. I thus urge
21 the Commission to continue to strive to make decisions
22 based on empirical foundations and to consider all of
23 its tools if it finds evidence of harm to the
24 competitive process that reduce consumer welfare.

25 So I will leave you with a few closing

1 thoughts on what guidance past agency experience can
2 offer for the future. First, the FTC is well suited to
3 play a leadership role in large part because of its
4 design, which has played significant part in its
5 contributions to difficult competition issues. It has
6 afforded the agency bipartisan political support, a
7 coherent policy framework to protect consumers with
8 complementary tools, and the capacity and capability to
9 invest in resolving novel competition issues with
10 long-ranging plans relying on outreach, research,
11 advocacy, and enforcement.

12 And also the real key to successful agency
13 design, in my opinion, is the ability to attract and
14 retain great people. And judging by the people I have
15 met during my time at the FTC and the enthusiasm they
16 all bring to the job of protecting American consumers,
17 I feel very confident of the agency's success in the
18 future.

19 Thank you very much.

20 (Applause.)

21 (End of Hearing 2.)

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CERTIFICATE OF REPORTER

I, Linda Metcalf, do hereby certify that the foregoing proceedings were digitally recorded by me and reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, not financially or otherwise interested in the outcome in the action.

s/Linda Metcalf

LINDA METCALF, CER

Court Reporter