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FEDERAL TRADE COMMISSION
COMPETITION AND CONSUMER PROTECTION
IN THE 21ST CENTURY

Wednesday, October 17, 2018
9:00 a.m.

George Mason University
Antonin Scalia Law School
3301 Fairfax Drive
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3 INTRODUCTION AND WELCOMING REMARKS

4 MR. MOORE: Good morning. Welcome to day three
5 of our hearing sessions on antitrust and multi-sided
6 platforms. We have a great and full day for all of you
7 in the audience and watching on the web.

8 Just to put today's events in a little bit of
9 context, on Monday, the first day, we heard quite a bit
10 about the economics of multi-sided platforms, and we
11 also heard about individuals' experiences operating
12 multi-sided platforms and investing in multi-sided
13 platforms in the business world. And we also heard
14 about how to define relevant markets and think about
15 market power from an antitrust perspective.

16 Yesterday, we heard about the United States vs.
17 Microsoft case, a protoplatform case. That case was
18 litigated and decided before much of the new economic
19 learning on multi-sided platforms had taken place. And
20 we also heard about how the U.S. and European
21 competition agencies might treat cases involving
22 multi-sided platforms differently.

23 Today is all about conduct, and when I say
24 "conduct," I'm using the term quite broadly. I'm
25 thinking both about anticompetitive conduct by a single

1 firm and also about mergers and acquisitions. So in
2 the morning sessions, we have two panels on potential
3 exclusionary conduct cases involving multi-sided
4 platforms as defendants.

5 The first panel, which will take place in just
6 a few moments, is going to focus on specific pieces of
7 potential anticompetitive conduct. The second panel is
8 going to focus on how vertically integrated platforms
9 might be able to engage in potential exclusionary
10 conduct.

11 We have three afternoon sessions devoted to the
12 timely topic of how to think about mergers and
13 acquisitions involving multi-sided platforms,
14 particularly when the acquiring company is a large and
15 established multi-sided platform.

16 So with a broad overview of where we're going
17 today and how that fits into what we've done so far, I
18 will turn the mic over to my colleague, Ian Conner, who
19 is going to moderate our first panel.

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1 PANEL 1: UNDERSTANDING EXCLUSIONARY CONDUCT
2 IN CASES INVOLVING MULTI-SIDED PLATFORMS: PREDATORY
3 PRICING, VERTICAL RESTRAINTS, AND MFN
4 MR. CONNER: Thank you.

5 So good morning. So this is the first panel.
6 It is Understanding Exclusionary Conduct in Cases
7 Involving Multi-Sided Platforms: Predatory Pricing,
8 Vertical Restraints, and MFN.

9 So I will do a very quick introduction of the
10 esteemed panelists.

11 To my right, first, at the end of the table is
12 Dick Schmalensee, who is the Howard Johnson Professor
13 of Management Emeritus, Professor of Economics
14 Emeritus, and Dean Emeritus of MIT's Sloan School of
15 Management.

16 Judith Chevalier is the William S. Beinecke
17 Professor of Economics and Finance at the Yale School
18 of Management.

19 Tom Brown is a partner in the antitrust and
20 competition and the global banking and payment systems
21 practice at Hastings in San Francisco.

22 Susan Athey is the Economics of Technology
23 Professor at Stanford Graduate School of Business.

24 And, finally, Pinar Akman is the Director of
25 the Center for Business, Law, and Practice, and a

1 Professor of Law, specializing in competition law at
2 the University of Leeds in the United Kingdom.

3 We will start with opening statements from each
4 of the panelists and then turn to questions. So I will
5 turn first to Dick Schmalensee for his opening
6 statement.

7 MR. SCHMALENSEE: Thank you. Let me just make
8 a few general remarks.

9 First, I think it's important to be clear what
10 we're talking about. The definition of "platforms" is
11 sometimes a little vague. I really mean a business
12 that facilitates interactions between members of two
13 distinct groups, and when that's a viable business,
14 there are inevitably indirect network effects, network
15 externalities, connecting the members of those two
16 groups. If you can make a business out of facilitating
17 interactions, they must care about the folks in the
18 other group. That's indirect network effects.

19 When multi-sidedness is present, it is hard to
20 imagine, in antitrust analysis, why it wouldn't be
21 considered -- perhaps not modeled explicitly, perhaps
22 put to one side -- but if it's an important feature
23 that affects business conduct, like scale economies or
24 intellectual property, it's hard to make a case for
25 ignoring it. And I take this to be the primary lesson,

1 perhaps the most durable lesson from the AmEx decision.

2 The need to consider two-sidedness I think is
3 particularly clear in predatory pricing, and that's
4 what I'm going to focus on. Platforms often sell to
5 one group at a loss and make their money on the other
6 side. Those are denoted the subsidy side and the money
7 side in the vernacular.

8 Newspapers are a classic example, and I'm going
9 to ask you to cast your minds back to a world in which
10 newspapers were profitable and important. Typically,
11 the papers themselves were sold at or below marginal
12 cost, and the money is made on advertising.

13 Now, in fact, I get a couple of neighborhood
14 weeklies for free every week. Now, to say that that
15 pricing of newspapers below cost is always predatory
16 and to ignore the advertising side would be crazy, but
17 similarly, to say that any price for advertising above
18 cost is nonpredatory would also be a little bit crazy.
19 It's possible to price advertising in this world above
20 cost and still have predatory effect by making it
21 impossible for other newspapers to earn a living.

22 People talk in this context about the
23 Times-Picayune case, but people often forget that there
24 were two charges initially in Times-Picayune. One of
25 them was a predatory pricing charge. Times-Picayune

1 operated a morning newspaper and an evening newspaper.
2 The charge was the evening newspaper was operated below
3 cost, thereby making it impossible for another evening
4 newspaper to compete.

5 A district court looked closely at that looking
6 at the whole newspaper, not at how newspapers were
7 priced or how advertising was priced, and said, "That
8 paper's profitable. Good-bye." That allegation did
9 not reach the Supreme Court.

10 Let me make two other general comments if I
11 haven't run over my time. A central feature of
12 two-sided platforms is they need both groups to
13 survive, so cutting off access to either one, even if
14 it is the subsidy side, suffices to bar entry. So in
15 considering whether a deterrent strategy can work, you
16 don't have to block both sides. Blocking one will do
17 the trick.

18 The second thing is in rule of reason cases,
19 there's always the fundamental issue of whether there's
20 a significant impact on competition, and that really
21 does require looking at something like a market, and
22 I'm sure we'll come back to market definition
23 questions, but since we're probably not going to be
24 able to avoid AmEx, that's the part I like least about
25 the dissent.

1 The dissent almost seemed to say you suppressed
2 competition, that's illegal, and I wonder what would
3 have happened if Diner's Club had had the nonsteering
4 rule that American Express had had.

5 Thank you.

6 MR. CONNER: So next we will turn to Tom Brown.

7 MR. BROWN: Thank you, Ian, and thank you,
8 Dick, for the introduction to this wonderful topic, and
9 I actually want to thank the FTC and my former
10 colleague, Bilal Sayyed, for inviting me, having spent
11 the last couple of days sort of reviewing all the
12 amazing content. So I really do want to thank the
13 Commission for pulling all of this together.

14 So I want to start in a somewhat prosaic
15 fashion since I'm, you know, the practicing lawyer
16 here, not the academic, and to focus on the practice
17 that triggered the Supreme Court's case in Ohio vs.
18 American Express. We tend often, when a case reaches
19 the Supreme Court, to lose sight of, like, the thing
20 that we were thinking about in the first instance, and
21 so I think we should all keep in mind the words of
22 David Byrne and ask sort of -- the noted economist,
23 David Byrne -- how we got here.

24 So I brought an American Express card just as a
25 prop, because I thought it would be useful for people

1 to have, like, visual -- because this is something we
2 do all the time, but we don't necessarily think about
3 it. So the precise practice at issue -- and I'm not
4 making this up, like this is what the case is actually
5 about, okay -- so the restraint at issue in Ohio vs.
6 American Express was that when a merchant has decided
7 that they're willing to accept American Express cards,
8 and so they have a little decal on the door, and the
9 consumer goes into the store and then takes out their
10 American Express card, that the merchant at that point
11 is disabled, as a matter of contract, from encouraging
12 the consumer to use another form of payment.

13 Do we all have that in our heads? I can do a
14 replay, okay, just in case you missed it. So I'm in a
15 store, I have stuff I want to buy, I take out my
16 American Express card, and at that point, the merchant
17 is disabled from persuading me to use another form of
18 payment. That's what that case is about.

19 The precise legal issue that's teed up -- and
20 there are all kinds of things to talk about in the
21 opinions themselves. One -- and I think it would have
22 actually been nice, in sort of rereading the opinion,
23 had Justice Scalia been on the Court, because I would
24 have hoped that the case would have been slightly
25 clearer -- but the key legal issue is actually buried

1 in a footnote, footnote 7 of the opinion, because the
2 Department of Justice claimed that it could make out a
3 case challenging that restraint that we've discussed
4 and that I've described by pointing to the restraint,
5 plus the fact that American Express charged higher
6 prices for its services than its competitors, right?
7 So you have a restraint, plus higher prices, and
8 according to the Department of Justice, that's all they
9 need to show in order to shift the burden to the
10 defendant to justify the conduct.

11 The Supreme Court then holds, no, that's not
12 enough. If you're going to point to those prices as
13 direct evidence that the contractual provision that
14 you've identified has harmed competition, you actually
15 have to define the market and grapple with the conduct
16 in a coherent way to link the alleged restraint to the
17 higher prices, right? Otherwise, we just have this
18 sort of weird correlation, no real causation, and
19 that's not enough. That's the case.

20 So the claim that the case represents some
21 dramatic change in the trajectory of antitrust law
22 seems, on the facts, like the only word that comes to
23 mind -- well, I guess there are two. The polite way of
24 putting it would be hyperbolic. The less polite way
25 would be that's crazy, like -- and you can put whatever

1 expletive you want in front of crazy, right? Like I
2 have all kinds that I put in my head, and I'll just
3 omit them in polite conversation, but, like, that's
4 nuts.

5 And to demonstrate the nuttiness of it, let's
6 recall another super famous two-sided market case, also
7 involving the Department of Justice, also involving a
8 loss in the Supreme Court, and I don't mean
9 Times-Picayune, right? My famous two-sided market
10 case, for what it's worth, is U.S. vs. Chicago Board of
11 Trade. When I teach two-sided markets in antitrust
12 law, I always start with Chicago Board of Trade, right?

13 And let's then go back and think about Chicago
14 Board of Trade for a second. So the Department of
15 Justice case in Chicago Board of Trade consisted of a
16 set of rules that restricted how traders on the floor
17 could trade grain that was going to arrive at the end
18 of the closing session, and the joint venture adopted a
19 rule that said if the grain was arriving after 2:00,
20 you couldn't purchase it at a price other than the
21 price at the end of the closing session. That bothered
22 some traders and some railroad owners, I think, I think
23 that's the sort of subtext of that particular case, and
24 so then the Department of Justice sued.

25 Justice Brandeis said, like, that's not enough

1 to establish that some provision has inhibited
2 competition within the meaning of Section 1 of the
3 Sherman Act. You have to actually dig in and evaluate
4 the underlying facts. So, again, I commend the
5 Commission for putting all of this together, and I hope
6 that we can reduce some of the sort of hyperbolic
7 claims about where antitrust law has gone.

8 Again, right, so I did see David Byrne at a
9 music festival this week, so, like, he's kind of on my
10 mind, right? Like, antitrust is not actually a road to
11 nowhere, but to know where we are, it is helpful to
12 know where we've been.

13 MR. CONNER: Susan?

14 MS. ATHEY: Thank you.

15 So I think as Dick pointed out, you know, a key
16 feature of platform markets is that they're
17 characterized by scale economies and particularly the
18 chicken and egg problem, and so, you know, if you want
19 to get started as an entrant in a platform market, you
20 need sellers to get buyers and buyers to get sellers.

21 And so a common way that, you know, I teach my
22 MBAs about what you would need to do if you wanted to
23 enter one of these businesses is to find some kind of a
24 business deal that allows you to acquire a set of
25 either consumers or sellers and then use those to pull

1 the other side on board; or another option is a large
2 intermediary that might be able to steer a group of
3 buyers or sellers to become sort of the anchor tenants
4 of your platform.

5 So an entrant can raise capital, sort of
6 subsidize an initial set of parties to participate, and
7 then pull the other side in, and this is very common,
8 and it's been, you know, used across all the
9 marketplaces that we know and love to get started.

10 Of course, incumbents recognize that as being
11 the key path to entry, and so they also realize, then,
12 if they can stop entrants from acquiring a big set of
13 consumers or sellers through business deals, then they
14 may be able to really impede entry.

15 Another thing that they can do is to avoid
16 letting the entrant kind of easily siphon off a
17 customer. So if customers might multihome, like switch
18 back and forth between platforms, another kind of
19 strategy an incumbent can follow is to make it
20 difficult for, say, the sell side of the market to
21 multihome.

22 So let me give some hypothetical examples of
23 conduct that would sort of go into these types of
24 buckets so we could think about what might have some
25 consumer welfare challenges. So I'm going to

1 intentionally use some examples that are not happening,
2 so, please, nobody tweet that I said these specific
3 examples are happening, okay?

4 I'm going to use firm examples that I'm not
5 aware are doing this just to sort of get us thinking
6 about, you know, how we would interpret that conduct.
7 So these things have happened but just not by these
8 specific firms or in these industries.

9 So a first example would be suppose that Amazon
10 told booksellers that they were not allowed to use
11 software that helped them figure out whether the best
12 place to sell their particular book is on eBay or
13 Amazon, okay? So suppose Amazons said, if you want to
14 use that kind of software, you have to communicate with
15 us by uploading CSV files. You can't actually plug
16 into our software and change your prices in real time.
17 What would we think about that? We might think that
18 that might somehow be bad for competition between
19 Amazon and eBay.

20 Suppose that Amazon owned the software that
21 booksellers used to try to decide where to sell their
22 books, whether on Amazon or eBay or other platforms,
23 but they didn't actually give exactly accurate
24 information about where to sell, and, in fact, they
25 suggested that sellers sell on Amazon when they might

1 get a better price on eBay. That also might concern us
2 from a competition standpoint.

3 Another type of hypothetical example, suppose
4 there was a car review website that had blogs and
5 information about, you know, where to buy stuff on
6 cars, and Amazon said to that car review website, well,
7 if you want to put an affiliate link in the part where
8 you talk about books, so if you want to make money on
9 your car review website by linking to Amazon and
10 getting a commission for referring book customers,
11 well, you also have to use Amazon affiliate links on
12 the page that sells auto parts. So you can't actually
13 put an affiliate link for an auto part website over
14 there. Again, we might think that would make it hard
15 for an auto part e-commerce site to enter because they
16 would have a hard time acquiring customers if they
17 didn't also sell books, and so it would sort of make it
18 hard for them to acquire a big group of customers by
19 making a deal for affiliates from the popular blog
20 website.

21 And as a final hypothetical, suppose that AT&T,
22 having now entered the advertising business, decided to
23 charge higher prices to Amazon if they showed ads
24 through DirecTV, and Amazon couldn't advertise its
25 books or its Prime delivery for the same price as other

1 advertisers through DirecTV.

2 So I think all of these would at least cause us
3 to stop and question, you know, whether those types of
4 practices had efficiency benefits, as well as whether
5 they might cause some harm to competition, and you
6 might be really the most worried about long-term harm
7 for competition, those cases that might make it hard to
8 have real platform competition that really incentivised
9 the platforms to behave well.

10 So all of those examples were actually
11 motivated by work that I did when I spent a lot of time
12 working in another industry, which was internet search,
13 and those types of practices were really common, and
14 sort of maybe perhaps surprisingly, they really were
15 not mostly stopped even by all the various litigation
16 that you've seen around the world.

17 So just to think about how this customer
18 acquisition works in search, most of us think about
19 ourselves as sort of choosing an internet search engine
20 as an individual consumer without realizing that, you
21 know, maybe up to 30, 40, even at times 50 percent of
22 the market, the consumer searches are actually steered
23 through various types of business deals.

24 Just as an example, you know, Google pays Apple
25 billions of dollars a year to be the default search

1 engine on the iPhone. I read a recent news report -- I
2 don't know if it's true -- that that was 9 billion in a
3 recent year. So these types of business deals are
4 used, and they are used for, you know, being the
5 default engine on browsers, and they used to be used
6 for PCs and phones and various other types of
7 mechanisms for acquiring consumers. And, indeed, you
8 know, Google got its start through a series of these
9 deals.

10 Just as an example of how one of those worked,
11 when Bing first entered the search market -- well, it
12 wasn't called Bing then. When Microsoft did, Microsoft
13 and Google competed to be the default search engine on
14 AOL, and actually Google ended up paying more than 100
15 percent of the search revenue from advertising to AOL
16 in order to make sure that that ten points of market
17 share stayed with Google rather than went over to
18 Microsoft's search engine.

19 And so those types of business deals are
20 actually really important behind the scenes, and so
21 what types of conduct that you might worry about in
22 those cases are making the exclusive deals go across
23 countries, across all different types of searches,
24 across all different websites operated by the same
25 company, and those things might make it difficult for

1 new entrants to come and get a toehold.

2 So, broadly, I think that we want to think
3 about exclusive conduct in these types of markets,
4 especially in environments where it's really important
5 to be able to acquire, say, consumers in order to
6 really get a platform going and have later platform
7 competition.

8 MR. CONNER: Okay. With that, I'll turn it
9 over to Judy.

10 MS. CHEVALIER: Okay, thanks.

11 So I think I'm going to start maybe behind
12 where everybody else started and try to give what I
13 think is the kind of list of things we might actually
14 worry -- like, the categories of things we might worry
15 about as anticompetitive potential issues in platform
16 markets, and then talk a little bit about practices
17 that might create them, all right?

18 So what are we worried about? So, number one,
19 I think we're worried about -- when we say exclusionary
20 conduct, what kind of conduct are we worried about? So
21 I think number one is some situation in which we can
22 make a case that a multi-sided platform effectively
23 shuts down competition outside the platform, and that
24 would be either from a rival platform, which Susan
25 focused a little more on that, or from individual

1 platform members themselves, right? So participants on
2 the platform's outside competition. So that might be
3 one set of things we worry about.

4 The second set of things we might worry about
5 is a situation in which a vertically integrated
6 platform provider creates conditions that grossly favor
7 its own product over the other products on the
8 platform, okay? That would be a situation that we
9 might, again, in principle possibly worry about.

10 The third, I think -- and I think this is the
11 lens through which some people view the AmEx case -- is
12 a platform creates negative externalities for consumers
13 not using the platform.

14 And then the fourth, which is probably a little
15 aside from our topic today but I will add it for
16 completeness, is a situation in which the platform
17 functions to facilitate collusion among the platform
18 participants. So when I think of a complaint against a
19 multi-sided platform, I typically want to think about
20 which, if any, of those four buckets that I just
21 described is it implicating.

22 Now, I think one of the challenges in looking
23 at this -- and I agree with Dick's opening statement
24 that this is -- that all of these cases are just
25 fact-specific, which makes it hard to derive too many

1 general principles, I agree with him, and in particular
2 I want to talk about what I think is a false dichotomy
3 that sometimes arises in looking at these contractual
4 practices.

5 So are there situations in which the
6 contractual practices can substantially contribute to
7 the four problems I just identified? Yes, I think so.
8 Is it also true that those same practices may have
9 fairly compelling efficiency rationales for being
10 adopted? Yes. So I think there -- that the same
11 practice can be both having a fairly compelling
12 efficiency rationale and a fairly compelling theory of
13 harm from an anticompetitive perspective, and we often
14 try to think of those things as mutually exclusive, and
15 they're really not.

16 So I'll give an example of maybe two situations
17 where you might think there's both an efficiency
18 rationale and a theory of harm. One is hypothetical.
19 One, I think, is real. So obviously I think Pinar is
20 going to talk about some cases in Europe around travel
21 MFNs, and there we're thinking about the situation in
22 which a online travel service provider is entering into
23 contractual relationships with the hotels that book
24 through the site with regard to how much the hotel --
25 how the hotels can price and offer availability outside

1 the site and, therefore, you know, typically restrain
2 the extent to which the hotels offer cheaper prices on
3 their own sites, for example, or on rival sites than on
4 the travel booking site.

5 Now, is there a good efficiency rationale for
6 that? Yes, right? A lot of people will search the
7 travel site, use the facilities provided by the online
8 travel site, free-ride off of it, and then go book on
9 the hotel site itself if there's some better deal from
10 booking on the hotel site. Is it also potentially a
11 source of an anticompetitive practice? You know, I
12 think it is, especially in the circumstance of a very
13 dominant booking site, potentially.

14 Another one which is hypothetical, but I think,
15 you know, you could think about, is -- so think about
16 Amazon, and I will say I think I am more relaxed about
17 Amazon's market position than many of the people who
18 are watching the webcast, but nonetheless, one thing, a
19 lot of people use these little apps that they attach to
20 Amazon that tells them when there's a cheaper price
21 elsewhere, as they're about to put something in their
22 cart. Now, those apps do create competition between
23 Amazon and other websites.

24 If Amazon were to enter into a contract with
25 retailers who sell on Amazon or who sell their products

1 on Amazon, you know, preventing them from offering
2 cheaper prices elsewhere, would there be a substantial
3 free-riding justification for that, given people are
4 using Amazon and the app to find out that there's a
5 cheaper price at some website they didn't even know
6 about? Yes. Is there also the argument that in some
7 dynamic sense that would have the effect of restricting
8 competition? Yes, I think it probably would, right?

9 So I think when we think about these cases, the
10 trick here -- and I don't think we've been very
11 disciplined about thinking of the rules -- is we need
12 to think about situations in which -- we have to ask
13 the question, how dominant does a firm have to be to
14 have this explanation override or the anticompetitive
15 concerns override an efficiency rationale?

16 Thanks.

17 MR. CONNER: Okay, thank you.

18 And last, but certainly not least, Pinar, and I
19 will turn the clicker over to you in the hopes that you
20 can operate it better than I can.

21 MS. AKMAN: Thank you. Thank you, and I'm
22 grateful to the FTC for the invitation. It's an honor
23 to be here.

24 So I would like to continue on the theme of
25 these MFNs, and like Dick, I also take the platform to

1 mean an intermediary that facilitates a transaction
2 between two parties, and this platform is usually
3 remunerated by a commission. So I'm not looking at
4 platforms that might be funded by advertising, for
5 example.

6 So in the European Union, in the last two to
7 three years, we have had at least 16 recent
8 investigations that have concerned platform MFNs.
9 There are 28 member states for the moment, until the
10 end of March, so quite a few of the European Union's
11 national competition authorities have looked at these
12 MFNs in different contexts. Most of them have
13 concerned online travel agents, but we've also had the
14 Competition Commission, now the CMA in the UK, look at
15 price comparison websites for insurance, and there's an
16 ongoing case against one of these price comparison
17 websites. There's also been a case against an online
18 auction platform in the UK again.

19 At the E.U. level, the European Commission
20 itself looked at Amazon's MFNs. Interestingly, these
21 were MFNs in Amazon's contracts with e-book publishers,
22 like the case in Apple, which preceded this, and Amazon
23 had required e-book publishers to agree to these MFNs
24 so that Amazon will not be beaten on price, but part of
25 those clauses also required these book publishers to

1 inform Amazon of any better clauses elsewhere.

2 The Bundeskartellamt, the German federal cartel
3 office, also looked at Amazon and actually in a
4 scenario quite close to what Judith described, so the
5 Bundeskartellamt cartel office found that Amazon had
6 MFNs with all the sellers who were selling everything,
7 basically, so it wasn't specific to books, but Amazon
8 had these MFN clauses in the contracts with third-party
9 sellers by which they were promising to Amazon that
10 they will not essentially sell the same product
11 elsewhere more cheaply. Amazon terminated its practice
12 to end the proceedings.

13 Now, in the E.U., after all these cases, a
14 distinction has been made in relation to these MFNs.
15 So this distinction is between so-called wide MFNs and
16 narrow MFNs. By wide MFNs, the authorities refer to
17 clauses that align prices across all sales channels, so
18 the price on platform A will be the same as on all
19 platforms, as well as the seller's own website, as well
20 as the seller's offline sales channels.

21 And by narrow MFNs, they refer to clauses
22 seeking parity between the platform and the supplier's
23 online sales only. And this distinction has proved to
24 be quite fundamental because the enforcement practice
25 has really been based on this distinction.

1 Now, unfortunately, much of the enforcement
2 practice have gone in different ways, so in Europe now,
3 we have a landscape in which one entity in particular,
4 Booking.com, for example, finds itself subject to very
5 different approaches when it comes to the assessment of
6 its contractual clauses with hotels. So some
7 authorities have prohibited all types of MFNs, wide
8 ones and narrow ones. Some of this has been done by
9 enforcement. Some of it has been done by legislation.

10 And some authorities have prohibited only wide
11 MFNs, but they allowed narrow MFNs. And, again, some
12 of this is through time-limited commitments, so they
13 will come to an end in about five years' time. And
14 some of these have been done through enforcement
15 decisions. So we have a really fragmented legal
16 landscape applying to these clauses in Europe.

17 So in the rest of the time I have, I'd like to
18 talk a little bit about what about multi-sided markets
19 makes these MFNs different, and it's a lot quicker to
20 explain that on this diagram than to say it in words.
21 So with the regular MFN, you have a seller that
22 promises to a customer that that customer will be
23 treated as well as that seller's other customers. So
24 such an MFN on a regular market, not a multi-sided
25 market, would essentially link the prices between

1 different customers of the same seller, giving
2 reassurance to the first customer that essentially a
3 competitor of that customer later will not get a better
4 deal, for example, regarding the input price of the
5 product that the seller is providing.

6 Now, in contrast, with a platform MFN, on a
7 multi-sided market, the MFN clause that you can see in
8 the contract between one platform and a supplier
9 basically links the prices for the same customer,
10 buying the same product, from different outlets, and
11 usually these will be competing platforms. So this is
12 how platform MFNs differ from regular MFNs, and this is
13 also why, in the literature, it's been said that they
14 are closer to price-matching guarantees than regular
15 MFNs, because essentially it's about the price of the
16 same product to the same customer that's being linked
17 at different outlets.

18 Now, in terms of the theory of harm, as
19 Judith's already mentioned, some of it has to do with
20 collusion between platforms. So when platforms have
21 these MFNs in these clauses, this will soften
22 competition between them because there will be no
23 benefit to any platform from reducing its commission to
24 the seller to give a better price on that product to
25 its customers, because prices will be essentially

1 matched.

2 Similarly, this can foreclose other platforms.
3 So a new entrant who would like to enter the platform
4 market will not be able to cut prices to steal
5 customers from the incumbent platform because the MFN
6 will, again, match the price for the incumbent as well.

7 Because they were sort of more similar to
8 price-matching guarantees, commenters have suggested
9 that these should essentially be treated in the same
10 way as resale price maintenance clauses, but then more
11 recently we see again in the economics literature that
12 there are models which show that actually all types of
13 MFN clauses, including wide MFNs and narrow MFNs, may
14 increase welfare, and they may increase welfare of
15 consumers as well as the surplus of the platforms and
16 the suppliers.

17 In that model, what's crucial is that the
18 seller in such a scenario has its own direct sales
19 channel as well, but I won't go into the details of
20 that. So the economics of it hasn't really been
21 settled in any way.

22 In terms of what about multi-sided markets make
23 sort of the assessment different, I think several
24 features of these markets make the assessment of these
25 clauses more complicated. The most important one in my

1 view is the fact that these platforms operate on the
2 basis of an agency model.

3 So in my research, I would argue that these
4 platforms are legally agents of the suppliers, so from
5 an antitrust point of view, these clauses really fall
6 within the single economic entity doctrine, and that
7 should essentially take these clauses out of the scope
8 of a Sherman Act Section 1 or Article 101 TFE treatment
9 in the E.U.

10 Why are they agents? Because they never own
11 the product. They never set the price for the product.
12 They don't assume any of the financial risk arising out
13 of the contract between the platform and the third
14 parties, which is the crucial factor at least in the
15 E.U. when we look at agency, so -- and I think that
16 should say something to antitrust enforcers about what
17 sort of theory of harm might be the relevant one here,
18 because these are essentially contracts between a
19 seller and agent of the seller.

20 And the agency model also further complicates
21 the theory of harm because we've seen in the cases in
22 Europe, it's not always entirely clear whether the
23 restriction we are concerned about here is, for
24 example, the restriction of interbrand competition or
25 whether it's about the restriction of intrabrand

1 competition.

2 So the competition between different retailers
3 or -- well, agents in this case selling the product of
4 the same company, and if we look at the Apple case,
5 e-books case in the U.S., for example, we see that the
6 theory of harm there was clearly a horizontal
7 price-fixing conspiracy type theory of harm, whereas in
8 the online travel agent cases in Europe, the clauses
9 are very similar. The theory of harm seemed more like
10 a vertical restraint type theory of harm, rather than a
11 horizontal conspiracy, but there were sort of the --
12 the decisions sometimes alluded to an effect on the
13 horizontal competition between platforms as well.

14 So in terms of other specific features of these
15 markets, efficiency arguments, as Judith mentioned, are
16 something to really look into here, and these platforms
17 operate on the basis of commission normally, and if
18 consumers always use the platforms to search and find
19 what they like and go to the supplier's own website to
20 then enter into the transaction, the platform never
21 essentially makes money out of its business.

22 And also, consumers over time learn that
23 actually this platform is not really a good way of, you
24 know, finding out about anything, because I can always
25 find the same product at a cheaper price on the

1 supplier's own sales channel. So this argument was
2 called the credibility argument in the UK Competition
3 Commission investigation into the insurance comparison
4 market, and the Competition Commission actually
5 accepted this as a valid efficiency argument, arguing
6 essentially or accepting that the platform business
7 model will eventually collapse if their own channel can
8 always undercut the platform on the price. There's
9 also another efficiency argument which has to do with
10 low-quality, low-cost platforms free-riding on the
11 services of the high-quality, high-cost platforms.

12 So just to conclude in terms of what antitrust
13 enforcers should be looking for in these markets, I
14 think as, again, Judy mentioned, market power is quite
15 important. Again, in my research, I argue that the
16 European cases would have been a lot better dealt with
17 as potentially abuse of dominance cases rather than
18 agreement cases. In those cases, the clauses were all
19 adopted in markets with four to five platforms,
20 maximum, so they are quite tight oligopoly markets,
21 some of these markets. And another key factor to
22 consider is I think whether to -- to decide whether
23 this platform is a gateway to the consumers or whether
24 the supplier can simply walk away and sell elsewhere.

25 Well, a final thing to say is that looking at

1 the case law as well as the sort of developing
2 economics literature on this, the form of the clause,
3 so whether it's a narrow platform parity clause or a
4 wide parity clause doesn't seem to matter, and it
5 really should be about trying to figure out the effects
6 of the clauses on a clearly identified theory of harm
7 in relation to interbrand competition or intrabrand
8 competition or both.

9 Thank you.

10 MR. CONNER: Thank you.

11 So before turning to individual questions, I
12 wanted to give the panel the opportunity to respond to
13 any of the comments that have come out from the other
14 panelists. So, Susan and then Tom.

15 MS. ATHEY: Yeah. Just to sort of pick up on
16 some of those comments, I think I appreciated all the
17 comments from Judy and Pinar about the price comparison
18 engines, but I think one efficiency part that maybe
19 wasn't fully explored is just the impact of the way a
20 price comparison engine works on competition in the
21 industry.

22 So some research by Glenn Ellison focused on
23 this, as well as some empirical analysis of what
24 happened on eBay when they made price comparison more
25 transparent. Generally, if a price comparison engine

1 sort of works better and makes it very clear what the
2 prices are, that really toughens competition among the
3 sellers and can make the sellers lower their prices and
4 lower their margins.

5 And so say, like, if eBay forces the sellers to
6 show their shipping costs and makes it sort of more
7 transparent, how to actually compare offers across
8 firms, that really makes the products much more
9 substitutable, reduces search costs, lowers prices, and
10 increases welfare to consumers, and so the -- you know,
11 when -- I know Glenn Ellison called it obfuscation, but
12 generally in the context of a price comparison engine,
13 the participants are going to want to try to find ways
14 to make it harder to search and soften the price
15 competition, because people using a price comparison
16 engine often end up being much more price-sensitive
17 because it's so easy to make those comparisons.

18 And so I think an efficiency benefit of sort of
19 forcing the sellers to have full transparency is that
20 it reduces search costs, and I think, you know, those
21 benefits can vary by industry. So if there's only
22 three sellers you're comparing among, maybe it's not so
23 hard for the consumer to go to their individual
24 websites and do the comparisons, but if there's lots of
25 different sellers and they're, you know, very

1 differentiated, and there might be an infrequent
2 purchase, something like that, then the consumer
3 welfare harm of not being able to easily shop and
4 compare could be quite large and could really have a
5 big effect on price competition.

6 MR. CONNER: Tom, and then Dick.

7 MR. BROWN: So I think as the only
8 card-carrying lawyer on the panel, I want to -- and I
9 love economists, many of my best friends are
10 economists -- but I want to pull back a little bit and
11 make a legal point, and it's prompted by an observation
12 that Judy made that I think comes through some of the
13 other content associated with these -- I think we call
14 them hearings, right? Yes, hearings -- and that's a
15 question about why and what we think the antitrust laws
16 are designed to do.

17 I think there are sort of two themes that are
18 coming through -- well, a lot of the discussions, some
19 I think more from economists and some I think more from
20 lawyers. So I think -- this is a hypothesis -- I think
21 economists, when they think about antitrust law, think
22 of antitrust law as a tool for optimizing market
23 outcomes. I think lawyers -- and that's, like, maybe
24 natural given the econ pedagogy. I think lawyers, when
25 they think about it, think about antitrust law as a

1 tool for protecting roughly the process of competition
2 from conduct that borders on industrial sabotage.

3 And both of these things can be thought of as
4 designed and sort of stemming from a consumer welfare
5 standard, but these are very different regimes.
6 Optimizing a market outcome, either a narrow one or a
7 wide one, is very different than enacting a law to
8 protect -- this is, like, where the Sherman Act came
9 from, useful to know where we were, so we can think
10 about where we're going -- was designed to prevent
11 industrialists from hiring bands of thugs to blow up
12 one another's production facilities.

13 Debating the merits of MFNs in complicated
14 markets, a lot different than hiring people -- again,
15 I'm not making this up -- to blow up one another's
16 production facilities. And so I think we can like
17 antitrust law for what it's good at and still sort of
18 think that, yeah, maybe not really a regime to finetune
19 market outcomes.

20 MR. SCHMALENSEE: I like lawyers. Some of my
21 best friends are lawyers. I want to elaborate I think
22 a little bit on where I think Tom was going, and it
23 relates to one of Judy's buckets, and that's the issue
24 of creating externalities.

25 So if I understand it correctly in the AmEx

1 context, the argument is you accept the American
2 Express card. That raises your costs. You spread
3 those costs over all your customers, even those who
4 don't carry and don't use the card, and that issue has
5 or that process and whether it's good or bad has been
6 debated in a number of settings, in a number of
7 contexts.

8 We regulate debit card fees in this country,
9 for instance. We don't regulate credit card fees.
10 It's hard for me to see that as an antitrust concern.
11 It's a legitimate subject for debate. It's a
12 legitimate subject for concern. But if you take Tom's
13 point of view that the antitrust laws are about
14 competition, I don't think it falls there.

15 I think there may be some reason why you look
16 askance at credit cards, at payment cards, as a lot of
17 people do, but I don't think it's an antitrust offense.
18 That's how that market works. You don't like it, there
19 are ways to fix it, but bringing a monopolization suit
20 doesn't strike me as the way to do it.

21 Just a quick comment on Susan's point about
22 price comparisons. I'm reminded of the many
23 business-to-business exchanges that were set up in the
24 dot-com boom and all the press that said these are
25 going to make price comparisons easy. It's going to

1 make shopping for businesses looking to acquire nuts,
2 bolts, whatever, much easier and much more transparent.
3 They almost all failed, and all that transparency and
4 reduction in transaction costs didn't occur because
5 sellers didn't like price transparency, thank you very
6 much, and they didn't sign up. So thinking about
7 what's good and what's bad in these complex markets is
8 not altogether straightforward.

9 And one other comment, Susan listed a whole
10 bunch of practices, and I would only say that how
11 concerned you are about them would depend on who does
12 them and in what market setting. She used Amazon in a
13 number of examples, and, of course, firms with a lot of
14 market power get a close look. If the neighborhood
15 online mall does them, maybe not so much. So I think
16 context is really critical in these settings, as in all
17 antitrust settings.

18 MR. CONNER: So unless there's any other
19 comments, I'll turn to the first question, and this
20 will be for Susan. This is on predation, and the
21 concept of predatory conduct is not limited to simply
22 pricing conduct. Many have argued that nonprice
23 predation, including predatory innovation, should be
24 actionable under the antitrust laws.

25 How should we think about nonprice predation in

1 the context of multi-sided platforms? Is there a
2 nonprice conduct that we think might be
3 profit-sacrificing if we look at one side of the
4 multi-sided platform but is efficient and
5 output-enhancing if we look at both sides?

6 MS. ATHEY: Sure. So let me just start with
7 one kind of behavior which is -- I spent some time
8 thinking about, which is, you know, sort of vertical
9 manipulation, for example, like when a search engine,
10 you know, promotes one product over another or, like,
11 makes their own shopping site and promotes that over
12 competitors.

13 And so that was a big issue in Europe, and, you
14 know, there were concerns that Google had done that in
15 some cases, which ended up actually putting out of
16 business a number of, say, European shopping comparison
17 sites or things like that.

18 And so that -- I think that that's interesting
19 to think about in a platform context, especially when
20 the vertically related firm is itself some kind of a
21 platform and has its own scale economies, because if
22 you steer traffic away from certain types of firms,
23 they actually become lower quality.

24 So if you steer traffic away from, say, a
25 review comparison site, then there are less consumers

1 reading reviews, less consumers writing reviews, and
2 actually the content of the site gets worse; or if, you
3 know, if you even steer traffic away from an
4 ad-supported website, they have less users, then they
5 are less attractive to advertisers, and they monetize
6 less well, have less incentive to go out and create
7 more content.

8 So it's an environment, and when you go to
9 think about predation, you sort of think about a
10 short-term sort of sacrifice for a long-term gain.
11 It's particularly tempting to do that in a market where
12 you know that if you sort of temporarily, you know,
13 steer away consumers from this downstream firm, that
14 they will be permanently sort of damaged. Their
15 quality will be lower, which makes them a less
16 effective competitor in the future, and especially if
17 they are sort of startups, they may, you know, run out
18 of money.

19 So, you know, I worried about, say, making,
20 say, a temporary sacrifice by, say, looking up a less
21 good shopping engine on the page, which is sort of
22 hurting your -- let's say a search engine's user
23 experience in the short run as a way to, you know,
24 advantage their own shopping site against a competing
25 site, which then ultimately, if that competing site

1 just gets sort of depressed, it's not as good, then in
2 the long run, it's actually not a sacrifice anymore,
3 because now the competing site is not as good quality.

4 So the consumers don't mind if it's at the
5 bottom of the page because it actually isn't any good
6 anymore, and you don't actually suffer any kind of
7 long-term harm from that manipulation. So I worried
8 about that from an efficiency perspective, because it,
9 first of all, could -- if you think that these
10 businesses are very innovative, then, you know, there's
11 no reason to think that a monopoly firm is going to
12 continue to innovate the same way that a startup would
13 when it was trying to acquire customers.

14 And there's also actually just, like, broader
15 implications, like if there's no e-commerce firms in
16 Europe, that might be, like, bad for Europe, and they
17 might -- you know, a lot of times you see people work
18 in one firm and then go off and spin off another firm,
19 and if those firms never get started and never develop
20 those capabilities, it might actually have sort of
21 broader implications as well. Of course, that's
22 outside of antitrust considerations directly.

23 So I think that we have to watch carefully in
24 markets that have these sorts of scale economies,
25 because it can actually be pretty easy and really not

1 that costly to really damage downstream competitors.

2 MR. CONNER: Thank you.

3 And, Dick, a related question. Is there
4 nonprice conduct that may seem exclusionary if you look
5 at only one side but may be efficiency-enhancing if you
6 look at the whole platform?

7 MR. SCHMALENSEE: Well, as a logical matter,
8 there almost certainly are such examples. I wish I had
9 some good snappy ones, but I spent some years on the
10 board of a securities exchange, an options exchange,
11 and options exchanges are platforms that bring
12 together -- particularly that one as it was set up --
13 bring together liquidity providers and liquidity
14 takers, and we spent every board meeting discussing
15 rules, typically nonprice rules that limited what
16 liquidity providers could do, how brokers could behave.

17 Were some of those exclusionary? Probably if
18 you looked at them through the wrong lens, they might
19 be. Our objective obviously was to make our enterprise
20 more attractive to both sides, and so occasionally you
21 had to restrict behavior and even membership on the one
22 side in order to make sure the other side found the
23 market attractive.

24 And you can imagine nonprice restrictions on,
25 say, Uber drivers that might limit participation of one

1 kind or another. I know a retired fellow who drives
2 for Uber, and he loves to drive his friends, so he
3 lurks in his neighborhood and waits until somebody
4 wants a ride and, bingo, he's there.

5 Now, if I'm Uber, I might not like to have that
6 behavior. I might like to exclude him, because it is
7 kind of strange, but, you know, I might want to do that
8 just because I'd like my drivers to actually go to
9 where the demand is rather than lurk. I would exclude
10 him. Is that a bad thing? Probably not.

11 So I think the general principle from Susan's
12 examples and my nonexamples is that you really want
13 to -- in a two-sided context, you really want to look
14 at the implications of rules of any kind on both sides
15 and for the enterprise as a whole, because rules may
16 look exclusionary on one side but be for the benefit of
17 the enterprise as a whole, or they may be profit-
18 sacrificing but output-enhancing if you look at the
19 whole thing. So I mean, it really is important to look
20 at both sides.

21 MR. BROWN: So I think I may have an example,
22 and this was not planned, but, like, this card is kind
23 of, like, an example. So this is a collector's item.
24 It's a Bank of America-issued American Express card.

25 MR. SCHMALENSEE: Wow.

1 MR. BROWN: Yes. And the reason this card
2 exists is because of a prior Department of Justice
3 lawsuit against Visa and Mastercard. And so Visa and
4 Mastercard were sued by the Department of Justice for
5 adopting rules that said that if you were a participant
6 in Visa, you couldn't issue American Express cards.
7 This is sometimes called the 2.10(e) litigation or U.S.
8 vs. Visa and Mastercard. And the claim was that the
9 existence of that bylaw inhibited American Express, was
10 exclusionary on the issuing side. The defense was that
11 it enabled the joint venture to cohere and actually
12 enabled the joint venture to better balance the
13 interests of merchants on the one hand with consumers
14 on the other hand, because it effectively enabled the
15 networks to reduce the amount of revenue that they had
16 to provide issuers to essentially get their loyalty.
17 You could get a complete volume commitment rather than
18 at the level of a particular card portfolio.

19 So that case was litigated. Dick played a
20 role. And, again, in that case the Department of
21 Justice refused to look at the implications of the
22 practice on both sides of the market, right? This was
23 the sort of first two-sided market case involving the
24 payment card networks, and we were unable to persuade
25 the Second Circuit that, in fact, the market -- that in

1 evaluating the constraint, you needed to look at both
2 sides.

3 The rule went away. Banks began issuing
4 American Express cards and, not surprisingly and
5 consistent with the claims that both the card networks
6 had made in the litigation, you saw more price
7 competition at the portfolio level, and merchant
8 discount rates and interchange went up.

9 MS. ATHEY: So just to maybe give another
10 example that might be -- you could imagine somebody
11 having different opinions about would be something like
12 thermostats. So you might have thermostat companies
13 make thermostats and charging a price greater than
14 marginal cost. You could imagine a firm coming in and
15 deciding their business model is actually to acquire
16 consumers for an Internet of Things platform and view
17 the thermostat as a customer acquisition device and,
18 you know, subsidize the cost of the thermostat in order
19 to induce the consumer to start using apps or a
20 platform more broadly, or they might have a broader
21 value for the data. They might think more consumers
22 and then they'll get more apps and monetize later.

23 And it is pretty common, I think, for platforms
24 to think about, say, a device as a consumer acquisition
25 device from -- a consumer acquisition vehicle in order

1 to monetize then later, and so that would be very sad
2 for you if you were a stand-alone thermostat company,
3 but in general, these changing business models -- you
4 know, the industry might evolve so that, you know,
5 vertical integration or -- becomes important or at
6 least thermostat companies need to somehow receive some
7 subsidy from a platform in order to be competitive,
8 given that the consumer is now getting brought onto a
9 platform, and that's part of the benefit of having the
10 consumer adopt the good.

11 I also want to pick up on something that Dick
12 said that I think is super important. When platforms
13 often have to make a fair number of rules in order to
14 make the platforms function efficiently, and sometimes
15 those rules trade off the different sides of the market
16 but in a way that is output-enhancing. So just some
17 examples, like, you would -- eBay could reward sellers
18 and rank them more highly if they have high star
19 ratings and they ship faster, and that's a really
20 important thing for eBay to be able to do.

21 And, you know, a seller in Alaska might feel,
22 you know, discriminated against because they can't ship
23 as fast as other sellers, and that might be sad for the
24 seller in Alaska, but it's important for the platform
25 as a whole to be able to provide fast shipping;

1 otherwise, consumers will leave the platform and go
2 elsewhere.

3 And so a bunch of things, you know, making sure
4 that Uber drivers drive safely, that they keep their
5 cars clean, that they don't turn down too many rides
6 that are suggested to them; you know, making sure that
7 Airbnb hosts keep their calendars up to date and don't
8 reject bookings; all of these things are very
9 important.

10 I just had -- I tried to book a ski condo this
11 weekend, and then the seller cancelled on me after I
12 had already booked my flights, and I was really
13 disappointed. I want the platform, you know, to demote
14 that seller because that was a bad experience. It
15 makes me want to just go book a hotel where they are
16 not going to cancel on me.

17 So, you know, there are -- and there's a whole
18 host of practices, and I think as the platforms mature,
19 and especially if they're more competitive on the
20 consumer side, they do tend to squeeze the sellers,
21 and, you know, Amazon squeezes its sellers, and, you
22 know, historically Walmart squeezed its sellers, and
23 that is tough for the sellers.

24 But at some level, like, economic efficiency
25 wants the sellers to be, you know, forced to be pretty

1 competitive, to provide high quality, low costs, low
2 margin. That's what expands output. And at some level
3 the platform is acting on behalf of the consumer to
4 force them to provide that, and you don't want to get
5 in the way of them.

6 MR. CONNER: So before turning to the next
7 question, I did want to let everyone know in the
8 audience that FTC staff is walking around with question
9 cards. So if you do have a question, just hale them
10 and you will be able to put in a question.

11 So the next question I have is for Judy, and
12 this actually plays off of something that Susan was
13 just talking about. The FTC in these hearings has
14 received a number of comments arguing that the success
15 of Amazon's Prime Program, where you pay a flat fee for
16 access, is a tool that Amazon uses to exclude
17 competitors. For instance, Stacey Mitchell from the
18 Institute for Local Self-Reliance writes, "There's
19 evidence that being a Prime member alters consumer
20 behavior. When people pay for Prime, they naturally
21 want to maximize the value in free shipping and they
22 derive it by doing more shopping on Amazon. Studies
23 show that Prime members are significantly less likely
24 to comparison-shop compared to non-Prime customers."

25 Would an economist analogize Amazon's Prime

1 Program to a two-part tariff, a pricing scheme that is
2 ubiquitous in many markets -- including retail markets,
3 for instance, in Costco -- and does the multi-sided
4 nature of the Amazon business make the pricing scheme
5 more questionable?

6 MS. CHEVALIER: Yeah. So I think the answer to
7 that is it is a two-part tariff, and it's hard to see
8 really how the multi-product part really -- I mean, the
9 platform part affects that. I mean, I think -- you
10 know, one thing that's been floating a little bit in
11 some of the conduct that we've been discussing -- and
12 Pinar had this discussion of platform MFNs versus
13 regular MFNs -- and one characteristic of the platform
14 MFNs is that the kind of language -- the contractual
15 language is a contract referencing rivals, right, which
16 is language people sometimes use to think about a
17 category of contracts that we might want to give extra
18 scrutiny to.

19 I mean, Prime is not that. I mean, I
20 understand that you have to have a certain amount of --
21 you know, Amazon had to have a certain amount of scale
22 to make Prime attractive, and I also understand that it
23 lowers the marginal cost for the consumer to purchase
24 Amazon products, but I think unless you're going to
25 entirely abandon a consumer welfare standard of

1 antitrust law, it's hard to see -- it's hard for me to
2 see why Amazon Prime would be a practice that anyone
3 would want to challenge.

4 MR. CONNER: So, Dick -- I'm sorry, let me ask
5 Dick and then Pinar.

6 MR. SCHMALENSEE: I'm in violent agreement with
7 Judy. It is true that unless you have scale as an
8 online platform or an online retailer, you really can't
9 profitably do this, but as an avid viewer of Amazon
10 Prime streaming and an avid shopper on Amazon, I am not
11 made worse off. It is tough for competitors because it
12 seems to be a very effective business strategy for
13 Amazon that does require scale. Costco does it. Other
14 people do it. Of course, when you become a Prime
15 member, you shop more on Amazon. That is the point.
16 It works.

17 I don't see how you would challenge it. Even
18 under an abuse of dominance standard, I don't know how
19 giving you a two-part tariff is an abuse of dominance,
20 and certainly under the U.S. law, I don't see where you
21 would go.

22 MR. CONNER: Thank you.
23 Pinar?

24 MS. AKMAN: I had a similar comment. I think
25 at least anecdotal evidence suggests that when people

1 sign up to Prime, they don't just spend more on Amazon
2 in the same category, but they actually start shopping
3 from more categories on Amazon, and this leads to more
4 third-party sellers want to join Amazon's platform to
5 sell more in those other categories as well.

6 So it's essentially a virtuous cycle, and in
7 that sense obviously some more third-party sellers mean
8 more goods, but also then more consumers, and so on,
9 and reducing costs to those consumers, again, because
10 there are more third-party sellers funding Amazon's
11 fixed costs and so on. So, if anything, I think the
12 multi-sided nature of that platform makes the practice
13 more benign in those circumstances.

14 MS. ATHEY: So just maybe one other
15 consideration here is that if you're an online
16 presence, like an Amazon, then if the consumers trust
17 you and come to you directly and know -- and believe
18 that they don't need to price-compare, then it's
19 actually much cheaper to acquire consumers. And, like,
20 the very, very worst thing, like, that can happen to
21 Amazon is that consumers decide that actually Amazon
22 doesn't have the best prices, and they need to start
23 price-comparing more.

24 In particular, if the consumer goes to Google
25 and looks for other places to shop, then Amazon has to

1 buy an ad to acquire that consumer back, and
2 essentially all of the surplus goes to Google. So if
3 you're sort of a -- like a vertical price comparison or
4 shopping type of site, whether it's, you know,
5 e-commerce, like Amazon, but it applies to other
6 scenarios as well, as soon as the consumer thinks they
7 need to go back to Google and look at what the other
8 options are, you've lost all the profit from that
9 customer, because there's somebody else bidding against
10 you on Google who has a similar business model and
11 roughly, like, you bid up to the value of the consumer
12 and you pay it all back to Google.

13 So that's -- it's sort of a huge threat and
14 concern, and so that concern can induce these firms to
15 really make sure that they're providing a great deal
16 for consumers so that they don't think they have to go
17 back and price-compare. So I think as long as there
18 are, you know, competitors out there who can plausibly
19 offer, you know, similar products at similar prices,
20 it's actually pretty -- you know, if I was advising
21 them from a business strategy perspective, I would tell
22 Amazon, like, I don't care if you've got Prime, and I
23 don't care if you did a study that showed that you
24 could raise the prices 20 percent on any particular
25 product for a particular Prime customer today, I would

1 say don't do it, because if you teach your consumers to
2 go back to compare across sites, that's actually going
3 to be a really bad consumer habit to create.

4 So I think, of course, if all the other
5 retailers went out of business, you know, then you
6 would have a very different concern, but it -- at the
7 stage where they're moderate in size and there are
8 other e-commerce firms out there, in the medium run,
9 they want to keep prices low, even though I'm sure if
10 you did a study, Amazon could raise prices on a ton of
11 products in the short run and not lose customers,
12 because we all love our Prime so much.

13 MR. CONNER: Okay. So I want to turn now to
14 MFNs, and, Pinar, you talked quite a bit in your
15 presentation about this. Jean Tirole speaking about
16 MFNs in the travel industry said that a requirement
17 that hotels use, a particular platform allows users to
18 book rooms and -- excuse me, allows users to book rooms
19 that may not offer lower prices on other platforms, and
20 she has said that a higher market share is not
21 necessarily a condition for competitive harm.

22 Do you think that this is correct? And if so,
23 how would the antitrust doctrine treat those MFNs
24 differently than from other restraints?

25 MS. AKMAN: Thank you. It would be extremely

1 foolish of me to disagree on a point of economics with
2 a Nobel Prize laureate in economics; however, other
3 economists have, and John Tirole himself did say in the
4 same interview that the economists haven't yet done
5 their homework on this.

6 This is actually really interesting, because
7 this point ties in really well with the discussion we
8 were having earlier, started off by Susan's comments
9 and then Dick's comments on Susan's comments, so the
10 question of whether these platforms are actually
11 bringing added value, so there are socially valuable
12 services, or are they essentially a negative
13 externality on the consumers who don't use the
14 platforms, because I think it's exactly in that context
15 that John Tirole made the comment.

16 In his book as well, he basically suggests
17 these platforms shouldn't turn into parasites, because
18 he thinks of them, at least, as a private tax levied on
19 the platforms -- levied by the platforms on the
20 consumers who don't use the platform. So as Judy
21 mentioned in her remarks, he refers to that point about
22 them imposing a negative externality on consumers, but
23 then essentially putting that together with Susan's
24 comment later that these platforms reduce search costs
25 and make it so much easier for consumers to, you know,

1 find what they want to buy or what they want to book, I
2 think there's a question about whether these platforms
3 bring socially valuable benefits and essentially
4 whether the commission that the hotel is paying to
5 Booking.com is worth that added value the platforms
6 bring as a socially valuable benefit.

7 In terms of market power, I think there has to
8 be some level of market power, because if this platform
9 has no market power at all and it's not a gateway to,
10 let's say, a unique group of consumers, then I don't
11 see why the supplier, be it a hotel or a book
12 publisher, wouldn't just walk away from that platform
13 and go sell elsewhere. So that level of market power
14 certainly does not need to be at the level of market
15 dominance, but I think there has to be still some level
16 of market power which would provide essentially the
17 platform with a bargaining chip to go to the suppliers
18 to say I have these unique consumers -- again, this is
19 similar to what Jean Tirole was mentioning -- and if
20 you want to sell to these consumers, you will have to
21 join my platform, and you will have to pay my 30
22 percent commission fee.

23 So in short, I think market power is relevant
24 but not necessarily at a level of dominance.

25 MR. CONNER: Tom?

1 MR. BROWN: So I just wish I had a little bell
2 like Clarence in It's a Wonderful Life that I could
3 ding whenever we fell into this gap between are we
4 trying to optimize market outcomes or are we trying to
5 protect the process of competition, because like this
6 conversation falls squarely in that gap.

7 MR. CONNER: So I will say I'm not sure what
8 price angels would get every time you dinged on
9 vertical restraints, but...

10 MS. CHEVALIER: Let me, if I could just add to
11 that, I do think that this is an area which requires a
12 little more work, and I -- you know, we talked about it
13 in the context of the travel MFNs. An antitrust case
14 which -- two antitrust cases that were settled which I
15 think about in this light is our -- the cases against
16 SESAC, which SESAC is a music licensing entity. It's a
17 for-profit company. It competes with ASCAP and BMI,
18 which are cooperatives, and they settled two antitrust
19 cases that were brought by television and radio
20 licensees.

21 And the argument was something like even though
22 SESAC has a relatively small share, we need SESAC
23 licenses because you can't really functionally operate
24 a television station without one. And I think there's
25 an interesting -- I have not studied this issue, and I

1 think no one has to the appropriate extent in terms of
2 empirically and theoretically, and I do think that it
3 has something to do with this question of a platform
4 that is -- is there or are there separate
5 considerations somehow for a platform that offers a
6 gateway to a unique set of consumers? And how do we
7 have to think about the fact that they have made real
8 investments in servicing and serving that particular
9 set of consumers?

10 So, again, I think -- I would give the
11 antitrust -- I would allow the antitrust laws to do a
12 little more than just stop industrialists from blowing
13 up each other's factory, but I understand this is
14 actually -- but I agree with Tom, this is actually in
15 the area of, you know, how much -- you know, how
16 exactly would we make a kind of disciplined set of
17 rules around that that make sense.

18 MR. SCHMALENSEE: Just a quick reaction on
19 another point that would go in the same direction.
20 Imagine a booking site that has a relatively small
21 share of bookings but that signs platform MFNs or most
22 favored customer clauses or contracts with a wide range
23 of suppliers. So if you just looked at booking share,
24 it's small, but if you have those contracts with a wide
25 number of -- a large number of suppliers, you have

1 affected the whole market, even though you, yourself,
2 are not a major player in the market. So how would you
3 get those contracts signed? That's an interesting
4 question, but if you did, even if you had a tiny share
5 of bookings, you would have a large market impact.

6 MR. CONNER: Susan?

7 MS. ATHEY: Yeah, just not to get into a
8 philosophical argument about law and economics, but I
9 do think that actually it's -- it can be very useful to
10 put the law aside initially and think about an
11 industry -- and think about the business strategy of
12 the industry or the economics of the industry,
13 understand how competition works, what are the
14 existential threats, and what are the types of concerns
15 that would make a firm act in the interest of consumer
16 welfare, like if the only thing a firm can do is
17 improve their product quality or cut price, then, you
18 know, it's pretty clear that, gosh, more competition
19 makes them improve quality and cut price, and that's
20 good for consumers.

21 So, you know, if that's the way that market
22 works, then I can sort of just -- you know, the normal
23 legal structure will probably work pretty well, but if
24 I think about contexts that have a lot of scale
25 economies, have a lot of chicken and egg problems, and

1 I have firms that have a lot of strategies available to
2 them that are not improving their price or decreasing
3 quality, strategies like, you know, steering consumers
4 away from current competitors or potential competitors
5 or other things, I mean, sabotaging your opponent's
6 factory is one, but there's actually -- the modern
7 business world actually has a lot of different kinds of
8 practices that aren't efficiency-enhancing, and, in
9 fact, when faced with competition, you can -- you could
10 be going along behaving very nicely, and then when
11 confronted with a perceived competitive threat, you
12 could start using some strategies that are very
13 welfare -- bad for consumer welfare.

14 So I think understanding the business and
15 economic contexts, the strategy space, the incentives,
16 the way that incumbents and entrants think about
17 problems, is pretty crucial, and if you start trying to
18 put it into the legal framework too quickly, you'll
19 start getting caught up with market definition and, you
20 know, oh, gosh, we don't do predation cases because
21 they always lose, and, you know, that kind of sounds
22 like predation, and so you can kind of like, you know,
23 just shut down the conversation before you've really
24 understood the economic tradeoffs.

25 And then, of course, we have to decide whether

1 achieving economic outcomes that are beneficial is
2 possible in a clear, simple legal framework that
3 doesn't cause more harm than good, but I think first
4 having a pretty clear view of the economic outcomes,
5 especially for having a debate about what policy should
6 be or what the law should be, is kind of the right
7 place to start. We can decide that it's too
8 complicated to get to the optimal outcome, but we need
9 to understand what market competition looks like, and
10 also we need to understand what kinds of behavior firms
11 will engage in and what those consequences will be in
12 the short run/long run before we decide that the legal
13 framework is good or bad.

14 MR. CONNER: So, Tom, this is actually a
15 question from the audience, and you are not going to
16 get away from your sabotage example.

17 MR. BROWN: Okay.

18 MR. CONNER: Judy and Susan both picked up on
19 it.

20 The question is, you distinguish law from
21 economics by referring to borderline industrial
22 sabotage versus defining outcomes. Price-fixing is
23 about outcomes rather than sabotage. Is your
24 distinction not somewhat limited?

25 MR. BROWN: So not in the context of unilateral

1 conduct, and when we're talking about vertical
2 restraints, we're really talking about unilateral
3 conduct in another garb, so I think the distinction is
4 actually robust. Good question, though.

5 But I -- and, I mean, I agree with Susan about
6 sort of thinking and deeply investigating the nature of
7 business conduct. I think what the -- the reason for
8 sort of prompting and recognizing the gap, right -- in
9 the sort of, you know, "London Tube mind the gap" sense
10 -- is that the conversation we're having over the last
11 couple of days about platforms and about the
12 significance of Ohio vs. American Express and whether
13 Ohio vs. American Express represents some significant
14 departure from the way we've understood antitrust law
15 for almost a hundred years, like 99 years to be exact,
16 and I don't think so.

17 I mean, that -- the -- that case is about a
18 legal tactic that had been adopted by the Department of
19 Justice over the last 20 years, which was to say that
20 we don't have to define the broader context in which
21 we've identified some behavior that we think may lead
22 to anticompetitive effects. Once we identify something
23 we don't like and we can point to higher prices on one
24 side of a jointly consumed product, the burden shifts
25 to the defendant to say that there's no restraint.

1 I thought that was grossly unfair and
2 inconsistent with U.S. antitrust law when I was a baby
3 associate defending Visa on a case that was so stated.
4 I thought it was grossly unfair, though highly
5 ironic -- and in that sense enjoyable -- when the case
6 was brought against American Express, but the -- like,
7 the -- in thinking about the law, like, this is -- this
8 is not a change. I mean, I think we can look at Ohio
9 vs. American Express in the same way that we look at
10 U.S. vs. Chicago Board of Trade, and not much has
11 changed in a hundred years.

12 MR. CONNER: Okay. So moving on to the next
13 question, which actually is directed to Tom and also
14 fits right in with what you were talking about, so some
15 commentators have argued that the best way to evaluate
16 welfare effects of vertical restraints by multi-sided
17 platforms is to look at marketwide output, measured by
18 the total volume of transactions, e.g., the total
19 number of credit card transactions.

20 If the total number of transactions is
21 increasing, we should be less skeptical that the
22 restraint is harmful. The Supreme Court in the AmEx
23 case appeared skeptical of the plaintiff's theory in
24 part because of the evidence that marketwide output was
25 increasing. Is marketwide output measured by

1 transactions a useful way to think about competitive
2 effects in vertical restraints by multi-sided
3 platforms?

4 MR. BROWN: Hmm. So I'll take the first stab
5 at this question, but I actually -- sort of recognizing
6 the limits of my economic intuition -- I think it's in
7 some ways a question that as a lawyer I would first go
8 to an economist to get an answer to.

9 MR. CONNER: And to be clear, I am going to
10 follow up with Judy, so don't worry.

11 MR. BROWN: Again, I think that antitrust
12 struggles to make -- antitrust, as a law, right, as
13 opposed to thinking about the role that competition
14 should play in public policy generally, which is sort
15 of a way of more broadly framing the debate, I think
16 antitrust really struggles to identify empirically
17 observable facts that support a prior hypothesis that
18 something is bad.

19 I think it's certainly possible to look at
20 increased output in a particular industry and to come
21 away from the conclusion that that should at least give
22 us some pause as to whether the underlying conduct is
23 anticompetitive, but the reason that platforms are
24 interesting, right, is that they demonstrate increasing
25 returns to scale. So from an overall consumer welfare

1 perspective, from a social welfare perspective, it's
2 not obvious that more output equals more benefit for
3 society or consumers as a whole. Like, so I think it's
4 kind of an uncertain signal.

5 MS. CHEVALIER: Yeah. So I think, you know, in
6 a simple antitrust framework, I think looking at
7 whether the conduct is output-increasing or
8 output-decreasing is a pretty good way to go. I do
9 think -- I do think there's a bunch of issues that make
10 it tricky. First of all, you mean output-increasing
11 relative to the appropriate counterfactual but-for, and
12 I haven't studied the AmEx case well enough to know
13 whether the appropriate counterfactual but-for is
14 actually what was being considered, but I do think
15 there are a set of complications, especially -- you
16 know, the credit card cases -- the credit card cases --
17 and I have no dog in that fight, because I have never
18 worked on a credit card case. I don't really have -- I
19 have not studied them at great extent, but given that
20 one of the arguments in the credit card cases is
21 something about an externality, when there's something
22 about an externality, then you do actually want to be
23 careful about making an output argument as the kind of
24 basis of deciding whether something is anticompetitive
25 or not.

1 I think we almost always are going to come --
2 the economists are going to almost always come down on
3 this side of, you know, you are really going to need to
4 do a lot of case-specific economic analysis. I am
5 going to caution against a hard and fast rule.

6 MR. SCHMALENSEE: Yeah, I think it's a -- just
7 saying output went up, therefore, this was not a bad
8 thing, what you sort of got in the AmEx decision is a
9 little simple. The other side is, oh, prices to
10 merchants went up, so it's a bad thing. Wait a minute.
11 You really do have to look at the facts of the case,
12 and I would stress Judy's point, which is all about
13 counterfactuals. This is all about what would have
14 happened if.

15 So output is useful in assessing importance in
16 a marketplace, for instance. It's the way people do
17 shares in the payment card business, but output going
18 up by itself doesn't necessarily tell you anything.

19 I'm reminded of -- I didn't know this, but a
20 few years ago I did a compilation of articles on
21 deregulation, and the one that surprised me the most
22 was one of the times cable television was
23 deregulated -- it was regulated, deregulated,
24 regulated, deregulated -- one of the times it was
25 deregulated, two things happened. Prices nationwide

1 went up, and output went way up, because the regulation
2 had constrained bundling in such a way that the bundles
3 were unattractive.

4 When the operators were free to optimize
5 product, they offered more attractive offerings.
6 People paid more for them. People were happier. There
7 were more subscribers. So just looking at "Q" doesn't
8 necessarily tell you anything of interest.

9 MR. CONNER: Susan, and then Tom.

10 MS. ATHEY: Just, I mean, maybe to reiterate an
11 earlier point about marketplaces, so if you think about
12 a simple example of a marketplace, imagine it's, you
13 know, the first entrant, and so it's running its own
14 marketplace. It's not that worried about competition
15 as essentially a monopoly marketplace. Even if you're
16 giving business strategy advice to a monopoly
17 marketplace, you -- the first way to think about it is
18 that a marketplace is a matchmaker, and it's trying to
19 expand output.

20 And so to a first approximation, when I teach
21 my students, I say, actually, marketplaces are kind of
22 fun businesses to be in, because you're mostly just
23 trying to make everybody better off. Like, you're
24 trying to make a -- make transactions smooth, and to
25 the extent that you're -- where you're charging, what

1 you should try to do is charge in a way that minimizes
2 distortion. So you want to maximize output and charge
3 in such a way that you don't scare away buyers and
4 sellers, because you have these indirect network
5 effects, so there's like an extra sort of cost to
6 pricing people out of your market.

7 So, you know, it's -- and that's one reason I
8 like working with marketplaces as well, because in some
9 sense that's more -- I'm thinking -- when I'm advising
10 a business, I'm thinking more like the social planner.
11 So from that perspective, you know, the marketplaces, a
12 lot of these tactics of making sure that sellers
13 provide high quality, potentially kicking people off a
14 platform, can all be welfare-enhancing, and, indeed,
15 expansion of output would be a good sign.

16 If you've squeezed suppliers but it makes more
17 people use the service, then that's a -- that's a good
18 sign. I think where you get into trouble is in
19 situations where there's sort of longer term strategic
20 issues going on, where you're worried about, say, one
21 of your suppliers growing so big that they compete with
22 the platform, or when, you know, you're worried about
23 various types of disruption or entry that really
24 threatens the platform's viability, that's when, you
25 know, people engage -- firms engage in sort of more

1 problematic behavior.

2 Not to say that platforms don't exert market
3 power over their participants in some cases, not that
4 everything that they do is in the social interest, but
5 a lot of the nonprice -- you know, if there's a price
6 you're charging, of course, that's a little bit zero
7 sum. If you're charging a fee for using the platform,
8 that's a bit zero sum between the platform and the
9 sellers, and they certainly might charge higher fees
10 than social welfare would suggest, but a lot of the
11 nonprice terms are often about making the platform more
12 effective as a whole. Not always, but that extent --
13 looking at the output standard could be a good way to
14 think about it.

15 I just want to agree with Judy, though, that if
16 your main issue is externalities, you certainly, in the
17 credit card case -- I mean, I have not also worked on
18 these cases -- but, you know, if I think my main
19 problem is that cash-paying -- that this whole system
20 is regressive and that cash-paying consumers pay higher
21 prices, and there's this big cross-subsidization going
22 on, then you should presumably include those consumers
23 in welfare calculations, if you think that's the main
24 economic harm.

25 MR. BROWN: So I am going to actually give a

1 disclaimer on the credit card cases, too. I don't work
2 on them. I have not worked on them in years. I have
3 no reason to believe that I will ever work on them
4 again, notwithstanding the fact that I was once
5 in-house at Visa and think that not everybody there
6 hates me, but, you know, apparently too much exposure
7 produces some sort of antibody reaction.

8 The -- I do want to talk a little bit about the
9 particular context, though, of the U.S. vs. AmEx case,
10 because I think it's interesting, and it sets up a
11 point about natural experiments that I think is
12 important to think about from an antitrust policy
13 perspective. So just bear with me for a second.

14 So when the Department of Justice first brought
15 that case, they also challenged rules that Visa and
16 Mastercard had that were similar to, though not
17 necessarily congruent with, the AmEx steering rule. So
18 the industry conduct -- and there was no claim that the
19 rules had been adopted on a concerted basis, that they
20 had just emerged in parallel. So you have the three
21 then major card networks, each of which has some rule
22 that says that you can't discourage people at the time
23 that they've expressed an interest to use some other
24 form of payment.

25 Visa and Mastercard, in response to that

1 complaint, repealed their rules, and the sort of
2 missing person here, in case you're sort of wondering,
3 like, who cares about any of this stuff, it's -- let's
4 just identify it -- it's Discover. So Discover is sort
5 of -- and DOJ's sort of -- by adoption -- theory of
6 competitive harm was that somehow these rules prevented
7 Discover from being more than -- you know, let's just
8 be honest about this -- a rounding error in the
9 payments world, which if you just sort of step back and
10 think that that's a little implausible, like there are
11 other things going on that explain, like, why you're
12 fourth of three.

13 But what that -- I know, that's -- it's mean,
14 but it -- you're laughing because it's a little true,
15 too, like that's -- but so what that then set up was an
16 opportunity for a natural experiment, right, because
17 you had an industry where Visa and Mastercard had had
18 rules, repealed them, and so for merchants that only
19 accepted Visa, Mastercard, and Discover, and not
20 American Express, did you see behavior different than
21 the behavior that you saw in the AmEx-accepting
22 merchants.

23 And for me, like, that's the dog that doesn't
24 bark in the case, and, again, I think consistent with
25 why it seems sort of goofy to begin with, like, DOJ

1 does not attempt to introduce facts into the record to
2 establish that the conduct that they believed had been
3 suppressed by the existence of the rules, in fact, then
4 appeared in that universe of -- like, this is not a
5 small universe, 3 million merchants that accept Visa
6 and Mastercard and Discover.

7 So -- and the reason for sort of pointing to
8 that, right, is that I think -- like, this
9 counterfactual point comes up over and over and over
10 again when you're litigating an antitrust case. Like,
11 is it in somebody's head? And here you actually have a
12 real world opportunity, a real lab in which to see
13 whether the thing that you say was suppressed was, in
14 fact, suppressed, and you didn't see it. So, like -- I
15 mean, I don't want to beat a dead horse on how bad that
16 complaint was, but, like, that -- like, that -- like,
17 we just shouldn't be outraged at the result in the
18 Supreme Court.

19 MR. CONNER: Judy and then Susan.

20 MS. CHEVALIER: Let me just put one footnote on
21 that, and that is we may not be entirely done with this
22 set of issues. I know there's some -- there's been
23 some -- and it's just press reports right now, but
24 there's some recent discussion about Target being kind
25 of particularly vocal about this, that they want to --

1 they don't actually want to discourage all Visa and
2 Mastercards, but they actually don't want to take the
3 super high rewards cards, and so they actually want to
4 be able to discriminate across Visa and Mastercards,
5 which, you know, might actually -- you know, so we may
6 not be done with seeing the dog barking that you're
7 describing.

8 MS. ATHEY: Yeah. I actually wanted to bring
9 up another case that hasn't come yet, at least in the
10 U.S., but may end up not ever being an antitrust issue,
11 but it involves also credit cards, but the credit cards
12 are now on the other side of this argument and actually
13 would like to get rid of antisteering provisions in a
14 different case.

15 So this is a case of ApplePay. So those of you
16 who have tested out ApplePay or seen it starting to get
17 more accepted, you see that you could put a credit card
18 into your Appeal Wallet and then use that to make
19 transactions. What you might not know is that behind
20 the scenes, some -- about -- depending on which country
21 you're in, about 0.15 percent of that transaction is
22 going to Apple, and in addition, it's actually not
23 possible to create a competing wallet on the iPhone, at
24 least not one that uses the NFC radio, which is part of
25 the receivers for accepting ApplePay.

1 So this is a case where Google is a little more
2 of the good guy on this particular issue and that you
3 can have multiple -- there's an NFC radio in the phone,
4 and the nonprice exclusionary provision, if you like,
5 which is present on the iPhone is that the only place
6 you can access the NFC radio is through the Apple
7 Wallet.

8 So anybody can use the flashlight, anybody can
9 access -- all the apps can access the maps or the
10 buttons, but there is one feature on the iPhone that
11 you can't access, and that's the NFC radio that's used
12 for payments. The only way an app can access the NFC
13 radio is through the Apple Wallet, and the only way a
14 card can go in the Apple Wallet is if you basically
15 share the interchange fee with Apple.

16 In addition, there are no steering provisions.
17 So in particular, the credit card company cannot charge
18 the consumer more or affect merchants either to -- as a
19 result of this fee. So you can't tell the consumer,
20 hey, you have to pay a little more if you use the Apple
21 Wallet rather than your physical card, okay? So those
22 no-steering provisions make the consumer completely
23 insensitive to whether they use the phone or the card,
24 but it's imposing an additional cost on the system.

25 And so this comes back to platform competition,

1 because you might say, well, gosh, I thought, like,
2 Apple and Google were competing for consumers, and so,
3 you know, if there's lots of great wallets and lots of
4 credit cards in wallets on the Android phones, then
5 maybe people will switch over to the Android and away
6 from their iPhone.

7 But the problem is that if you ask a consumer,
8 you know, would I switch phones because my CitiBank
9 Visa is not available in my Apple Wallet, but, you
10 know, my Chase Visa is, most consumers are not going to
11 switch phone operating systems over the availability of
12 a single card.

13 So in the end, the credit cards are now the
14 sad -- they're in the same position the merchants were
15 in in the AmEx case, and they say, oh, gosh, what do I
16 do? If I don't go put my card in the Apple Wallet,
17 then my consumers will just use another credit card
18 that is in the Apple Wallet, so, gosh, the credit
19 cards -- sort of a prisoner's dilemma problem --
20 collectively they would like to be able to negotiate
21 with Apple to get that fee down, but individually, none
22 of them have enough power, and so in countries where
23 the banks are fairly -- they're fragmented, like the
24 U.S., they all just capitulated and generally put the
25 cards in the wallet and paid the 0.15 percent. This

1 is -- all the business terms are confidential, so I
2 just have read things from news reports, but in other
3 countries where the banking system was more
4 concentrated, they negotiated those fees down a bit.

5 And, you know, broadly you might say the answer
6 ultimately should be that maybe countries should just
7 regulate that fee. So if you think about -- if you're
8 a country, not the U.S., that's not getting the benefit
9 of this Apple fee, and suddenly there's like a 0.15
10 percent tax on all transactions, you might just say
11 that's sort of too high, I don't want to regulate it
12 down, but we could also think about the role of
13 antisteering provisions in this type of case, and we
14 could also ask whether, you know, there's an antitrust
15 issue with basically locking down access to the NFC
16 radio within the platform, which is kind of a form of
17 exclusion.

18 So I'm not making a policy recommendation right
19 now as to whether this should be the antitrust law or
20 this should just be regulation of the financial system,
21 but it's a place where these economics, you know, come
22 into play, and, you know, we might say that that fee
23 sounds a bit inefficient.

24 MR. CONNER: Okay. I am going to turn to what
25 may be the last question, looking at our time, and I am

1 going to direct this to you first.

2 So many of the vertical issues that we have
3 been grappling with today are not new, and, Dick, you
4 pointed out in your opening statement that newspapers,
5 for instance, are the two-sided -- excuse me, are
6 two-sided markets where the product is free or low cost
7 to one set of users -- you mentioned your weeklies that
8 come in free -- but that are funded through the other
9 side via advertisers.

10 We have now moved to technology platforms that
11 have similar characteristics. How is the analysis
12 different, if at all, in any of these issues if the
13 platform is free to users and garners revenue via
14 advertising? And does the lack of a strong indirect
15 network effect running in both directions affect how we
16 should think about predation, restraints, MFNs, when
17 they're ad-supported?

18 MS. AKMAN: Thank you. I think when they are
19 ad-supported, market definition really becomes quite
20 fundamental, to get the market definition right in the
21 beginning. In terms of some of the restraints that
22 we've discussed, in practice, they only -- like MFNs,
23 they only seem to be taking place in situations where
24 the platform is not ad-supported because it relates to
25 the platform's commission and so on.

1 Newspapers are, indeed, a good example, because
2 there have been newspaper cases where courts, again,
3 around the world have differed in terms of how they
4 approach the market definition issue. A case that
5 involved, for example, Google, Google Maps in France,
6 at one point the Court found that the maps service
7 itself is predatory, full stop, because it's free to
8 consumers. Then that was overturned by taking into
9 account the obviously indirect network effects and the
10 fact that it was funded by advertising.

11 Similarly, a case in the UK a long time ago
12 called Aberdeen Journals, which had to do with free
13 newspapers competing against newspapers that weren't
14 free, again, market definition was quite critical, and
15 in that case the UK Competition Authority actually
16 found that the free journals still also compete with
17 journals that are not ad-funded and, therefore, it -- I
18 mean, the effects come into play first at the point of
19 defining the market, I think, but then also when you're
20 looking at competition, it still will play a role, but
21 it might be that even with ad-funded media and so on,
22 the competition is still in the wider context between
23 ad-funded and paid for items or products as well.

24 So I think some of these restraints won't be
25 necessarily an issue in ad-funded platforms, but where

1 the platforms aren't funded, as we have seen in the
2 AmEx case as well, that brings up a very important
3 issue about what's the relevant market here, because
4 the rest of the analysis seems to follow usually from
5 the market definition.

6 MR. CONNER: Susan?

7 MS. ATHEY: Yeah, so I think some of my
8 comments have already addressed some of these issues,
9 but I would say in ad-funded businesses, you need to
10 think specifically about the incentives the platforms
11 have, and so, like, say, going back to Google, which is
12 one of the most successful ad-funded platforms, why
13 does it want to -- why does it worry about, say,
14 competition from Amazon or another kind of -- maybe
15 think of them as a vertical competitor in some way,
16 that Amazon's, like, specialized at shopping?

17 Well, if people start going directly to Amazon,
18 then not only will they stop going through Google as
19 their entry point, thus sacrificing the ad revenue from
20 those consumers, but then a company like Amazon might
21 also start its own ad platform, which it has, which
22 then could be thought of as a -- which can grow into
23 more of a direct competitor for Google's business
24 model.

25 So, you know, what looks today like it's just a

1 downstream firm, like people go from Google to search
2 generally to do shopping on Amazon, as Amazon grows
3 big, it then starts its own ad platform and actually
4 competes for advertising dollars directly against
5 Google, and those types of analogies go across sort of
6 vertical by vertical, some of these websites that are
7 referred to by Google themselves grow into large
8 ad-supported websites, and then they can expand
9 horizontally and develop their own marketplaces.

10 So the fact that the original ad-funded
11 platform we were thinking about worries about other --
12 their own advertisers becoming competitors introduces a
13 new set of considerations. It makes that -- and that's
14 partly why we worry about vertical manipulation. You
15 worry that Google might not act in the interests of
16 social welfare, its consumers, because its main
17 motivation is preventing, you know, one of these
18 competitors from taking root and getting large and
19 really peeling people off vertically and horizontally,
20 and it's really the scale economies.

21 And in the ad-supported business, one other
22 thing to remember is, you know, to be a really
23 successful ad-supported business, you really need to be
24 very, very large. I mean, ads just aren't -- you know,
25 they just don't give you that much revenue. You need a

1 lot of consumers to really be able to attract
2 sufficient advertisers to be profitable, and so those
3 scale dynamics can be pretty important.

4 MR. CONNER: Anything else? Okay.

5 There is a question from the audience.
6 Professor Athey gave an example where consumers will
7 not switch phone operating systems for the wallet
8 because phones are -- I'm sorry, phones are so many
9 products to us. What are some other implications of
10 this particular point?

11 MS. ATHEY: Yeah, so I think if you -- so,
12 again, the challenge -- and, you know, I thought about
13 this at some point when thinking about the viability of
14 a third mobile operating system, the question is, like,
15 is there some, you know, killer app on a phone that
16 would really -- if it was available on one phone and
17 not the other, it would really cause you to dump one
18 phone operating system and go to the other.

19 It just happens, in the case of phones, there
20 aren't a lot of apps like that, especially because you
21 can access services through the browser, so it's just
22 hard to have, like, the killer app on a phone that
23 would cause you to switch. And I would say I would
24 contrast that with video games, where, like, a hit
25 video game on a gaming platform would induce a customer

1 to buy, say, an Xbox instead of a Playstation, so --
2 and there are some platforms where there are, like,
3 more concentrated content, and that content will take
4 their consumers with them, or like TV sports, like live
5 sports, you know, the customers will follow that
6 content from platform to platform. They won't just be
7 loyal to NBC because -- even if NBC doesn't have the
8 sports.

9 But with the phones, it's really pretty
10 fragmented, and so there's not a killer app. And so
11 what the consequences of that are that the phone
12 operating system then does have a lot of market power
13 over the apps. It can extract a lot of surplus.

14 Again, another example I like to think about
15 is, you know, the friction of getting a Kindle book.
16 You know, if you want to buy it on your phone, you tend
17 to have to go to the website and then order it and then
18 come back to the app, because they don't want to pay
19 the fee for the in-app purchase to the mobile operating
20 system. It would obviously be better for the consumer
21 if that was an easier process, but there hasn't been
22 able to be sort of a good consumer solution because of
23 the bargaining problem between the apps and the phone
24 operating system. And so I think that just sort of
25 illustrates that the phones aren't that concerned about

1 the consumer switching from one platform to the other
2 just because it's hard to buy a book in the Kindle app,
3 and instead, you know, there's actually a fair bit of
4 ability to exercise market power in the app ecosystem.

5 And so generally, you know, there hasn't
6 been -- you know, as -- there's not as many of these
7 issues as there are in search or vertical integration,
8 but there are some. Like if you think about the music
9 providers trying to compete with the, say, like
10 competing against iTunes, if you have to pay -- if you
11 have to share the in-app purchase revenue, if you're a
12 third-party music provider and you have to share the
13 in-app purchase revenue, that makes it kind of hard to
14 compete with the vertically integrated product.

15 So I think broadly the dynamics of the
16 competition mean that you have to watch out for the
17 behavior of the mobile phone platforms towards the
18 apps. Sometimes their incentives aren't misaligned,
19 but if they have -- if they own their own vertical
20 product or they see some kind of, you know, really
21 strategic issue, like payments, you might worry -- you
22 might be more on the lookout for anticompetitive
23 behavior or at least behavior that's not in the
24 interest of consumer welfare.

25 MR. CONNER: Dick, did you still want to --

1 MR. SCHMALENSEE: No, I'll pass. I'll pass.

2 MR. CONNER: Okay. So I want to turn to what I
3 think has to be the last question now, and it's
4 something that was prompted by something Susan said,
5 but it's been touched on by I think almost every
6 panelist, and that is, in the predatory pricing
7 context, where we have a seller who is not focused on
8 the selling of the product -- and, Susan, you had used
9 the example of thermostats -- but they were in customer
10 acquisition, and, Pinar, you had mentioned this in
11 France with the Google Maps and being per se because it
12 was free.

13 Where you're trying to analyze predatory
14 pricing and the business model that the person's
15 operating under looks at the -- doesn't look at the
16 product that you're looking at, which they may be
17 selling at either at or below cost, but they're looking
18 at a much broader -- because they're looking at
19 themselves as an ecosystem, and they want to get the
20 personnel into the ecosystem. How do we analyze
21 predatory pricing using the frameworks we've used for a
22 hundred years now -- to cite Tom -- in a situation
23 where the company that's selling the product doesn't
24 actually care what they're selling that particular
25 product for?

1 So I open that up to the panel, because all of
2 you have touched on it.

3 MR. SCHMALENSEE: Yeah, let me jump in. I
4 mean, this seems to me analogous to loss leader
5 pricing, right? I mean, supermarkets sell milk below
6 cost, occasionally to bring traffic in, and I think
7 you'd want to look at the facts of the case. I mean,
8 if the firm is set up to be much broader than a
9 thermostat maker, and that's plainly the strategy and
10 they're plainly set up to implement that, then you
11 might hold back. If it's one thermostat maker taking
12 advantage of a deep pocket to take over the thermostat
13 business, that's another matter.

14 So it would pose problems, just like below-cost
15 pricing always does, but I don't think that they would
16 fundamentally be new relative to evaluating loss
17 leaders.

18 MS. ATHEY: Yeah, I would just say, I agree
19 that the loss leader strategy is a very common
20 strategy, and if you're a multiproduct firm in the
21 online case, it totally makes sense to use loss leader
22 strategies. I mean, from a business perspective, the
23 customer -- a platform is trying to acquire customers.
24 They have lots of customer acquisition strategies, and
25 they are going to look at the lifetime value of the

1 customer.

2 If you think you have a great set of -- a suite
3 of services on your site and if you can just get the
4 consumer to come see how awesome you are, how great
5 quality you have, what great deals you have, then, you
6 know, trying to price very competitively on a product
7 that's very salient to a consumer, even pricing below
8 cost, could be a perfectly reasonable thing to do.

9 We don't worry about it in supermarkets too
10 much because we think that it's like -- those are
11 pretty competitive, so I think I would really look at
12 the facts of the case. I might think again if a person
13 that was doing it was so dominant that they were sort
14 of picking winners and losers or they were able to put
15 an entire company out of business or monopolize an
16 industry, that there certainly could be facts like
17 that, but broadly, you know, these -- I think these
18 kinds of loss leader types of strategies should be
19 expected, and they wouldn't, just on the face, be, you
20 know, necessarily a problem.

21 MR. CONNER: And Judy and then Tom?

22 MS. CHEVALIER: Yeah, I would just quickly say
23 that I think oftentimes a framing to think about this
24 kind of loss leader -- I've worked on supermarkets, so
25 I like that framing -- but I think another framing is

1 in a sense it's a feature on a larger -- I mean,
2 oftentimes the thing that you're -- you could be
3 preying on is really a feature you've put on a larger
4 product, and we have certainly -- we certainly expect,
5 as technology, you know, improves, that, you know,
6 there are features I used to buy separately for my
7 phone which now I just expect my phone to just have,
8 and I think we wouldn't actually want to stymie that
9 kind of change in the products, and so that's just
10 another framing to think about it.

11 MR. CONNER: Tom?

12 MR. BROWN: So I would say call a lawyer
13 admitted to practice in California and bring the case
14 under California's below-cost pricing statute.

15 MR. CONNER: Well, that's an interesting way to
16 end this panel, but we are out of time. So I do want
17 to thank everyone here for attending, those watching
18 online, I hope it has been informative, and most
19 importantly, I want to thank the five panelists for
20 their contributions. It has been certainly a very
21 interesting discussion. So thank you very much.

22 (Applause.)

23 (End Panel 1.)

24

25

1 PANEL 2: UNDERSTANDING EXCLUSIONARY CONDUCT
2 IN CASES INVOLVING MULTI-SIDED PLATFORMS: ISSUES
3 RELATED TO VERTICALLY INTEGRATED PLATFORMS

4 MS. BLANK: Good morning, everyone. After a
5 very interesting first panel, I hope everyone here is
6 able to see it, I think this will be a great second
7 panel, because some of the topics that we just started
8 discussing in Panel Number 1, we are going to dive into
9 with this panel with this wonderful group of academics
10 and economists and lawyers.

11 So I am just going to introduce everyone. I
12 guess I will start from the end down there.

13 We have Hal Singer, who is a managing partner
14 at Econ I Research, a Senior Fellow at the George
15 Washington Institute of Public Policy, and an Adjunct
16 Professor at Georgetown University's McDonough School
17 of Business. It was also just announced that Hal is
18 going to be honored next month by the American
19 Antitrust Institute with an award for outstanding
20 antitrust litigation achievement in economics. So
21 congratulations on that, Hal.

22 Next to Hal, I think we have Amy Ray, who is a
23 Partner at Orrick, Herrington & Sutcliffe. Amy was
24 recently featured in Global Competitions Review as one
25 of 40 under 40, Class of 2016, antitrust lawyers, in

1 its global survey.

2 Next to Amy, we have Nicolas Petit, a Professor
3 of Law at the University of Liege in Belgium, a
4 Research Professor at the School of Law of the
5 University of South Australia in Adelaide, and a
6 Visiting Fellow at the Hoover Institution at Stanford
7 University.

8 Next to Nicolas, we have Robin Lee, an
9 Associate Professor of Economics at Harvard and a
10 Faculty Research Fellow at the National Bureau of
11 Economic Research. Robin previously served on the
12 faculty at NYU's Stern School of Business.

13 Next we have Susan Creighton, Co-Chair of the
14 Antitrust Practice at Wilson, Sonsini, Goodrich &
15 Rosati. Previously Susan also served as Director and
16 Deputy Director of the Bureau of Competition at the
17 FTC.

18 Finally, next to me, I have Lesley Chiou,
19 Professor of Economics at Occidental College. Lesley
20 was previously a visiting scholar at UCLA and at Boston
21 University.

22 And I should add, I'm Barbara Blank. I'm at
23 the Federal Trade Commission.

24 So I thought we would just get started, just
25 jump right into the panelists' prepared remarks, and we

1 are going to start this morning with Amy.

2 MR. LEE: Hi. Good morning, everyone. I will
3 use my introductory remarks primarily to address two
4 points. First, to set the stage for where we are with
5 respect to Sherman Act Section 2 enforcement in conduct
6 cases, and then second, to acknowledge that perhaps
7 appropriately there's a good deal of scrutiny on
8 competition on and among vertically integrated digital
9 platforms.

10 So, one, from a view outside the agencies,
11 here's one take on Section 2 enforcement. The last set
12 of monopoly conduct guidelines were withdrawn a decade
13 ago. The most recent major Section 2 conduct case
14 brought by the federal antitrust agencies was against
15 Microsoft. We look back to that 2001 D.C. Circuit
16 liability opinion in Microsoft as a beacon of the
17 agency's ability to tackle tough questions about
18 competition in the technology sphere, yet without
19 federal guidelines or Section 2 enforcement post
20 Microsoft, it might be fair to ask whether our current
21 antitrust law and economics toolkit are up to the task.

22 I'd respond to that last point in the
23 affirmative, given the flexibility inherent in
24 antitrust law, but perhaps the enforcement approach
25 could benefit from a bit of finetuning, especially as

1 new platform and aggregator technologies continue to
2 race forward in vertically integrating.

3 And by the way, I credit Ben Thompson, who was
4 a speaker during Monday's hearings, with putting
5 forward that term "aggregator." I think it's helpful
6 for the types of technology interdependencies we will
7 discuss during this panel.

8 So moving to my second point, these platforms,
9 or aggregators, find themselves under the enforcement
10 microscope. Echoing my own experience in going under
11 the hood in these types of matters, we need to
12 appreciate both how network effects and platform
13 durability contribute to market power. In unpacking
14 the underlying structure of competition and technology
15 markets, retrospective studies can be helpful to the
16 Commission.

17 That said, we should be cognizant that history
18 might not capture the dynamism of today's digital
19 marketplaces and the ways in which network effects can
20 be combined with conduct to undermine competition; for
21 instance, in preventing other disrupters from reaching
22 efficient scale.

23 As just one example, perhaps we can distinguish
24 the historical poster child for efficient vertical
25 integration, the A&P Grocery Store. It faced

1 competition given that "entry into the food trade was
2 so cheap and easy and that any attempt to raise prices
3 would immediately have resurrected competition."
4 That's quoting from Martin Adelman's book. Can the
5 same be said about digital marketplaces? Well, let's
6 consider a few things.

7 The availability of behavioral data, which we
8 assume is captive to the platform operator and
9 aggregator only, that allows for precise targeting of
10 customers for its own products. Then combine that
11 ability to target conferred by behavioral data with the
12 incentive a vertically integrated aggregator has to
13 preference its own offerings.

14 For applicable law, we can look back to the
15 computer reservation system cases and related DOJ
16 commentary. I have a feeling some other panelists may
17 talk about that as well. I'll just read from a 1988
18 Central District of California opinion. "Display
19 biasing is unreasonably restrictive of competition in
20 that it restricts competition on the merits in the air
21 transportation business, and this type of competitive
22 advantage depends upon the perpetration of a fraud upon
23 the consumer. It is unreasonable and, therefore, an
24 unwarranted competitive advantage because it inhibits
25 competition on the merits."

1 Also in digital marketplaces, multihoming
2 evidence should receive due weight in assessing
3 competitive effects. To what extent do or don't market
4 players multihome and why? Moreover, we're in an era
5 in which platform aggregators often compete for a
6 market in winner-take-most scenarios. It has been
7 acknowledged that this type of aggressive competition,
8 incentivising monopolies, has produced some of the most
9 spectacular innovations we enjoy today. We, however,
10 should also account for subsequent reduced innovation
11 effects when a monopolist acts to raise rivals' costs,
12 to raise barriers to entry, and thereby to entrench its
13 market power.

14 Let me propose one data-related hypo to you.
15 Suppose a platform operator opens its data to retailers
16 on its platform to help them refine their products to
17 suit the tastes of customers in a market. It then
18 commits to work with massive market research firms to
19 offer the retailers even more thorough analyses of how
20 to delight those customers.

21 That example is actually not apocryphal. It
22 describes what Alibaba did when it demonstrated to Mars
23 that Chinese snackers prefer a Szechuan spicy flavor
24 called mala. Mars then introduced a new product for
25 the Chinese market that is now a wildly popular spicy

1 Snickers bar.

2 Of course, Alibaba is not -- is a nonintegrated
3 platform. Now, does a vertically integrated platform
4 aggregator have the incentive to share that data? If
5 not, and it opts not to introduce the innovation, that
6 innovation may not come to market. You and I, sadly,
7 might never devour a spicy Snickers bar.

8 So wrapping up, where do we go from here?
9 Again, retrospective studies could clarify the
10 durability of any single platform aggregator's market
11 power, but these industries move quickly and history
12 has its limits. Are new single-firm conduct guidelines
13 the answer? I submit enforcement policy need not be
14 articulated in that formal a manner. Moreover, we all
15 recognize it was difficult to obtain consensus during
16 the last round.

17 But practitioners in the business community at
18 large do need some guidance on vertical integration,
19 related conduct, and the range of remedies enforcement
20 agencies would consider. The report coming out of
21 these hearings is a good opportunity for that input.

22 I'll look forward to hearing my copanelists'
23 contributions and how we apply cutting-edge, vigorous
24 economics to these issues, and I'd like to end with a
25 quote from the late Chairman Pitofsky, explaining his

1 mind-set on competition. "Antitrust is a deregulatory
2 philosophy. If you're going to let the free market
3 work, you'd better protect the free market."

4 MS. BLANK: Thank you, Amy.

5 Next we will hear from Hal, who will come up.

6 MR. SINGER: I don't have any slides, but I
7 understand that a speech needs to be delivered from a
8 podium. Thanks for having me, Barbara. Thanks for
9 having me, Derek and the FTC.

10 Dominant tech platforms have the incentive and
11 ability to leverage their platform power into ancillary
12 markets by vertically integrating and then favoring
13 their affiliated content, applications, or wares with
14 their algorithms and basic features. A platform owner
15 should be concerned for the overall health of its
16 ecosystem, which in theory should discourage it from
17 squeezing complementers, but that calculus goes awry
18 when a platform enjoys monopoly power and can take its
19 customers for granted.

20 Dominant tech platforms can also exploit the
21 vast amounts of user data made available only to them
22 by monitoring what their users do both on and off their
23 platforms and then appropriating the best performing
24 ideas, functionality, and nonpatentable products
25 pioneered by independent providers. If these practices

1 are left unchecked, the resulting competitive landscape
2 could become so inhospitable that independents might
3 throw in the towel, leading to less innovation at the
4 platform's edges.

5 In a recent issue of The Economist, venture
6 capitalists referred to the area around the tech giants
7 in which startups are squashed as the "kill zone."
8 Classic examples of new ventures that have flown too
9 close to the sun include Diapers.com, Bearbones
10 Workwear, and BeautyBridge in Amazon's orbit;
11 Foundem.com, TripAdvisor, Shopping.com in Google's
12 orbit; and Snapchat, Timehop, and Grubhub in Facebook's
13 orbit.

14 A 2017 survey of two dozen Silicon Valley
15 investors suggests that Facebook's appropriation of app
16 functionality from edge rivals is "having a profound
17 impact on innovation in Silicon Valley." Some new
18 findings are consistent with independents throwing in
19 the towel or not getting funded. Per Crunchbase data,
20 VC investing inside of tech, as measured by the number
21 of deals, has declined since 2015 on average by 23
22 percent in the United States and by 21 percent
23 globally.

24 In contrast, VC investing outside of tech
25 increased over that same period, suggesting the problem

1 might be tech-specific, and new research using
2 PitchBook data reveals that broadly defined industries
3 in which Amazon, Google, and Facebook -- inside the
4 Amazon, Google, and Facebook orbit experienced a
5 collapse in venture capital first financing since 2015,
6 a reduction not observed in comparable tech sectors.

7 There are three basic approaches to dealing
8 with this threat to edge innovation. First, we could
9 lean on antitrust enforcement to police discrimination
10 pursuant to the consumer welfare standard. Second, we
11 could police these episodes on a case-by-case basis
12 pursuant to a nondiscrimination standard. Or third, we
13 could erect structural barriers via legislation to
14 prevent dominant platforms from annexing ancillary
15 markets.

16 I am on Team Nondiscrimination, but before I
17 defend its merits, let me briefly discuss the demerits
18 in the approaches of Team Antitrust and Team Structural
19 Relief. The antitrust path leads to underenforcement
20 because judges increasingly interpret the consumer
21 welfare standard to require demonstration of a
22 tangible, short-run harm to consumers, and yet most
23 episodes of discrimination will not produce a price,
24 quality, or output effect.

25 Moreover, the snail's pace of antitrust

1 adjudication ensures that edge innovation would be dead
2 by the time relief could be administered. On the other
3 side of the spectrum, structural separation is a messy
4 undertaking. How one draws the boundaries around a
5 platform's core mission is not straightforward. Not
6 all ancillary offerings require the same level of
7 ingenuity and creativity, and, thus, not all verticals
8 present the same welfare tradeoffs. Barring Google
9 from incorporating a commodity feature, such as
10 answering a math problem, while beneficial to rival
11 math apps, would likely reduce the welfare of users in
12 the short run without any offsetting innovation game.

13 Finally, structural separation can always be
14 imposed after less invasive behavioral remedies have
15 been deployed without success. The problem from an
16 economic perspective is not vertical integration, per
17 se. The problem arises when vertical integration is
18 followed by discrimination in a vertical that entails
19 innovative or creative energies; that is, in verticals
20 where the best source of innovation is likely to come
21 from independents.

22 Under a nondiscrimination regime, Amazon would
23 be free to sell private-label mass, and Google would be
24 free to collect and attempt to organize its own
25 restaurant reviews, but as soon as these platforms

1 vertically integrate, they would be subjected to a
2 nondiscrimination standard. This standard would be
3 enforced via a complaint-driven process initiated by
4 the party alleging discrimination. The standard would
5 prevent Google from limiting its search results for
6 local doctors or local restaurants to Google-affiliated
7 content. Instead, Google would be required to run its
8 page rank algorithm across the entirety of the public
9 web for local searches.

10 Under a nondiscrimination standard, a
11 vertically integrated Google could discriminate in its
12 organic search results in every dimension, save one,
13 whether the results are affiliated with Google. An
14 added benefit of my approach is that it borrows from
15 the solution to a nearly identical problem concerning
16 vertical integration by a dominant platform in the late
17 1980s and early 1990s.

18 The dominant platform of that era was owned by
19 cable operators, many of whom vertically integrated
20 into programming. Based on a handful of compelling
21 anecdotes, which revealed the vulnerability of
22 independent cable networks operating at the age of the
23 cable platform, Congress created a specialized dispute
24 resolution process that operated outside of antitrust
25 and provided a forum for independent networks to lodge

1 discrimination complaints against vertically integrated
2 cable operators.

3 The protections were not supported by an
4 econometric proof of diminished edge innovation owing
5 to discrimination, but instead were motivated by a
6 simple political preference, that independent networks
7 were an important source of innovation in content and
8 were deserving of protection.

9 To create similar protections for independent
10 content providers of the internet era, Congress would
11 have to pass a law with a private right of action. It
12 could give the FTC power to resolve these matters
13 administratively, or parties could develop federal
14 common law on this issue by trying cases before Article
15 3 judges.

16 So I have a modest proposal for the agency.
17 The FTC should pursue a Section 2 case against a tech
18 platform when the harms manifest as a price output or
19 quality effect. In the absence of a tangible consumer
20 injury, the FTC could pursue a Section 5 case by
21 treating discrimination as an unfair practice. In any
22 event, at the end of its competition hearings, the FTC
23 should ask Congress to give the agency a new source of
24 authority to adjudicate complaints against vertically
25 integrated tech platforms pursuant to a

1 nondiscrimination standard. The FTC already has an
2 administrative law judge. Now it just needs a mandate
3 from Congress and some complaints to protect edge
4 innovation.

5 Thanks.

6 MS. BLANK: Thank you so much, Hal.

7 Robin?

8 MR. LEE: Well, good morning, everyone. First
9 I want to thank the organizers and the Commission for
10 bringing this panel together.

11 I am going to take a slightly different tack
12 than the previous panelists. I'm going to put on my
13 academic hat and discuss two research papers that talk
14 about platform markets I've been involved with, and
15 this is from the view, as noted by Susan and others in
16 the previous panel, that understanding the economics is
17 a useful first step for later discussion. I hope to
18 show that or how, rather, we can use econometric tools
19 to measure the costs and benefits of integration and
20 exclusionary conduct by platforms and along the way
21 help to emphasize some nuances of these markets that
22 are important to consider when thinking about
23 competition and welfare, okay?

24 So the first paper I want to discuss is on
25 integration in the multichannel television industry.

1 Now, this is a setting I'm sure many are familiar with
2 given recent events. Essentially, there are upstream
3 channels, here in orange, that have to contract with
4 downstream distributors, in blue, to access customers.
5 What do we do in this paper?

6 Well, I, along with several co-authors,
7 including Greg Crawford, Mike Winston, Ali Yurukoglu,
8 build and estimate a bargaining model in the cable
9 industry in order to quantify the pro and
10 anticompetitive effects when high valued content --
11 here regional sports networks, or RSNs -- vertically
12 integrate with distribution.

13 Now, I think multichannel television is a nice
14 industry to start with because the efficiency and
15 foreclosure effects here are present in many other
16 platform environments. In particular, the efficiencies
17 that we measure and focus upon include the standard
18 elimination or reduction of double marginalization, as
19 well as the better alignment of incentives regarding
20 strategic actions. Here, those strategic actions
21 include increased carriage of integrated content, but
22 in other industries, could include R&D and investment.

23 The anticompetitive effects we're going to
24 focus upon include these foreclosure effects, primarily
25 downstream foreclosure, by which we mean an integrated

1 content provider either completely excludes or
2 disadvantages rival distributors when it comes to
3 carrying its programming. This includes raising
4 rivals' cost effects.

5 Now, what we do is we simulate vertical mergers
6 and divestitures for approximately 30 RSNs in our
7 sample period, which is in the mid-2000s, and our key
8 findings are that, on average, across channels and
9 simulations, there is a net consumer welfare gain from
10 integration. Don't get me wrong, there are significant
11 foreclosure effects, and rival distributors are harmed,
12 but these negative effects are oftentimes offset by
13 sizeable efficiency gains. Of course, this is an
14 average. It masks considerable heterogeneity. When
15 complete exclusion occurs, which happens both in our
16 simulations and in the data some of the times, consumer
17 welfare is actually harmed. And this suggests that in
18 this industry, these program access rules that were in
19 effect, by ensuring availability of integrated content
20 to other distributors, actually helped consumer
21 welfare.

22 Two additional points about this paper. First,
23 this analysis doesn't really quite get at upstream
24 foreclosure; that is, the disadvantaging of rival
25 channels by the integrated distributor. Now, you might

1 think this may be less of a concern here due to the
2 presence of program carriage rules; however, these
3 rules don't eliminate all potential harm. For example,
4 consider the channel neighborhooding requirement
5 imposed for the Comcast-NBCU merger.

6 Second, this paper measures really the static
7 effects of integration and doesn't capture long-term
8 effects on entry, exit, investment, and so forth, which
9 can be significant. For this we would probably like to
10 complement it with some kind of dynamic analysis, and
11 to do this, I'm going to sort of highlight another
12 paper of mine that looks at a somewhat more dynamic
13 environment.

14 This one studies the role of exclusively
15 integrated software in a particular hardware/software
16 market or canonical hardware/software market, the video
17 game industry in the 2000s. You know, this, too, is a
18 platform market. Consumers purchase a hardware
19 platform to access affiliated software titles, but
20 here, as with most technology products, it's important
21 to consider the evolution of this industry over a
22 period of years, right, not just at a single snapshot.

23 To do this, in this paper I estimate and build
24 a model of platform competition, with network effects,
25 focusing on how platforms try to attract both consumers

1 and software developers, and it turns out here beliefs
2 over which platforms will eventually succeed are
3 critical in the early months or the early years of this
4 generation.

5 What's interesting about this particular
6 generation of the industry was that there was
7 essentially an incumbent, Sony, who had released its
8 platform a year before other entrant platforms came to
9 market. There was also a brand new entrant at this
10 time, Microsoft, who previously had never been involved
11 in the video game industry.

12 The key finding of this paper was that the
13 entrant platforms were able to leverage integrated and
14 exclusive content to their advantage; that is, in a
15 counterfactual world, where integrated and exclusive
16 software prohibited, entrant platforms really couldn't
17 have provided a compelling reason to either software
18 developers or consumers to join their platform. Most
19 software products would have initially joined the
20 incumbent, and consumers would have followed, and this,
21 in turn, implies that exclusivity, given that entrant
22 platforms were able to outbid or outproduce
23 high-quality content, encouraged platform competition.

24 This analysis also emphasizes the -- how a
25 reduction in platform competition can appear to maybe

1 have small short-run effects but very large long-term
2 effects. Here, without subsequent entry by successful
3 platforms, prices would have been higher, and
4 industrywide quality and software development likely
5 reduced over time.

6 Now, these similar findings about the benefits
7 of platform competition exist elsewhere. For example,
8 in a related study in television markets, Economists
9 Austin Goolsby and Amil Petrin measured consumer
10 welfare gains from the entry of satellite television
11 distribution to be on the order of billions of dollars
12 per year. Thus, although facilitating competition
13 within platforms for complementary products is
14 desirable, this suggests that cross-platform
15 competition can be just as, if not more so, more
16 important.

17 And one last point before concluding. I think
18 Amy touched on this point as well. In this industry,
19 multihoming is really important to consider. Here, the
20 heaviest users and the source for most industry
21 revenues, they bought multiple platforms, and I bring
22 this up because the extent to which consumers can
23 multihome matters for how platforms compete. For
24 example, if you're a platform, you don't really need to
25 access all complementary products to be successful.

1 All you really need to do is offer a compelling set of
2 certain products to get some multihoming consumers on
3 board.

4 Similarly, any product can potentially be
5 brought to market and be successful even if it's
6 excluded from one or several platforms. So on that
7 point, I'd like to pass it along to the next panelist.
8 Thanks.

9 MS. BLANK: And we are going to move on to
10 Lesley.

11 MS. CHIOU: Okay. So, yeah, it's wonderful to
12 be here, and I'm looking forward to our panel
13 discussion. So in the spirit of Robin's remarks, I
14 will also put on my academic hat and use the next few
15 minutes to share some of my research that I've done on
16 platform markets. In particular, I want to talk about
17 two papers. The first looks at a platform introducing
18 new products, and the second looks at a platform
19 copying content from other sites. And in both papers I
20 find that this type of platform content can have
21 significant consequences for the use of third-party
22 sites by consumers.

23 Okay, so my first paper in the Journal of Law,
24 Economics, and Organization, I'm looking at whether or
25 not or actually how a platform introduces or integrates

1 product into its particular platform. So in this case
2 I'm looking at search engines. So if you have your
3 laptops handy or, you know, your cell phones, feel free
4 to pull up Google, and you can sort of look along.
5 Just do a keyword search for flights to D.C., and
6 you'll see in this case that you'll get a set of search
7 results, and they'll have links to various online
8 travel agencies, like Expedia, Travelocity, and you'll
9 also see as well Google's own product, Google Flights.

10 So the question I'm interested in is, you know,
11 how does the integration of Google's own products, in
12 this case Google Flights and at the time Google Zagat
13 restaurant ratings, how does that affect the use of
14 third-party sites? So what happens to Expedia and
15 Yelp.

16 And so my results actually show two opposing
17 findings. So the first is that when Google integrates
18 Google Flights, what happens is that a usage of online
19 rival travel agencies decrease, but on the other hand,
20 the integration of Google's Zagat ratings actually
21 increases the use of other review sites on Google.

22 And so, in other words, what this is saying is
23 that Google Flights is serving as a direct substitute
24 or a direct rival to other online travel agencies,
25 while Google Zagat restaurant ratings are actually a

1 complement towards other review sites. So it seems
2 that, you know, the consequences for third parties
3 really matter whether you're looking at consumers
4 searching for quality information or pricing
5 information. And so I'll circle back more to this
6 after I talk about my second paper.

7 So in my second paper, so this is joint work
8 with Catherine Tucker and in the Journal of Economics
9 and Management Strategy, and we're interested in
10 looking at what happens when a platform copies content
11 from another site. And so, in particular, we're
12 interested in how a news aggregator, like Google,
13 functions when it shares headlines or short extracts of
14 articles from other news sites.

15 And so what we find is that when there's a
16 sudden and large removal of news content from this news
17 aggregator, this actually leads to a sharp decline in
18 consumers' visits towards other news sites from Google,
19 all right? So, in other words, Google News here is not
20 serving as a rival to other news sites or as a direct
21 substitute, but, rather, it's serving as an upstream
22 referral to these sites. And, in fact, in particular,
23 what we find is that consumers tend to use these news
24 aggregators to locate information that they might not
25 otherwise find, so content that is more unusual or more

1 niche, more highly localized news.

2 And so if you take these two papers together,
3 what this is showing really or what this suggests is
4 that platform integration of either its own products or
5 content can really shift consumers' use of third-party
6 sites. So when consumers are looking for or exploring
7 information that is more unknown, so perhaps looking
8 for a restaurant they haven't visited or today's news,
9 this type of platform content can enhance the use of
10 third-party sites.

11 On the other hand, when consumers are looking
12 to confirm prices or perhaps to make a purchase, this
13 type of platform content can have a negative
14 consequence for rivals, all right? So, thank you, and
15 I'm looking forward to our panel discussion.

16 MS. BLANK: Thank you, Lesley.

17 Nicolas?

18 MR. PETIT: Sure. Thank you, Barbara, and
19 thanks again for the invitation by the FTC. It's a
20 great opportunity to talk about great topics.

21 So I'd like to give a bit of context and then
22 make two general remarks on the topic. So the context
23 first, as we heard, there's a lot of clamor against
24 platform strategies or vertical exclusionary conduct,
25 and there is basically two main families of allegations

1 which are made. The first involves leveraging conduct,
2 where the platform gives preferential access display or
3 placement to its own products or services at the
4 expense of rivals. The second family of claims
5 involves vertical integration itself, so the platform
6 would sort of undertake aggressive M&A or copycat
7 innovation to squash actual or potential competitors.
8 So this is a sort of standard Amazon story, uses data
9 on merchants or from merchants to favor its own
10 businesses. It's like, you know, in the X-Men, there
11 is a character, I think it's called Rogue, and it can
12 absorb other mutants' powers just like that. So it's a
13 bit the same sort of thinking.

14 So with that in mind, the first high-level
15 remark that I'd like to make is that I think antitrust
16 could better acknowledge that the social costs of
17 vertical exclusionary conduct by platforms is
18 risk-class dependent. So what I mean by that, that
19 harm to consumer welfare is higher when we see
20 exclusion of firms with a cross-platform threat kind of
21 potential.

22 By contrast, the harm resulting from the
23 exclusion of harms without disruptive potential should
24 be a lesser concern for antitrust policy. So there is
25 nothing groundbreaking in what I'm saying here, but my

1 perception of the current conversational framework is
2 that we are not quite seeing that discussion or that
3 distinction. We talk about whether to protect inter
4 versus intraplatform competition. We talk about
5 substitutes versus complements competition. We talk
6 about remedies between platform and edge innovators.
7 That framing is not necessarily useful, because risk
8 classes are independent from these concepts, and real
9 platform threats can come or not from those substitutes
10 and edge products.

11 So Microsoft Bing, for instance, the
12 complainants in the Laverdine (phonetic) case in Europe
13 and elsewhere against Google Search, strong interplay
14 from competition, not sure that this represented
15 platform threats for Google.

16 Diapers and batteries, intraplatform
17 competition to Amazon or edge competition, is this
18 real -- is there a real risk of platform threats
19 through those kinds of products and services, I'm not
20 too sure about it.

21 And so what I want to say is we risk missing
22 the real big thing here if we are basing enforcements
23 on the basis of frameworks, which are not actually
24 helping us distinguish between the real platform
25 threats, which is a sort of, you know, big consumer

1 harm type of category, versus the lesser harmful type
2 of anticompetitive conduct.

3 So to be a little concrete, the law sometimes
4 draws a distinction, and we heard yesterday on the
5 panel on the Microsoft case, that the Microsoft case
6 was a lot about platform threat type of conduct and
7 applications barriers kind of threats. We also know
8 that the U.S. Merger Guidelines tell us that mergers
9 can reduce competition when they eliminate a maverick
10 company. So I think antitrust policy could perhaps go
11 a little further and think about drawing the full
12 consequences of the various types of risks of
13 foreclosure when it designs priority -- a priority
14 agenda or tests or rules and standards for enforcement,
15 and, for instance, you can say we are going to
16 prioritize cases which involve real threats of platform
17 disruption versus cases which do not really represent
18 that type of risk for market competition.

19 All right, so that brings me to my last point
20 and my last remark. So I read a lot of work being done
21 on platform-specific harms to competition, and I read
22 much less work on platform-specific vertical
23 integration efficiencies, and I'm not talking here
24 about all the efficiencies that we know from the econ
25 literature about, you know, preventing holdup, reducing

1 double marginalization, and that sort of stuff. I'm
2 talking about things which are read in sort of, you
3 know, management or, you know, startups kind of
4 literature, and so in those books, there is a lot of
5 interesting material.

6 So in the tech world, there's sort of received
7 wisdom concept, which is adding verticals, adding
8 verticals is a sort of recent concept, and it's a
9 concept that people talk about when they're talking
10 about growing a company. So in the growth stage,
11 platforms also use adding verticals as a strategy to
12 accelerate customer acquisition. So Facebook, for
13 instance, invested multi -- invested a lot of money in
14 acquiring multiple companies for email scraping
15 purposes to be able to find out the people to invite to
16 the service.

17 E-companies like Amazon, for instance, started
18 in one segment, like, you know, e-books in 1997, and at
19 very quick pace added on music and video, adding
20 verticals, or, you know, the same with Uber and Lyft,
21 adding eats and scooters and other kind of verticals.
22 So when firms add verticals, as part of their growth
23 strategy, the real hot question for antitrust is the
24 following: So we may welcome adding verticals as a
25 growth monetization strategy for startups, but should

1 we change the assessments for firms that are no longer
2 startups, like incumbent platforms? And when should be
3 the tipping point where adding verticals no longer is
4 legitimate?

5 So in this discussion, you also have to bring
6 into the mix the thinking about the fact that late
7 entry is often the sort of norm in the tech industry
8 and often a source of efficiency. Think about Google
9 entering mobile OS or think about maybe Amazon today
10 trying to enter some verticals because maybe things
11 that -- the verticals on the platform do not do good
12 service to customers.

13 Now, I just want to close with one last
14 statement. This concern about adding verticals may not
15 be -- you know, and this efficiency about adding
16 verticals may not be so pertinent in technology areas
17 where you have a lot of ex ante coordination, for
18 instance, in standard-setting organizations, where you
19 can clear all the sort of details through an ex ante
20 trial and error process and discussion within industry.

21 But in industries like the tech industry we're
22 talking about today, there is no such process, and so
23 it may make sense to let companies add verticals later
24 to sort of capitalize on the experience of previous
25 experiments by smaller firms and provide to consumers

1 value for money. Thank you.

2 MS. BLANK: Thank you so much, Nicolas.

3 Susan, last but never least.

4 MS. CREIGHTON: Well, thank you, Barbara, and
5 thank you again to the Commission and for having me on
6 the panel.

7 So I wanted to maybe step back, and Amy
8 mentioned history. I actually thought maybe step back
9 even further and give a historical perspective. I have
10 been representing tech companies in antitrust for a
11 really long time now, but that -- the history goes back
12 even further than I do, of grappling with this problem
13 about vertical integration, particularly understanding
14 it to mean technological innovation in both hardware
15 and software platforms for at least the past four
16 decades that I'm aware of.

17 So examples to think about would include the
18 IBM peripherals cases in the late 1970s; the Antitrust
19 Division's two Microsoft investigations; the FTC's 2010
20 Intel investigation; and the FTC's 2012 Google
21 investigation.

22 So the IBM -- just to give an example of what
23 are the kinds of issues those cases involved, the ones
24 that people might be a little less familiar with, the
25 IBM cases involved IBM's integration of previously

1 separate components, such as CPUs and disk drives. So
2 this integration eliminated a lot of cables and wiring,
3 but it also hurt the business of competing peripherals
4 manufacturers.

5 The first Microsoft case, people tend to
6 forget, prohibited the tying of Microsoft's MS-DOS with
7 its Windows 3.1 windowing software, but expressly
8 permitted their integration into Windows 95, and so on.

9 So apart from the cases, if you -- sort of the
10 things that didn't get challenged or didn't become
11 famous in the antitrust world, you see even more
12 examples of platform competition through product
13 integration.

14 I mentioned yesterday, David Evans has a nice
15 summary of the history of portal competition among the
16 major portals, AOL, Yahoo, and MSN in the nineties and
17 early 2000s, to illustrate how adding features is often
18 how platforms compete with each other. As Dr. Evans
19 noted, that portals competed intensely by adding
20 features such as email, messaging, search, news,
21 shopping, sports, maps, video, and travel. Some of
22 those may sound like platforms today. They were
23 verticals then.

24 On the hardware side, Apple innovated on its
25 iPod platform by adding mobile telephony and internet

1 functionality to the iPod, which they famously
2 advertised as a three-in-one device, and then they gave
3 it the name of the iPhone.

4 So if a review of the history of tech platforms
5 over the past several decades and, you know, in the
6 caricature of antitrust tech world, you know, you would
7 say you have gone from a caricature of IBM as the only
8 company out there to the Wind Hill duopoly to the three
9 big, you know, sort of portals and how scary AOL
10 looked, and now we're talking about big five or I've
11 lost track of how many big platforms. All through
12 that, the arc of that history, we've seen vertical
13 integration is a striking, pervasive, and distinctive
14 feature of platform competition.

15 So it says the protection and promotion of
16 innovation should be a paramount goal of antitrust
17 enforcement. Antitrust enforcers should tread with
18 particular care when they're challenging that kind of
19 product innovation.

20 Now, that's not to say that innovation should
21 be per se immune from antitrust scrutiny. The courts
22 and agencies, their consent orders have upheld
23 liability where the supposed innovations were
24 essentially shams. They made no business sense but for
25 their anticompetitive effect, such as when they

1 actually impair product performance or amount to a
2 deceptive bait and switch.

3 I think one of my favorite examples was from
4 the IBM peripherals cases. IBM found out that sort of
5 the amount of load that its rivals could carry was,
6 like, 30,000 bits and up, so it designed the product
7 only to go up to 29,000. That would be a good example
8 of a product that served no efficiency benefit.

9 But that said, I think two themes that
10 consistently run through the cases, run through the
11 consent orders, are themes that have served us in good
12 stead and that we would do well to follow. The first
13 that is in practice, the courts consistently have
14 upheld product integrations if they determine that the
15 integration provides an actual benefit to users even if
16 those changes impair competition from a rival's
17 product. Such a finding, whether the court has
18 articulated their test as a balancing test or some
19 other kind of test, in practice, I would submit, has
20 found that when they find that the product innovation
21 will actually benefit consumers, that finding has
22 acted, like in the predatory pricing world, like a
23 finding of above-cost pricing. Where found, it's
24 conclusive.

25 The agencies' consent orders have faithfully

1 reflected that state of the law even with dealing with
2 fencing-in relief to cure alleged antitrust violations.
3 Just to give one example from the FTC's history, I'd
4 point you to Section 5 of the FTC's 2010 Intel consent
5 order. So this is in the context of, even with
6 fencing-in relief, it expressly permitted Intel to make
7 design changes to its product that would "improve its
8 performance, operation, cost, manufacturability,
9 reliability, compatibility or intraoperability" even if
10 those changes degraded the performance of a
11 competitor's product.

12 Second, the courts and most expressly in the
13 D.C. Circuit's two Microsoft decisions, they have
14 recognized that it's a mistake to apply a
15 backwards-looking assessment of market demand and
16 market definition in the antitrust assessment of
17 product integration in platform markets.

18 So in Microsoft, this actually arose first in
19 the first consent decree case. We didn't really spend
20 much time on the Microsoft panel yesterday talking
21 about that case, but since the consent order permitted
22 Microsoft to "develop integrated products," so, again,
23 the consent order very faithfully, like the Intel
24 consent order, reflecting this consistent agency
25 concern, and this was over the course of a decade and a

1 half, because I think that consent order was from '93
2 or '94, like the Intel 2010 consent order, and in that
3 case the D.C. Circuit was wrestling with what did
4 "integration" mean, since it was dealing with sort of
5 the combination there of Windows 95 with the browser,
6 and the Court observed that integration implies the
7 combination of things that specifically were separate,
8 but then it rejected the notion that it would make
9 sense to apply tying laws, backwards-looking separate
10 demand test, in those circumstances, precisely because
11 sort of the kind of thing that Robin was flagging.

12 It effectively penalizes the first firm to
13 innovate by combining what previously had been two
14 separate features. I think maybe Susan -- I think it
15 was Susan or Judy mentioned on the last panel sort of
16 using it on her phone, previously -- so, you know,
17 having functions that previously were separate, and
18 then she was -- you know, sort of they just came with
19 the phone.

20 So the example the Court gave, which I
21 particularly enjoyed, was they said, "Just because
22 Kodak recognized separate markets for parts and
23 service, that should not make a self-repairing copier
24 an unlawful tie."

25 So as we talked about yesterday, the D.C.

1 Circuit, in its subsequent Microsoft Section 2 case,
2 used that same kind of rationale to reject the idea of
3 applying a Section 1 per se tying analysis to platforms
4 precisely because of the ubiquity at this of bundling
5 and the pervasively innovative character of platform
6 software markets. I think it's the kind of -- sort of
7 the example that Robin gave of Microsoft innovating
8 through its vertical integration to compete with Sony.

9 So in that context, I think the courts and the
10 agencies respectfully have gotten things exactly right.
11 So I think because product integration is integral to
12 how platforms compete, and for that matter to
13 competition in most, if not all, high-tech products and
14 services, we have been tending to focus on platforms
15 here, it's been equally true of hardware and software,
16 but it's also been true of nonplatform products. The
17 number of products that used to be separate that are
18 now combined, system on a chip, that kind of thing, we
19 should be very wary of rules that could inadvertently
20 chill the development of the D.C. Circuit's
21 self-repairing copiers.

22 I, for one, every time I stand at a copier and
23 get it jammed, would welcome the innovation of a
24 self-repairing copier and the elimination of all paper
25 jams, even as much as that development would be less

1 welcome for those in the copier servicing business.

2 MS. BLANK: Thank you, Susan. As would I, by
3 the way.

4 So thank you so much to all of the panelists.
5 We are going to move on to questions, and one
6 housekeeping note, as with the first panel, there
7 should be FTC staffers walking around with notecards,
8 and please feel free to take one and write down a
9 question for the panelists.

10 With that, though, before we move on to
11 questions, I wanted to give everyone a chance to
12 respond to any of the introductory remarks by other
13 panelists, if there are any.

14 MS. CREIGHTON: Actually, Barbara, sorry to
15 pile on, having just finished, but I did -- I thought
16 it was interesting, just as we go forward, to think
17 about what Lesley's research and kind of in light of
18 what Robin's research showed, just, for example, on
19 the -- just to pick one of her examples on the flight
20 search, because, you know, I think if you pick up on
21 something that Michael Salinger had mentioned, he said,
22 you know, there is no such thing as a general search,
23 and sort of this goes to the point about the importance
24 of multihoming.

25 I think most people in 2010, if they were

1 asked, hey, let's -- you know, why don't you do a
2 search for what flights you want, the first place you'd
3 think of probably to go would have been Expedia, and
4 then maybe Travelocity after that, and then maybe, I
5 don't know, you would think of Google, but you wouldn't
6 kind of have very much in the way of expectations of it
7 being -- producing a very good effect.

8 So another way of interpreting Lesley's sort of
9 findings is that sort of Google adding those flight
10 search capabilities actually was enhancing competition
11 to what was then sort of the dominant Expedia, and so
12 the substitution effect she found is exactly what we
13 would be hoping sort of that you would be seeing in
14 terms of interplatform competition.

15 So I'd just point that out in light of, you
16 know, sort of like Robin's example of Microsoft
17 competing against Sony. It's worth thinking about sort
18 of the -- you know, I think the empirical economic
19 research is great, and it's wonderful to be seeing the
20 results, to be kind of thinking about sort of what --
21 sort of as we're framing our questions, not to be
22 getting into sort of an assumption, which I don't think
23 either Lesley or Robin were suggesting, but that sort
24 of, like, somehow in a -- you know, we live in a
25 very -- oops -- multihoming world, and so sort of

1 getting into a world of sort of assuming that everybody
2 competes on a platform and then another platform and
3 then another -- you know, that that can be a constraint
4 that I don't think necessarily reflects how people's
5 consumer behavior actually is.

6 MS. BLANK: Thanks. I appreciate that.
7 Actually, on that note, you, Nicolas, and several
8 others, Lesley and Robin, all referred to this kind of
9 adding of verticals and whether adding verticals and
10 integrating technologically somehow is -- how we should
11 classify that, and with apologies to Nicolas, I
12 hesitate to admit with him sitting here at the table,
13 that we at the FTC -- and me, in particular -- spend a
14 lot of time thinking about what we know as
15 interplatform competition versus intraplatform
16 competition, where verticals are added to a platform.

17 Now, I know some argue that that's a false
18 divide or we shouldn't think about things that way. Of
19 course, Susan referenced the Microsoft decision. There
20 was a whole panel yesterday on the Microsoft decision.
21 Microsoft, in my interpretation, really did focus on
22 that question, the idea that these verticals, the
23 Netscape navigator, the Internet Explorer browser, were
24 these vertically integrated products, but the D.C.
25 Circuit focused not on the tying and dominance in this

1 downstream market -- certainly the DOJ brought that
2 claim -- but, rather, the impact of that tie on the
3 upstream operating system market, and the first
4 panel -- I wasn't going to raise AmEx, but I'm crazy,
5 so I will.

6 The first panel spent a lot of time on AmEx,
7 and I thought one of the points that may have been
8 overlooked, there was no one pro-DOJ on that panel, so
9 I am going to argue on the DOJ's behalf, that one of
10 the points that I thought didn't really come up in that
11 first panel was this idea of vertical restraints that
12 uphold or soften competition among the platforms, and
13 that was certainly underlying the Department of
14 Justice's theory. It wasn't about the vertical
15 restraints or one might argue it wasn't about the
16 vertical restraints and the antisteering. It was how
17 those antisteering provisions affected competition
18 between Mastercard, Visa, Discover, and American
19 Express.

20 So my question for the panel -- and this is for
21 all of the panelists -- is when people like me sit
22 around the FTC or DOJ staffers, what should we be
23 thinking about in terms of intraplatform competition?
24 Should we ever really care about intraplatform
25 competition for the sake of that competition between

1 websites on Google, between merchants on Amazon, or
2 Apple's vertically integrated products versus a
3 rival -- versus a downstream rival, or is the only --
4 or is the only real issue in a case whether we can
5 prove interplatform competition -- evidence of
6 interplatform competition harm.

7 Anyone who wants to answer.

8 MR. SINGER: I'll take it.

9 MS. BLANK: Please, Hal.

10 MR. SINGER: So, you know, I actually think
11 that the question is premised on a false assumption of
12 interplatform competition. I think competition among
13 the platforms here is exceedingly weak. I don't think
14 from a consumer's perspective or a user's perspective
15 you would view what Google is offering in terms of
16 search to be a reasonable substitute to what Amazon is
17 offering in terms of e-commerce or what Facebook is
18 offering in terms of social media.

19 In fact, this competition is so weak that
20 Google, I think last week, finally pulled out of the
21 social media sphere, and to me that was incredibly
22 significant, because if Google, with all of its
23 resources and accumulated data and network effects,
24 can't overcome the Facebook monopoly, then who can?

25 So I really reject this notion that

1 intercompetition -- interplatform is occurring and is
2 all that significant. My skepticism, by the way, of
3 antitrust being the right tool here isn't whether a
4 plaintiff or the Government could show that Amazon or
5 Google or Facebook were monopolists in their respective
6 fiefdoms. That would be fairly straightforward. My
7 skepticism is whether or not you could show a tangible
8 harm to consumers in the short run.

9 You know, I think about Google, say, making an
10 efficiency defense in a case. This could come up, and
11 they say, no, no, no, the reason why we invaded a
12 particular vertical is because we were worried about
13 DuckDuckGo breathing down our necks, and just think
14 about that for a second. Would it survive the laugh
15 test in a court? Probably not.

16 We don't know Google is making its decisions of
17 how to invade, but we do have a paper by Feng Zhu that
18 investigated why Amazon is invading its verticals, and
19 the authors in that paper -- it's a Harvard paper and
20 just got -- Harvard working paper, just got published
21 in the Strategy journal, but they determined that
22 Amazon was not making these invasion decisions based on
23 improving the ecosystem for the platform, but instead,
24 was scooping up profits that were previously earned by
25 independents. So I do think, in summary, that harm to

1 innovation at the edge is a worthy policy objective,
2 and it should be pursued and policed by the agencies.

3 MS. BLANK: Please.

4 MR. PETIT: Thank you, yeah. I just want to,
5 you know, think about this concept of interplatform
6 competition. I mean, what are we -- what kind of
7 platform competition are we talking about? Do we want
8 five search engines competing against each other, five
9 OS for mobile, do we want six competing email services?
10 I mean, are these really, you know, the social optimum
11 that we want? I'm not too sure.

12 I think what matters is to understand that
13 interplatform competition in tech doesn't really occur
14 in the core market functionality where the incumbent is
15 present, and so once you sort of start thinking this
16 way, you think about the fact that interplatform
17 competition is not horizontal, but sort of adjacent.
18 So, you know, the battle for the user interface is a
19 good example, where you've seen generations of user
20 interface applications replacing each other, and that
21 battle for, you know, being the prospective platform is
22 wise interplatform competition instead of horizontal
23 competition for, say, search or email functionality or
24 personal social network.

25 And I think as long as we have a healthy degree

1 of adjacent interplatform function by the meaning that
2 I just mentioned, where some people see kill zones, I
3 think a lot of people see opportunities. So you could
4 think that, you know, a monopoly in the platform market
5 that you're looking at is not really a kill zone but a
6 lighthouse, which tells entrepreneurs where they should
7 not invest and deflects effort towards trying to
8 envelop, bypass, leapfrog or, you know, just sort of
9 obsolete the platform that you are talking about. And
10 I think we don't, in the antitrust world, manage to
11 capture that source of competition, which is
12 prospective in nature.

13 MS. BLANK: Anyone else?

14 MR. LEE: I'll make one point. If we sort of
15 adopt this intra versus interplatform framework -- and,
16 Barbara, you alluded to this as well, I think it's a
17 nice point to make -- that even if it appears that
18 interplatform competition is relatively robust, there
19 are several platforms, you want to think about the
20 possibility that intraplatform harm can lead to harm or
21 softening of interplatform competition.

22 For example, if you have a platform that, let's
23 say, makes its customers more reliant on integrated or
24 exclusive products by perhaps disadvantaging rivals or
25 not providing products served by rivals, you might be

1 increasing switching costs, lock-in, and so on and so
2 forth. So although something may look reasonable right
3 now, over time, the situation could change. So I just
4 wanted to sort of bring that point up again.

5 MS. CREIGHTON: Yes. So, Barbara, I agree --
6 well, I mean, I agree with you on your characterization
7 of the Microsoft case, and I do think it was -- the
8 theory of that case really was the harm to -- it can be
9 to a product that's an intraplatform product, so, you
10 know, like when Microsoft misled the app developers
11 over polluted JAVA, you know, that was a harm to JAVA,
12 but the point was sort of creating the harm to the
13 interplatform competition, and that was definitely, you
14 know, I think the -- you know, it was interesting
15 hearing that, you know, sort of in -- in the Microsoft
16 case in the U.S., you know, the Department of Justice
17 didn't even challenge the idea of the dominant firm
18 bundling and giving away for free and making a default
19 its browser, which by comparison is the Android case in
20 Europe.

21 So what was sort of not even challenged in the
22 U.S., you know, we heard was sort of the basis for
23 liability in Europe, but what was the real focus in the
24 U.S. case was sort of real, kind of early recognition
25 of the importance of multihoming, was the restraints

1 that were adding on top of that, preventing users and
2 the OEMs from being able to allow switching and allow
3 multihoming.

4 And so those are -- I think those are a great
5 example of what you were talking about, about that's a
6 vertical restraint, but its harm was impairing the
7 multihoming and the switching that would have
8 facilitated the interplatform competition.

9 MS. BLANK: Thank you.

10 Related, one commentator, Stacey Mitchell, who
11 must have been very busy, because I heard her name come
12 up in the first panel as well, she submitted a comment
13 from the Institute of Local Self-Reliance, submitted
14 another public comment, also about Amazon -- I think
15 the comment in the first panel was about Amazon as
16 well -- stating that Amazon uses its dominant
17 gatekeeper position to undermine competition from rival
18 retailers and manufacturers that depend on its platform
19 to reach the online market, citing examples such as
20 Amazon taking retailer data on consumers and using it
21 to launch its own products or to preference those
22 products ahead of rivals.

23 The European Commission has also reportedly,
24 according to news reports, launched an investigation
25 into these practices. This goes to the heart of what

1 we were just talking about, a platform investing in
2 verticals or preferencing its own content and how we
3 think about those downstream issues. How should the
4 U.S. antitrust agencies look at this issue?

5 If I can start with Lesley?

6 MS. CHIOU: Sure. So, yeah, I haven't looked
7 at Amazon specifically. From my research on search
8 engines, you know, I can hypothesize that there are a
9 couple of things to keep in mind. So the first point
10 is actually something that Susan Athey spoke about in
11 the prior session, about this type of preferencing
12 serving as nonprice predation, so in a way in which you
13 can have a short-term sacrifice for a long-term gain.
14 So maybe in the short run, downranking or downgrading a
15 high-quality site or a high-quality seller on your
16 particular platform, with the hope of recouping in the
17 long run.

18 I think a second thing also to keep in mind is
19 really how consumers are using the platforms, because
20 this can help identify situations in which, you know,
21 we might be more concerned about this type of
22 preferencing leading to real harm or having -- a
23 platform having a more -- a higher incentive for doing
24 so, versus situations in which maybe we're less
25 concerned about this happening.

1 So, for instance, in the case of a direct price
2 comparison or purchasing perhaps on a platform, it
3 could be the case that, you know, this integrated
4 product is going to really act as a direct competitor,
5 direct substitute, and here the incentive and the
6 potential for harm could be great.

7 And then, finally, another point relates to
8 what Susan mentioned earlier about, you know, does this
9 integrated product represent an actual benefit to
10 users. So in what way, if any, does the integrated
11 product represent an improvement to rivals. So you can
12 imagine a case in which really it doesn't, or there
13 could be instances in which the integrated product is,
14 in fact, superior, either through the product itself
15 gets better or that consumers have some benefit of
16 seeing, within that ecosystem, and using that
17 integrated product.

18 MS. BLANK: Thank you.

19 Does anyone else want to comment on that one?

20 MR. PETIT: Yeah, maybe I just can, you know,
21 tell you a little what the European Commission did in
22 the Google Shopping case, operating under the
23 assumption that no one in this room read the 226-page
24 decision of the European Commission, but I did that,
25 and the reasoning might inform -- the reasoning of the

1 Commission in that investigation.

2 So the Google Shopping case is -- on the facts
3 is sort of, you know, a standard case where you have a
4 platform which has its own comparison pricing service,
5 and it does -- so the platform, Google here, was
6 accused by the European Commission having done two
7 things: resorting to the product integration, so
8 integrating the comparison pricing functionality of a
9 bunch of independent providers of that service; and
10 second, applying ranking penalties to competing
11 comparison shopping websites and services that it did
12 not apply to its own Google Shopping box, which
13 appeared very prominently on the search page.

14 Now, when you look at those facts, you could
15 think, well, you know, the European Commission probably
16 has followed a kind of run-of-the-mill
17 discrimination/leveraging theory of harm and
18 established its case on that basis. It is not what the
19 European Commission did. So if you read the decision,
20 you will understand that the logic in the case is not a
21 logic of Google trying to leverage and basically
22 replace independent function by its own service. It's
23 basically a logic of equality of opportunity, and I
24 think those words appear in the decision. The
25 Commission says that the problem that Google denied

1 equality of opportunity to competing products, it sort
2 of, you know, cured the air supply. That's it.

3 So you don't find the sort of, you know, fancy
4 IO language of stability and incentives to foreclose
5 secondary markets. Nothing of that appears in the
6 opinion, and you don't find the -- you don't find the
7 words "leveraging" in the European Commission decision.
8 There is no -- no such thing there. So I think it's
9 fair to say, on the basis of that case and that
10 reasoning informs what the Commission do -- will do in
11 the Amazon investigation, that you can actually move
12 quite fast to find liability under Article 102 in such
13 cases.

14 MS. BLANK: All right. And I'll just add that,
15 you know, if it's the case that Google was preferencing
16 its own verticals above those that were of lesser
17 quality and applying the scores to punch down the
18 results of competitors, looking at U.S. law, that's
19 probably cognizable as a consumer harm under the
20 consumer welfare standard.

21 MS. CREIGHTON: Yeah, so just on the -- not to
22 get too detailed on the facts, but the reason -- one of
23 the reasons for the differences in outcome between the
24 U.S. and the E.U., I would submit, is that in the --
25 the FTC's findings, where the conclusion was, as I've

1 mentioned before, I think, sort of really the clear law
2 in the U.S. is that if you have a product design and it
3 benefits consumers, that's pretty much the end of the
4 story.

5 Google competed -- you know, its argument in
6 the E.U. was not that it was trying to compete with
7 DuckDuckGo but that it was trying to compete with
8 Amazon, and so the -- you know, what the defense was
9 that the -- Google was trying to improve its product
10 relative to Amazon, and I think, as Nicolas was
11 suggesting, I think really the EC's concern was that
12 not -- even effectively stipulating that that were the
13 case, that there could still be quality of opportunity
14 problems with that. I think that's a pretty
15 fundamental difference between the two jurisdictions,
16 but...

17 MS. BLANK: Okay, thank you.

18 So we've spent a lot of time this morning
19 talking about Google, Amazon, I've heard Facebook
20 mentioned, and in the first panel as well. We
21 haven't -- Susan Athey mentioned Apple for a brief
22 second in the first panel, and, of course, the biggest
23 difference between Apple and Google and some of the
24 others is that Apple is, of course, a closed platform
25 from soup to nuts. It manufactures its own hardware.

1 It puts its own software. It is not an open system
2 under any sense of the word.

3 Is there something unique about a closed
4 platform like Apple, or to a lesser extent Facebook,
5 that makes preferencing one's own content or
6 integrating or these kinds of vertical integration
7 issues we've been talking about today less harmful?

8 Please, Hal.

9 MR. SINGER: Well, while I'm making friends
10 with the platforms, I'll pick on Apple as well. Apple
11 would not be immune from this nondiscrimination regime
12 that I am pitching, and I think that you can -- you can
13 understand what Apple is doing on its app -- in its app
14 space to be very similar to what the other platforms
15 are doing that I discussed earlier.

16 There was an old case regarding Google Voice,
17 where Apple wouldn't allow Google Voice in The App
18 Store until about -- I think it was resolved in 2010.
19 I understand that Apple is alleged to be using its
20 terms and conditions to keep certain independent apps
21 out of The App Store that might compete against its own
22 apps. Then most recently I came across a story in
23 which Apple took off an app that was offering a time
24 management tool, and Apple was trying to promote its
25 own. So I actually thought that sort of discrimination

1 in favor of your own app would lend itself very
2 naturally to the nondiscrimination regime that I have
3 in mind.

4 And then, you know, finally I'll just say that
5 I think there's something to be said for regulatory
6 symmetry. I wouldn't want to peddle a regime that
7 would uniquely pick on Google. I think that -- I think
8 that it's important that whatever -- whatever set of
9 rules that we come up with at the end of this ought to
10 apply equally to all the platforms, and so, you know,
11 it's important that it -- that both Google, Apple,
12 Facebook, and Amazon would be subject to these sorts of
13 complaints.

14 MS. CREIGHTON: So I just -- I wanted to
15 quarrel with the hypothetical a little bit or the
16 premise or something, because it might help, just in
17 terms of how we think about platforms, that, you know,
18 like if you just take iPhones and Android devices, for
19 example, neither Apple nor Google make their devices,
20 so Apple uses what are called ODMs or original design
21 manufacturers, while Androids are made by OEMs, and in
22 some ways that distinction is more about contract terms
23 than anything, because the same company can be an ODM
24 for one customer and an OEM for another customer.

25 So the difference really relates to the degree

1 to which the company that makes the device is given a
2 specified design. So whichever model you're following,
3 how much flexibility you can give can vary. So, like,
4 Microsoft followed an OEM model with desktops but
5 didn't give its OEMs very much flexibility. So there's
6 sort of this range here, and I think, maybe to pick up
7 on Hal's point from a slightly different angle, I do
8 think that that business model choice about how you
9 choose to distribute your product shouldn't really
10 affect how we think about openness for platforms,
11 because I think both -- in all three of those examples,
12 Microsoft, Android, and Apple, they were all open in
13 the sense that they were a platform that tried to
14 attract not just users, but also third-party apps.

15 So originally I think Apple reportedly had been
16 considering not having any third-party apps on the
17 iPhone, but, you know, as soon as -- so, like, I think
18 of more of a closed platform as being like BlackBerry,
19 say, you know, sort of in the old days, where it really
20 did -- there were no third-party apps available for it,
21 but I'd say that once you have an app store, you are a
22 platform, and so I guess I'd say whatever rules we're
23 thinking about, you know, you could -- if you're --
24 just to give a hypothetical, if you were Apple, you
25 know, you could do a polluted JAVA, right?

1 I mean, you could be encouraging -- you could
2 be making representations to their app developers and
3 then changing the terms and creating lock-in.
4 There's -- so I would encourage the Commission not to
5 be distinguishing different business models where
6 really kind of the platform nature was -- people were
7 calling it -- was it platforminess, is that what they
8 were calling it -- that the ODM/OEM part of it is
9 really not kind of fundamental to the antitrust
10 analysis.

11 MS. BLANK: Okay. On Hal's proposal of
12 nondiscrimination, we seem to have a lot of audience
13 questions about this issue, so I'm just going to read
14 one of the questions.

15 What do the panelists think of Hal's suggestion
16 about Congress granting the FTC broader authority to
17 enforce a nondiscrimination standard? Anyone?

18 MS. RAY: I'll take it, Barbara.

19 You know, creative. I said in my opening
20 remarks that perhaps we let the antitrust remedies try
21 it first and then what's of less preference is then to
22 go to a regulatory regime, which is what that would be.
23 You know, you would still have to do some sort of an
24 investigation, and I certainly take the critique that
25 it takes a little too long to do these conduct

1 investigations, and it's the remedial stage that
2 certainly would be shortened.

3 But I'd also say another approach is to bring a
4 case and then have a precedent to apply, and even
5 better, that precedent deters similar conduct.

6 MS. BLANK: Thank you, Amy.

7 Does anyone else want to comment?

8 Okay. This question is for Hal himself and
9 relates to something that has come up in our prior
10 discussions in preparing for this panel. One of the
11 questions that we were going to discuss is what kinds
12 of platforms should be subject to these
13 nondiscrimination regulations and how far would that
14 duty of nondiscrimination extend?

15 One of the examples that I think of in my mind
16 is the idea of a flashlight manufacturer and these --
17 maybe I shouldn't say this. We get actual complaints
18 about these things at the FTC, so, for example, a
19 flashlight manufacturer being accused of discriminating
20 against downstream battery manufacturers because it
21 changes its design to ensure that only its proprietary
22 batteries work in the flashlight.

23 You have the Keurig coffee makers that gets
24 attacked by angry consumers when they change the design
25 of the K-cup so that generic K-cups don't work with it

1 anymore. A great question from the audience is, should
2 supermarkets not be able to put their private-label
3 products on the top shelves? And why should we only
4 have a nondiscrimination rule for the internet, if
5 that's what you were suggesting?

6 Lots of questions for you, Hal.

7 MR. SINGER: Yeah, I get -- I appreciate it,
8 and I get that one a lot about am I going to -- is this
9 regime going to restrict what Safeway can do on its
10 shelves, and the answer is no.

11 So there is two ways to create exemptions as to
12 who would have liability under this nondiscrimination
13 standard. The first would be to put it right into the
14 authorizing legislation, say these protections are
15 meant to discipline and police the large dominant tech
16 platforms.

17 Now, there's another way, and it's actually my
18 preferred way, and it's what Congress did in the Cable
19 Act of 1992, which is you do it in the evidentiary
20 standard that a complainant has to satisfy in order to
21 prevail at the merits, and so I didn't get into those,
22 but very quickly, the three prongs that a complainant
23 has to establish in these cases is, one, that your app
24 or content is similarly situated to the cable
25 operators' app; number two, that you were -- you

1 received disparate treatment and you did so because of
2 your lack of affiliation, as opposed to some other
3 efficiency justification, and this is the causation
4 prong that allows the cable operator to provide
5 efficiency defenses. And then third, as a result of
6 one and two, you were materially impaired in your
7 ability to compare effectively or unreasonably
8 restrained.

9 It's that prong that I believe has prevented
10 anyone from using the nondiscrimination protections to
11 file a suit against, say, a mom and pop cable operator,
12 and the reason is, is that if you were to do so, you
13 would likely fail on that third prong. And so I think
14 that third prong, material harm to the complainant, is
15 what would prevent cases being brought from anyone
16 except the largest and most dominant tech platforms.

17 I'll just leave with this one last thought. On
18 the Safeway notion, I looked at market shares in
19 brick-and-mortar groceries, and Safeway just doesn't
20 have the requisite share in that market to ever
21 engender the kind of foreclosure levels that would make
22 life miserable for an independent who couldn't get on
23 Safeway's shelves.

24 In contrast, when you look at the e-commerce
25 market, you see that Amazon has a significant share and

1 likely would have sufficient size to foreclose an
2 online merchant, and so in that sense, you know, I
3 can't predict how the cases will shake out, you know,
4 how a judge would rule as to whether or not that
5 material injury prong was satisfied, but I can tell you
6 that Amazon would be much a more likely respondent than
7 Safeway if these rules were to come into existence.

8 MS. BLANK: Does anyone else want to comment on
9 the application?

10 Please, Nicolas.

11 MR. PETIT: Yes. So Hal's dream is probably --
12 you can probably find, you know, a sort of a
13 substantiation of your dream in Europe. It is known
14 that Americans wrote European Union competition law.
15 You know, Robert Bowie, a Professor at Harvard, I
16 think, and George Bull, in Brussels, were the drafters
17 of the treaty provisions that we have on
18 discrimination, and so we have now a provision in the
19 treaty, which is in the chapter on competition, which
20 says that it's unlawful for a dominant company to treat
21 similarly situated trading parties differently, thereby
22 inflicting on them a competitive disadvantage, right?

23 So we have that, and so the question is, what
24 have we done with that American creation in Europe?
25 And the answer is, well, we have not really applied it

1 because it's very complicated on the facts. So the
2 notion of competitive disadvantage lies in the eye of
3 the beholder. You know, level playing fields, all
4 those things are extremely, you know, difficult to
5 gauge on the facts.

6 And I think the third prong of your test would
7 not only make fail complaints against mom and pop cable
8 providers but also against large companies, because
9 it's very difficult to substantiate such claims.

10 So what we know from our experience in Europe
11 is that when the European Commission has received
12 complaints of unlawful competitive disadvantage in
13 abuse of dominance cases, instead of treating them
14 under that legal basis, they sort of move the case to
15 another theory of liability, like leveraging or
16 equality of opportunity, as I mentioned before, and
17 sort of skirted the discussion on discrimination,
18 because it's just very complicated.

19 MS. BLANK: Although if I can follow up and ask
20 you again about Google Shopping, some would argue that
21 Google Shopping really is about a dominant platform not
22 being able to pick winners and losers, the remedy at
23 least that was suggested. What is your view on that?

24 MR. PETIT: So I agree that the outcome looks
25 really like sort of, you know, nondiscrimination

1 outcome. The reasoning that went into the case was
2 very, very abstract and very formal. You know, the
3 Commission was simply talking of equality of
4 opportunity, thereby sort of implying that everyone
5 should have an opportunity to be on the platform, you
6 know, regardless of what Google did on the facts.

7 So the reasoning of the European Commission is
8 not predicated on the legal basis that belongs to
9 nondiscrimination. I don't think the concepts of
10 discrimination appear literally in the decision. The
11 European Commission talked of equality of opportunity,
12 and that basis only was material in reaching that
13 outcome.

14 MS. CREIGHTON: Yes, just to -- oh, I'm sorry.

15 MS. BLANK: No, both of you, please.

16 MR. LEE: No, sure. I wanted to just bring up
17 a point that's related but I don't think has been
18 brought up quite yet, and that's in regards to
19 regulation that might, let's say, tilt bargaining
20 leverage away from platforms towards a product market
21 where the participants have market power. And I'm not
22 quite sure of how this proposal would fall into this
23 bucket, the details do matter, but what I mean is the
24 possibility that, using an analogy from healthcare
25 settings, if you think of insurance providers as a

1 platform by which consumers join them to access medical
2 providers, you know, I have a paper with a coauthor
3 that examines, let's say, minimum network standards or
4 must carry provisions.

5 In that setting, we find that actually those
6 provisions, although motivated by access and making
7 sure people can get to doctors and hospitals that are
8 close to them, can result in higher negotiated input
9 prices and potentially higher premiums, thereby harming
10 consumer welfare. And this happens because insurers
11 are able to play off substitutable providers against
12 one another, and these substitutable providers actually
13 have local market power, and, you know, healthcare is
14 fairly concentrated in most local markets.

15 So pulling back now to the tech space, it could
16 be the case that Amazon in certain product markets is
17 really negotiating with manufacturers, and those
18 manufacturers are concentrated in whatever products
19 that they're offering. And so one just wants to bear
20 in mind that there are other potential consequences
21 that can happen when we impose these kinds of
22 restraints on what platforms are and are not able to
23 do.

24 This also comes through, like, cable
25 television, can they design bundles, leaving off

1 certain channels, to better cater to consumer
2 preferences, and perhaps those would be considered as
3 efficiency justifications for doing what they're doing.
4 With regards to negotiating better prices, it's perhaps
5 unclear how to think about those savings.

6 MS. CREIGHTON: Yes, so I just wanted to make
7 three, I guess, practical points, you know, sort of
8 concerns about Hal's proposal.

9 The first one is if you read his articles, I
10 think Hal shows a commendable concern about not having
11 the process become too encumbered and slowed down and
12 that kind of thing, but just in terms of the
13 practicalities, you know, what we're typically talking
14 about here are claims about technological favoring or
15 tying.

16 Barbara may recall, she and I were involved in
17 a case once -- not involving any company that's been
18 named, to my knowledge, in these hearings -- but there
19 was an alleged sort of allegation that this was -- it
20 was a software platform -- that they were engaged in
21 discrimination and ended up having to, like, examine
22 the code, you know, sort of retain a -- have a clean
23 room, and it was like the most kind of crown jewels of
24 the company's business, so sensitive trade secrets,
25 experts galore, you know, sort of the practicalities of

1 this just sort of -- you know, I guess would be one
2 thing to sort of be kind of thinking about.

3 A second concern would be, you know, sort of --
4 although I think Hal is intending to sort of focus this
5 on, you know, sort of -- I guess sort of smaller
6 players being able to challenge dominant firms, you
7 know, that's all kind of in the eye of the beholder,
8 very heavily dependent on market definition, who's
9 dominant, who's not. That seems to be an area that I
10 would say is chronically underexamined in terms of how
11 do we define products in this space, partly because of
12 the integration problem, the dynamism and stuff.

13 But just the likelihood of dominance, of, in
14 fact, firms with market power being able to game the
15 system seems to me extremely high, just to -- I guess
16 back when I was representing Netscape, you know, they
17 had 70 percent browser share. I remember somebody at
18 an agency joking, you know, why aren't we investigating
19 you? You know, so it's not all that hard to imagine
20 Microsoft, you know, kind of bringing this kind of
21 challenge against Netscape for being dominant in
22 browsers and slowing it down.

23 You know, and then just the final concern, and
24 kind of related to that second one, is I think one of
25 Hal's examples in one of his papers is sort of the

1 preferencing that Amazon has in their home assistant
2 for Avis. You know, that would be a great example of a
3 market where, you know, it's just barely getting going,
4 got five or six firms all tumbling into this market all
5 at one time, and sort of if you think about sort of
6 untying -- you know, what is the technological
7 preferencing plus gamesmanship plus innovation in the
8 market, which is -- you know, it's very hard to imagine
9 kind of -- there's a reason you end up going slow in
10 antitrust matters, and sort of the potential for
11 gamesmanship and for getting it wrong is pretty high.

12 MS. BLANK: Hal?

13 MR. SINGER: Yeah, let me just respond really
14 quickly to Susan's three points.

15 On the question of practicality of implementing
16 a nondiscrimination regime, we don't have to look to
17 Europe. We can look to the United States and the cable
18 experience. We have a handful of cases that you can go
19 look into and see how they were adjudicated, how they
20 were resolved. NFL Network vs. Comcast, MASN vs.
21 Comcast, Tennis Channel vs. Comcast -- and I have to
22 disclose, I was the complainant's expert in each of
23 those, and I am no longer invited to the Comcast
24 Chanukah parties -- but, you know, we just need an ALJ
25 and we need an evidentiary standard. So I'm not sure

1 if what you meant by practicality is that it's
2 cumbersome or too difficult to enforce this.

3 In terms of -- if what you meant was that we
4 have to go in and redesign, you know, someone's search
5 algorithm, I reject this notion, too. Remember, if
6 Google were a respondent in such a case, the complaint,
7 as I hear it, is that Google is being asked to run its
8 page rank algorithm in its exact form, in all its
9 glory, on the entirety of the web, period.

10 That is, there's no change being sought to the
11 algorithm. It's just that instead of populating the
12 one box -- and I should explain, this is the display
13 that appears at the top of the screen for certain
14 searches -- rather than limiting the content in that
15 one box to Google- affiliated content, Google instead
16 would be required, if it were to lose the case under
17 this regime, to run its page rank algorithm in its
18 exact form on the entirety of the web, right?

19 So no one's asking for a change in the
20 algorithm in that sense. And, by the way, if Google
21 won that race or won that competition on the merits,
22 you know, its local content scored highest per Google's
23 algorithm, then Google's content ought to go into the
24 win box.

25 With respect to rent-seeking and gaming of the

1 system, again, I point back to look at the case history
2 of cable. You know, I can tell you the cases. I just
3 mentioned three. There's about two others. You never
4 got a rival distributor using the system in order to
5 slow down a cable operator. So that just never
6 happened there, and I think that you can do that with
7 respect to standing. The purpose of these rules,
8 again, were to promote independent cable networks that
9 were being discriminated against by vertically
10 integrated cable operators.

11 And then, finally, I don't think the Google
12 Assist -- sorry, the Amazon Assist in steering you to
13 Avis is a great example of vertical integration
14 followed by discrimination. I see Avis as being a
15 third party that's getting preferenced by Amazon. I
16 don't think that would be a great case to bring under
17 this process.

18 What I'm thinking more of is when Amazon sits
19 back and figures out what types of merchants are making
20 a lot of money on its platform and then decides to copy
21 those ideas and to promote its own Amazon private label
22 merchandise. That's the kind of fact pattern that I
23 think would be ripe for a case.

24 MS. BLANK: Thanks, Hal.

25 On that note, another question from the

1 audience. You're very popular.

2 Is your idea, this nondiscrimination standard,
3 predicated on the FTC's failure to bring a case against
4 Google in 2013? And would your plan have addressed
5 that failure?

6 MR. SINGER: That's a great question, but I
7 don't think it's predicated. I would still be arguing
8 that there are gaps in enforcement under the antitrust
9 laws and under the consumer welfare standard,
10 regardless of what the agency did in that case.

11 And I just want to point out, too, that if this
12 regime were to exist on the sidelines, it would in no
13 way immunize the tech platforms from antitrust cases.
14 I mean, take Comcast. There have been famous antitrust
15 cases brought against Comcast in light -- during the
16 period of the nondiscrimination regime. You probably
17 heard of a case that went up to the Supreme Court
18 called Behrend vs. Comcast, which was an antitrust case
19 concerning clustering. And so I don't think that it
20 would in any way foreclose an agency from bringing a
21 standard case.

22 What I said in the speech, and I'll just remind
23 folks, that, again, if it -- I don't want to send
24 someone into a landscape that I expect them to lose. I
25 don't think anyone would want to do that for whoever

1 they're advising, but -- and this is an important
2 but -- if you can find a case where the harm presents
3 itself as a price, output, or quality effect, then by
4 all means the FTC should bring that case.

5 And I'll point you to a paper by Michael Luca
6 at Harvard and Tim Wu, Columbia Law, who have shown
7 that there could be a product quality case brought
8 against Google with respect to allegedly degrading its
9 search results in order to favor its own content. Now,
10 that was on -- granted, that was on a very limited
11 search term, and I think that you would probably need a
12 greater sample on a bigger database in order to bring a
13 case based on that kind of product, reduction in
14 quality, but that's a case that I think could, with
15 further evidence, lend itself to analysis or to
16 scrutiny under the antitrust laws.

17 MS. BLANK: Staying on this nondiscrimination
18 legislation that would give the FTC this authority to
19 pursue these kinds of cases -- and this question will
20 be for some other panelists responding to Hal -- does
21 requiring nondiscrimination skew the incentives of
22 platforms to create innovative and often free content
23 and free ecosystems?

24 And perhaps I can ask Lesley, who's sitting
25 here quietly, to address that.

1 MS. CHIOU: Sure. So Nicolas mentioned earlier
2 that the growth strategy of firms can also include
3 adding verticals, so I would say, just based upon
4 economic theory, that there are incentives for
5 platforms to innovate and to provide sometimes a free
6 experience for one side of the market, outside of
7 integrating its own product or having any sort of
8 preference for its products.

9 So this is really just part of being a
10 platform. It's really in their best interests to
11 maximize the number of transactions that occur to make
12 sure that as many are occurring on their platform as
13 possible, and so a lot of times that means offering,
14 you know, the platform free to one side of the market
15 to have a critical mass of consumers or sellers in
16 order to attract the other side. This could also mean,
17 you know, innovating to enhance the user experience on
18 the platform, really just anything to create more
19 transactions on the platform.

20 MS. BLANK: Does anyone else have any comments
21 on that?

22 MR. PETIT: Yeah, I just want to say that, you
23 know, there is like a fair amount of literature which
24 explains that when firms have imperfectly appropriable
25 assets, it makes sense to add verticals or, you know,

1 try to extend the scope of the firm in order to recoup
2 investments, you know, and fixed costs and other
3 things. And so I think that literature -- I mean, no
4 one has sort of shown me that that literature should
5 not apply to platform markets or anyone say that
6 there's sort of standard theory basis about, you know,
7 the digital world as a world in which you don't have
8 much appropriability in terms of, you know, IP rights
9 and others, which would entitle you to sort of not go
10 through scope or verticality to recuperate those
11 investments.

12 MS. BLANK: You know, Nicolas, one of the
13 comments you made earlier that I wanted to get back
14 to -- and this reminded me of it -- is I think in your
15 prepared remarks, you suggested this idea that we
16 should consider whether a platform can add verticals,
17 can vertically integrate depending on the size -- I
18 think the size, nature of the platform, and I apologize
19 if I'm misparaphrasing what you said.

20 I'm wondering if that concept takes into
21 consideration the kind of vertical that a platform
22 would be considering, this customer acquisition
23 vehicle, and whether it also requires the antitrust
24 agencies to make guesses as to whether any particular
25 vertical integration will actually add to the dominance

1 of that upstream platform.

2 MR. PETIT: Um-hum, okay. Well, that's a tough
3 question. The questions are tougher in America than in
4 Europe. That was very kind for me to say that.

5 Now, I -- so one way to try to address your
6 question and one sort of puzzle that I think a lot of
7 observers have when they look at enforcement against
8 platforms in verticals is why Google Shopping but not
9 Google Flights? And why Google Flights and not Google
10 Music? And why not YouTube?

11 And when agencies apply antitrust in a
12 particular case, those cases are often minimized in
13 terms of their impact by the defendants, which says
14 this finding is for the particular case, and
15 exemplified by complainants trying to sort of explain
16 that those findings should apply across the board to
17 other verticals of the platform.

18 And I think one of the ambiguities of antitrust
19 enforcement is that you have those findings of
20 liability in a particular market, regarding a
21 particular infringement, and a particular company, and
22 there is very little we can infer in terms of the
23 general deterrence effects and/or the general
24 implications of the findings.

25 Maybe, you know, you could think regulation

1 should be there because at least with regulation you
2 get a clear sense that the rules apply across the
3 board. You could, you know, think this way, or another
4 possibility is to try to promote rulemaking by
5 administrative agencies so they can explain that the
6 findings made in particular cases should, you know,
7 extend to certain markets, not others, or all markets.
8 I mean, that's sort of the thinking I have on that.

9 MS. BLANK: Thank you, I appreciate it, and I
10 apologize for catching you off guard.

11 MR. PETIT: No problem.

12 MS. BLANK: So I want to turn to -- with our
13 last ten minutes, I just want to make sure we hit on
14 this topic. It's been the hottest topic in antitrust
15 discussion for the last year or more. Of course, the
16 commonality of all of these platforms -- Google,
17 Amazon, Apple, Facebook -- is that they collect data.
18 They collect lots and lots and lots of our data.

19 For example, look at Google, which appears to
20 have real clout across every point of the display
21 advertising chain, online display, you look at the buy
22 side, the sell side, the ad exchange itself, and Google
23 is right there at every point. That is a lot of data
24 about each critical point along the advertising
25 continuum.

1 Does data, in and of itself, provide a
2 competitive advantage to a platform like Google or
3 Amazon or Facebook?

4 Maybe we can start with Robin on that question.

5 MR. LEE: Sure. You know, I do think that
6 there's a sense in which data, say about consumer
7 demographics or product preferences, can be seen as
8 essentially a cost-reducing or perhaps quality-
9 improving technology, much like know-how or experience
10 that's sort of gained through the production process.
11 Absent that, you need independent investment to gather
12 it. So if it delivers a cost advantage, for sure, data
13 can be seen as a competitive advantage for a platform.

14 Now, one thing that I want to sort of flag and
15 one key consideration -- this is going to inform policy
16 about that -- is what's the minimum efficient scale
17 that a platform needs to achieve to be competitive, to
18 perhaps get to the lowest quality adjusted cost of
19 production, let's say? And, you know, questions arise.

20 If that scale is so large that really only one
21 viable platform can exist, right, it brings along with
22 it a whole host of natural monopoly concerns or
23 regulation issues. So just things to hopefully have
24 other panelists talk about as well.

25 MS. BLANK: Oh, please, Lesley.

1 MS. CHIOU: Yeah. So, actually, I just want to
2 talk a little bit more about what Robin mentioned about
3 a potential quality advantage. So this is something
4 that my co-author, Catherine Tucker, and I looked at.
5 So we wanted to know whether or not search engines, if
6 they could retain longer periods of user logs, search
7 logs, whether or not this would lead to better quality
8 searches for users. So this is a working paper. It's
9 not published because we didn't find sort of any
10 empirical result.

11 So what we did was we looked at, you know,
12 differences in data retention policies, and we found
13 that, you know, whether or not they were lengthened or
14 shortened, that it didn't quite affect -- we didn't
15 find any effect really on the quality of search that
16 was being delivered to users and consumers.

17 And so there could be, you know, a few reasons
18 for this. It could be that, you know, having very,
19 very old data doesn't do such a great job of
20 predicting, you know, new information. I know that for
21 Google, at least, you know, 20 percent of searches that
22 happen in a given day are search queries that they
23 haven't seen in the past 90 days.

24 I do think, you know, that this is probably an
25 area that we need, you know, more empirical research

1 on. There could be other ways of measuring search
2 quality, something more indirect than what we do, and,
3 of course, there could be benefits to consumers for
4 search engines having longer periods of data, maybe
5 through, you know, algorithm testing or through fraud
6 prevention.

7 MS. BLANK: Anyone else?

8 MS. CREIGHTON: Yes. So maybe actually just to
9 pick up on a note of what Lesley was talking about and
10 then maybe kind of more broadly on data, so one of the
11 interesting things -- maybe it was in a paper you
12 co-authored, Lesley, and I know Catherine may have
13 talked about it two days ago -- but the importance of
14 localization. Many people are kind of looking at
15 competitive -- at sort of scale benefits that -- you
16 know, I think she gave the example of I don't really
17 care who has the restaurant reviews in Boston, you
18 know, sort of -- or I -- what I care about is that
19 they're in Boston -- she's at MIT -- and I don't really
20 care if they are in Seattle.

21 So I think you can kind of take that idea and
22 apply it sort to productize it, sort of like I don't
23 really care -- you know, if I'm in travel search, I
24 don't really care how comprehensive your hotel listings
25 are if what I'm looking for is, you know, sort of, you

1 know, music search or something, and so an interesting
2 thing will be kind of what data are we talking about
3 that way, and I think some of the -- it will be
4 interesting kind of how that research leads going
5 forward.

6 But stepping back, you know, sort of -- I did
7 speak on I guess an ABA panel in the spring on the
8 whole big data issue, so I have been giving it some
9 thought, and it will be interesting to see kind of
10 empirically where this goes. Right now, you can color
11 me skeptical, that, you know, it seems it's sort of
12 serving right now as a stand-in for -- you know, by
13 comparison with tangible physical assets, you know,
14 like think AT&T's local networks, the cable companies,
15 the last mile, you know, those are -- you know, it's
16 really easy to see what the barriers to entry are
17 there.

18 Google's been mentioned a lot here. Google did
19 a lot better job competing against the browser than it
20 did with Google fiber against that last mile monopoly.
21 So as we're trying to think about how does data compare
22 to this much more tangible -- and I think Catherine,
23 actually part of her -- Tucker, part of her research
24 has been on the importance of network effects being
25 localized to physical, tangible hardware, so -- but if

1 we're talking about big data kind of then abstracted
2 away into some purely virtual environment, you know, I
3 just haven't really seen examples of that being borne
4 out, like in the mergers that the FTC has been looking
5 at or something.

6 You know, in fact, if you -- I would have
7 argued maybe what I've seen more is that the
8 barriers -- that data used to be more of a barrier to
9 entry with -- you know, so like I was involved 20 years
10 ago when West and Thompson were merging, and there was
11 a question about, in legal research, whether or not the
12 internet could be a constraint on legal online
13 searching, and the -- you know, sort of -- in fact,
14 yes, sort of the DOJ concluded it could for current
15 cases, but the problem was that there were all these
16 states that had, you know, sort of like basically no
17 records of their past cases.

18 So that was a legacy data problem, and that
19 actually seems to be coming up a lot in a lot of the
20 FTC's recent cases, you know, so like the concern
21 about -- I think in Verisk-EagleView. There was sort
22 of the concern about archival footage involving
23 roofing. Nielsen-Arbitron involved kind of the value
24 of the historic radio and TV panels. So clearly data
25 can be a barrier. I guess the question is, is that

1 barrier going up or down as we're moving to a more
2 virtual world?

3 One of the -- it was interesting to me because
4 our firm was involved in this, sort of the one big data
5 examples that Gal and Rubinfeld pointed out was in the
6 BazaarVoice-PowerReviews merger, and said that was sort
7 of the -- that was their example of the merger that
8 best reflected concerns about big data. You know,
9 respectfully, you know, sort of ratings and reviews are
10 actually kind of the antithesis of big data.

11 I mean, they are actually held up as typically
12 you don't need big data, which is really more about
13 extrapolating odd correlations when you're looking at
14 massive data, because you have just got one review, and
15 what I really care about is this guy said this
16 restaurant's good.

17 So it's actually an example of a non-big data
18 kind of data set, and PowerReviews itself had only 11
19 million in sales at the time it was acquired, so it
20 doesn't exactly conjure up visions of some massive
21 amount of data. So I think it remains to be seen kind
22 of whether or not big data is going to turn out to be a
23 problem.

24 Just two other thoughts with respect to whether
25 or not it is a lot of sort of the dropping -- the

1 plummeting cost of data collection, analysis, and
2 storage, is it actually going to facilitate
3 competition? So we were also involved, our firm was,
4 in the Zillow-Trulia case, and I think it's been
5 estimated that something like 99 percent of all data
6 currently is unused. Those were companies who figured
7 out how to take public domain databases about real
8 estate sales and try to create a database that could be
9 at least a partial substitute to what has been a
10 legacy, huge, historical advantage of the multilisting
11 database.

12 And so one of the things -- this will be
13 interesting as time goes on -- is to see how much are
14 we seeing companies innovate in taking public domain
15 and other data sources that are just lying around
16 unused and actually causing increased competition, not
17 decreased.

18 And then I guess finally it's a sort of -- and
19 kind of relatedly -- you know, so the question about if
20 there's a lot of different ways to sort of use
21 different data sets to get to the same problem, how
22 likely is it going to be that a company actually
23 engages or tries to engage in foreclosure strategies?

24 The EC had a very interesting analysis at the
25 time Microsoft was acquiring LinkedIn on this issue,

1 for example. So the question was whether LinkedIn was
2 going to sort of withhold its full data set from
3 Microsoft's downstream rivals, and I think the EC
4 concluded that, you know, basically everybody said, you
5 know, it was a nonreplicable data set in one sense, but
6 Microsoft was not going to have any incentive to
7 foreclose because there were so many other ways that
8 the customers could acquire that data.

9 MS. BLANK: Thank you, Susan, and I know Hal
10 wanted to respond.

11 MR. SINGER: Is that okay with you?

12 MS. BLANK: Please, yes, just -- we're done
13 with our questions, I think.

14 MR. SINGER: Okay. So I do think that the data
15 is an important tool here for the platforms to use to
16 extend into verticals. There's a great piece by
17 Elizabeth Dwoskin in The Washington Post where she
18 discusses how Facebook uses a VPN, called Onavo, to
19 monitor what its users are doing both on and off the
20 platform, and when it determines that you're spending
21 too much time outside of Facebook, it can spot what
22 you're doing and appropriate the functionality and
23 bring it inside the mother ship. So this could
24 certainly distort competition on the edges and
25 innovation on the edges, and it certainly provides an

1 impetus or a push towards an intervention of some sort,
2 and the question is of what sort.

3 There is a constituency forming around this
4 notion of data portability, and if I could just
5 quickly, you know, weigh in on that one, you know --
6 and I know that -- I don't mean to hurt their feelings,
7 because I need support for the Net Tribunal, so maybe
8 we can trade each other's support.

9 But, you know, they like to invoke the
10 experience of number portability, and I was a big
11 fan -- I have a piece on estimated consumer welfare
12 benefits of number portability -- but I think the
13 prospects of success here are different and less,
14 unfortunately, because in the cell phone space, you
15 didn't need to coordinate with all your friends to make
16 a move; you just got permission to take your number
17 with you, and you went to a rival carrier.

18 And here I think that there's a very complex
19 coordination problem of everyone in your network kind
20 of moving at the same time to the new platform, and I
21 think for that reason, among others, I'm not as
22 enthusiastic about calling for mandatory data
23 portability.

24 MS. BLANK: Thank you so much, and I have 20
25 more questions I could ask on data. This is a great

1 topic, but unfortunately, we are out of time, and I
2 just want to give a huge thank-you to this amazing
3 panel we have had this morning. There are going to be
4 more data discussions, I think, coming up at these
5 hearings in a few weeks. So thank you so much,
6 everyone.

7 (Applause.)

8 (End of Panel Number 2.)

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1 PANEL 3: NASCENT COMPETITION: IS THE
2 CURRENT ANALYTICAL FRAMEWORK SUFFICIENT?

3 MR. SAYYED: Okay, I think we'll get started.
4 We have three panels and two presentations on nascent
5 competition this afternoon to illustrate the importance
6 that the Chairman specifically and the Commission
7 collectively is putting on this issue.

8 First, we're going to hear from Susan Athey,
9 who was on an earlier panel this morning, and as those
10 of you who were here or were watching earlier, she's
11 Economics of Technology Professor at Stanford's
12 Graduate School of Business. She will do a
13 presentation which will talk a little bit about the
14 incentives business model of the tech firms.

15 Then we will turn it over to Paul Denis to do a
16 presentation really describing the current analytical
17 framework for analyzing acquisitions of nascent
18 competitors or, arguably, acquisitions occurring in
19 nascent markets.

20 Once they're both done, we'll have a panel
21 discussion, and I will introduce the panel when we turn
22 to the panel discussion.

23 As I think everyone knows, if you have
24 questions, you either have a card already or you can
25 signal for a card from some of the FTC staff that's

1 circulating amongst the room, and it will be passed up
2 to us for possible or even likely inclusion in our
3 discussion.

4 So with that, I will turn it over to Susan, who
5 will then turn it over to Paul.

6 MS. ATHEY: Thanks so much for having me here
7 today, and what I would like to do in my remarks is to
8 really connect some of the issues from the morning and
9 the afternoon and talk about some of the reasons that I
10 think they are connected.

11 One of the main reasons I was concerned about
12 vertical manipulation and sort of vertical integration
13 is that, in fact, that is a nascent competition issue
14 for certain types of platforms. And another theme that
15 I want to continue from the morning is that in order to
16 understand what the role of regulation should be and to
17 understand the welfare consequences of behavior, it's
18 important to first understand the strategies of the
19 firms, because firms are most likely to do something
20 that's a bit of an antitrust risk, as well as
21 potentially harmful for consumer welfare, if they're
22 facing certain kinds of threats. And so understanding
23 what firms would view as really existential threats is
24 sort of a critical input to knowing where we should be
25 concerned or at least to understand what's going on.

1 So I want to start out just by thinking about
2 how I would talk about this to my business school
3 classes, because that's really, I think, where you
4 start thinking about business strategy and business
5 incentives. And so when I teach about platforms to my
6 business school classes, I start by posing some
7 questions they want to think about.

8 Are these platforms going to tend towards
9 monopoly? When would you see competition? When are
10 they going to be profitable? And what I'll really want
11 to focus on today is, is it possible for a new startup
12 or a new company to enter and succeed against
13 established incumbents? And, if so, how would you do
14 that?

15 And if you understand how you would do that, of
16 course, that also flips back to if you were the
17 incumbent -- of course, I always, as an economist, like
18 to take the side of the entrant when teaching my
19 classes -- but, of course, the flip side of the advice
20 for what the entrant should do is what the incumbent
21 should block, and understanding those strategies can
22 help guide policy.

23 So, you know, we talk a lot about basic
24 platform economics, and the key point there, of course,
25 is the chicken and egg problem. If an entrant's going

1 to come in and get started, they need to solve that,
2 more buyers, more sellers, more sellers, more buyers,
3 and also the broader types of economies of scale that
4 are incredibly important in tech companies. It's not
5 just, you know, having more data which is important,
6 but one thing I really like to focus on is learning by
7 doing, the fact that if you're -- one of the benefits
8 of being an incumbent is that you have lots of users,
9 you can experiment and learn from the users what works
10 and use the data, but not just have the historical data
11 of any type, but historical experiments that have
12 allowed you to understand how to make your product
13 better.

14 When I think about -- you know, I ask questions
15 about market structure and profitability. How do you
16 get started? How do you scale and grow? And, of
17 course, for startups, a lot of times they're actually
18 using platforms initially to get started. Two startups
19 that I work with are advertising on Google to acquire
20 their customers initially, and they also have questions
21 about how do you grow from there. Do you expand
22 horizontally or do you go into different verticals?

23 So to start with, I want to pick an example,
24 and actually Amy Ray also used this example earlier
25 today, but it's one that I think is useful to go back

1 to from before, you know, the modern tech era, although
2 this was also in a way a tech case. This is the case
3 of American Airlines and Sabre, and here's a newspaper
4 article from 1982, and it's talking about a Justice
5 Department investigation to see if computerized
6 scheduling and reservation services might have been
7 manipulated to give an advantage to American.

8 Here's some quotes in that same article from
9 the American CEO. He starts out by saying, "Well, the
10 best guarantee that the Sabre system doesn't advantage
11 American Airlines is that we have to sell them to
12 travel agents. So travel agents buy them. That
13 disciplines us to be fair."

14 But then he goes on immediately to say, "Well,
15 we're mostly fair, but actually, we advantage American
16 Airlines." So the fact that travel agents choose
17 systems puts some discipline on the system, but not
18 enough to keep them from advantaging American.

19 And, you know, as -- and then he goes -- and
20 then a final point that he makes is, "Well, we invested
21 in the Sabre system, we built it, so, therefore, we
22 should be allowed to use it to advantage our own
23 airline."

24 And, of course, anybody who's been following,
25 say, the Google antitrust case will recognize all of

1 these as the same arguments that Google used to talk
2 about with their vertical manipulation.

3 So when we think about these cases -- and as an
4 economist, in some ways I think this case feels a
5 little easier because we feel like we have, like, an
6 allergic reaction to somebody not showing customers
7 prices, like that feels immediate and harmful, and we
8 can immediately map that into the impact on prices.

9 But, in fact, you know, when I think about this
10 case, really the thing that bothers me more about it is
11 the fact that it made it hard for low-cost carriers to
12 come in. So if you know more about the history of this
13 case -- I won't go through all the details today -- but
14 not only did this manipulation soften price competition
15 and mislead consumers, but it also, it was alleged, led
16 to the exit of low-cost airlines because those low-cost
17 airlines weren't able to compete on price and get the
18 traffic away from American.

19 And, of course, we know that a low-cost airline
20 can enter in some routes, gain scale, and then grow
21 into a larger competitor, and so that using your
22 platform to keep someone from getting a toehold and
23 eventually reducing competition is really what concerns
24 me.

25 So if I put that in context -- and, of course,

1 as we talked about this morning, there are lots of
2 things platforms do in the vertical space that are
3 actually good for consumers and in the interest of
4 consumers. So, you know, Walmart ensures suppliers are
5 competitive. Airbnb makes sure that hosts that respond
6 quickly and provide high quality are ranked more
7 highly. Even search engines demote irrelevant ads and
8 don't show them. All of these are things that maybe
9 the advertisers or the suppliers don't like but are to
10 the benefit of consumers, and so those are types of
11 vertical behavior that I might not worry as much about.

12 So the kinds of things that I'm going to be
13 more concerned about are things that might be really
14 threats to a dominant platform, and so when I started
15 thinking about this, one question I started looking at
16 more than ten years ago was, you know, how can a search
17 engine compete, a general horizontal search engine
18 compete? And so one way that a smaller search engine
19 can compete is to get really good in a narrow category.
20 And, of course, the chicken and egg problem of a
21 platform -- more users, more advertisers, more
22 advertisers, more users -- can actually be solved
23 within a vertical. And so one way you can compete is
24 to get really good at something.

25 So I was advising Microsoft that they -- they

1 made an -- they went out and found the very best travel
2 search provider, ITA at the time, integrated that into
3 the back end of Bing, and had better travel services
4 than Google did, which then was allowing them to steal
5 share away from Google in the travel vertical, and the
6 hope was that, from Microsoft's perspective, that that
7 would then allow them to grow and get the consumers to
8 do adjacent verticals.

9 Now, what happened was Google bought the ITA
10 travel search engine, which ended the Bing
11 relationship, and flipped it to where Google was better
12 in travel than Bing was. And so this is interesting
13 because, you know, first of all, the travel search
14 itself, it could have spawned into something completely
15 distinct and not integrated with either platform, but
16 it also was something that helped a very small -- Bing
17 was around 7 or 8 percent market share at the time, it
18 wasn't called Bing -- it could have helped it grow into
19 a larger general competitor.

20 And broadly, if you were going to compete with
21 Amazon or compete with Google or compete with eBay in
22 what they do, you know, it would be silly to come in
23 and try to think that you could be better at everything
24 all at once. Instead, generally, you might start in a
25 vertical. And so they recognize those threats and try

1 to make sure that in a vertical, nobody gets too big or
2 too strong.

3 Another way that this can play out, which is
4 very related, is that a company, like, say, Amazon, can
5 start out. They're not actually in search at all.
6 They're not in general search. They're just doing
7 shopping. But over time they acquire more users, and
8 then they enter as an ad platform, which then is more
9 of a competitive threat to Google.

10 So we have to worry about these vertical things
11 because that actually is the entry path. It's really
12 the main viable entry path to compete with a big
13 platform that has more buyers and more sellers. We
14 have to watch for the verticals because they are
15 nascent competitors.

16 Now, one challenge in making these kinds of
17 antitrust arguments, the Sabre case in some sense would
18 be an easier one to make as an economic expert. You
19 could come in and you could show that consumers were
20 getting different prices, and the harm would be, like,
21 very immediate and apparent.

22 I think one of the challenges in the policy
23 arena is that, you know, the harm from the vertical
24 manipulation, how am I going to show that if you hadn't
25 put this shopping comparison engine out of business,

1 they might have grown into the next Amazon in, say,
2 Europe, and then from there, they might have grown into
3 a competitive ad platform? You know, maybe that would
4 have happened, and now we see that it did happen.

5 When we were talking about it, we didn't know
6 whether Amazon would be successful in advertising, and
7 we still don't know how big it will be. And so as an
8 economic expert, to talk about these longer run impacts
9 I think is really challenging, even though the welfare
10 effects from that are just so much larger than the
11 short-term effects.

12 Another way that you can enter is to find and
13 get a lot of traffic from intermediaries, and so,
14 again, in search, that was another way that we wanted
15 to get from an unprofitable and never possibly
16 profitable, at 7 percent market share, to something
17 bigger. So you look out and you say, who else has a
18 lot of consumers and maybe I could get those consumers
19 as a block to switch platforms? And, of course, in
20 turn, that's a threat to the incumbent platform.

21 So just as an example, if Google had not had
22 its own operating system in mobile and hadn't made a
23 deal with the iPhone, we might have seen very different
24 dynamics in the search business. So, say, the mobile
25 phones and mobile operating system, if it makes a

1 search engine a default, can swing very big chunks of
2 traffic all at the same time, and so that means two
3 things.

4 First of all, that intermediary that can shift
5 a whole bunch of consumers in a block, risk one is they
6 might shift those to a competitor, and risk two is they
7 are just going to extract all the surplus. So Google
8 has to pay billions of dollars a year to Apple in order
9 to make sure that Google is the search default, and
10 this also can happen with browsers. A very popular
11 browser can put up to auction what's the default search
12 engine and extract a lot of the surplus, and so on.

13 And then once we understand that, the big risk
14 to firms is any other intermediary who could shift big
15 blocks, take their partners with them to another
16 platform, and we can think about the incentives that
17 the platform has to make that not happen. And there's
18 lots of examples of these different -- we call them
19 referring services. They may not be able to exactly
20 bring their customers with them, but they can shift
21 customers from one platform to the other, and they
22 typically have a lot of power and are also potentially
23 very ripe for vertical integration that may or may not
24 be beneficial.

25 Now, another big theme that's important is that

1 when we think about all the things that a company can
2 do in the face of a potential threat, what we would
3 like a company to do when they're faced with a threat
4 from a new entrant is to make a better service or --
5 you know, and if it's a vertical competitor, they might
6 say, ah, if I'm worried that shopping is going to be
7 really big, I am going to make my own shopping, and
8 it's going to be really awesome, and even if I don't
9 manipulate, everybody's going to use my awesome
10 shopping service. That's one, like, welfare-enhancing
11 thing you might do.

12 Another welfare-enhancing thing you might do is
13 just make your search engine or your platform even
14 better, so that even if that shopping engine gets big,
15 people still want to use your main central platform.
16 But there's also things that you might do that are
17 welfare-harming, like make or buy an adequate vertical
18 service and then promote it and advantage it to take
19 away customers from the competing vertical service,
20 make sure that you own that thing, so that you've now
21 squashed the nascent threat of a shopping entrant
22 getting big and actually ultimately turning into a
23 horizontal competitor.

24 And I think these types of things are
25 particularly harmful if they're innovative services,

1 scale-driven services, or services with network
2 effects. So, you know, things like ad-driven news
3 media or review websites, and these are all examples of
4 things that can really harm and, therefore, never get
5 the chance to grow into something that might become a
6 more horizontal competitor.

7 Now, this type of thing also happens in other
8 types of contexts as well. So we haven't talked a lot
9 about ad tech today, and it's actually kind of hard to
10 talk about because there's so much jargon and it's
11 really complicated, but just as an example, we can
12 think about what's a way that someone might enter and
13 compete in ad exchanges?

14 Well, if you have two advertising exchanges,
15 where publishers and advertisers buy and sell ads, what
16 a smaller ad exchange might hope is that they can get
17 advertisers and publishers to multihome, and that might
18 give them a chance to grow into a larger ad exchange
19 and a more effective competitor.

20 And when you think from the publisher's side of
21 this market, it's actually -- like, in principle, it's
22 pretty tough competition, because the ad exchanges are
23 giving the publishers money, so that's, like, perfect
24 substitutes, you know, just which ad exchange is going
25 to give me more money.

1 So if there's two equally sized ad exchanges,
2 all the revenue should go to the publishers, because,
3 you know, I am going to -- one exchange says I'll give
4 you this many cents per impression, and then the other
5 publisher says I'll give you a little bit more, and
6 they would cut out their take rate and have to give all
7 the surplus to the publishers, or else the publishers
8 would just go to the other ad exchange.

9 So it's really scary, if you're a big ad
10 exchange, to worry about a smaller ad exchange growing,
11 because if they get to the -- if they're equally sized,
12 this is kind of a zero profit business basically. You
13 have to give all the revenue to the publishers.

14 Is that my time? Yep. So let me finish my
15 thought here.

16 So in order to prevent that type of growth, you
17 can use something like a tool, a software tool, that
18 helps people compare across ad exchanges, and if it's
19 vertically integrated, those tools can actually
20 advantage one ad exchange over the other. And so in
21 particular -- this particular practice was ended in
22 2017 -- the software would basically collect the bids
23 from all the other ad exchanges and then give Google a
24 chance to come in at the end and outbid the others just
25 by a penny and get the traffic, which prevented the

1 smaller nascent competitor from growing.

2 So the big theme is that in these types of
3 markets, we have to look at what are the tactics that
4 are used to try to keep the nascent competitors from
5 growing and be very cautious about all the different
6 things that you can do.

7 So I'm out of time, but I just will highlight
8 that the ways that you compete with different services
9 really are different from business to business, and the
10 way that a nascent competitor will compete against a
11 social network may be different than how it competes in
12 a search engine or an operating system or e-commerce.

13 And so for each of these industries, you need
14 to first think about the business strategy and how a
15 nascent competitor comes in, and then look for
16 exclusionary conduct or other types of squashing or
17 integrations or acquisitions that stop the particularly
18 threatening path.

19 Thank you.

20 MR. SAYYED: So Paul Denis will talk a little
21 bit about the current analytical framework. I
22 neglected to mention that Paul is a partner at Dechert.
23 He was principal drafter of the 1992 Merger Guidelines,
24 and the relevance of that may be clear as he speaks.
25 And Paul is the developer of DAMITT, which really

1 analyzes how long it takes for the agencies to clear
2 large, complicated merger transactions.

3 MR. DENIS: Thank you, Bilal. Thank you for
4 the opportunity to be part of this conference. A tough
5 act to follow, Susan. A fascinating presentation.
6 Mine will be much more prosaic, focusing on the legal
7 framework, but Susan has set it up well in giving you
8 some context for the type of problems that we've
9 devised these legal frameworks to handle.

10 I will focus on the acquisition context. I'll
11 stay away from, you know, the issues of predation,
12 vertical. It will be difficult enough in the time
13 available to get through just talking about the
14 analytical frameworks we have in place for analyzing
15 mergers that involve nascent potential competition
16 issues.

17 If you're a believer in fate, you might
18 actually think I was fated to do this presentation. In
19 the fall of 1982, I was in Ann Arbor, halfway through a
20 course of study in law and economics, and despite
21 having just finished a lucrative summer clerkship at a
22 big law firm, I needed money. I needed a part-time
23 job.

24 We had a visiting professor in that fall, a guy
25 named Joe Bradley, and he was going to teach my

1 antitrust class. So I figured he must be trying to
2 write some papers, maybe he needs a research assistant,
3 I should go see him about a job.

4 So I went to see him, and I didn't know much
5 about Joe Bradley at the time, but if I had done even a
6 modicum of research, I would have learned that he had
7 written the seminal article on what was called The
8 Potential Competition Doctrine. It was an 89-page, 300
9 some-odd footnote tome in the Yale Law Journal, with
10 the cumbersome title of Potential Competition Mergers:
11 A Structural Synthesis. It was a mouthful.

12 But as fate would have it, he was working on
13 another article. He had been asked to contribute to a
14 California Law Symposium on mergers under the then
15 brand new 1982 Merger Guidelines, and his topic was,
16 not surprisingly, potential competition mergers. I'm
17 not sure that he really needed a research assistant to
18 help him with that, but he hired me. What was supposed
19 to be a job turned into a paid tutorial for which I was
20 the principal beneficiary.

21 With my short-term cash flow problem in check,
22 I started thinking maybe I need another job next
23 summer, so I, you know, proudly put on my résumé that I
24 was the research assistant for the distinguished
25 professor Joe Bradley, working on this important

1 article on potential competition mergers, and I signed
2 up for a bunch of interviews with law firms that were
3 doing what I thought was important antitrust work.

4 One of the firms I targeted, Skadden, sent two
5 interviewers to campus, and one was a tax lawyer and
6 one was an antitrust lawyer. Somehow, by luck or
7 design, I ended up on the list with the antitrust guy.
8 It turned out that was Bill Pelster, who had just tried
9 the Grand Union case, one of the FTC's most important
10 potential competition decisions.

11 By the time I interviewed with Bill, I knew a
12 little bit about the potential competition doctrine,
13 not a great deal. It was a good thing I did, because
14 he spent the whole interview telling war stories about
15 the case and drilling me on various aspects of the
16 doctrine. So Joe Bradley saved me there. Bill never
17 really interviewed me, but he managed to get me a job
18 anyways, so...

19 I had the benefit of working with Bill and a
20 number of other extraordinary colleagues, including a
21 guy who was just about my age, who I think all of you
22 know, who is Joe Simons, now our FTC chairman, a great
23 group of people.

24 So why do I tell you these stories? Well, I
25 tell them in part because I thought I could get away

1 with it before Bilal would give me the hook, and I
2 could honor some people who I think were important in
3 my career, but I tell you these stories because they
4 illustrate what I think is a central point that we need
5 to focus on this afternoon in these hearings.

6 That is, you know, these concepts of nascent
7 and potential competition really are pervasive in U.S.
8 antitrust merger law and merger enforcement practice.
9 It's something well embedded in our legal framework,
10 and the panels that are going to follow, you know, will
11 debate the efficacy of some of those frameworks, but I
12 don't think there's any debating that these concepts
13 are well entrenched into our antitrust thinking.

14 I'll set the stage for the panel discussion by
15 outlining really just at a high level what some of
16 these concepts are, but first, before delving into
17 that, we will touch on some definitional issues so that
18 we can hopefully make the discussion a little bit more
19 tractable. Then after reviewing the framework, I'll
20 offer a couple thoughts on ways in which the framework
21 might be filled out, and the panel discussion will
22 allow us to dig into those issues and others in more
23 detail.

24 So the terminology in this area is to say not
25 the greatest. Some of the terminology is not well

1 defined. Some of it is well defined but is defined in
2 ways that most users do not find to be intuitive at
3 all. Nascent competition doesn't really have a formal
4 legal definition. The word itself implies some degree
5 of competition that's present but maybe not yet fully
6 realized. In common usage, the term "nascent
7 competition" is sometimes used to refer to competition
8 that we've yet to see. I think that's incorrect and
9 concede to falling into that usage at times myself.

10 So my suggestion for this afternoon is that we
11 try to focus on nascent competition being limited to
12 competition that's presently being felt but not yet
13 fully realized. Used in this sense, the acquisition of
14 a nascent competitor by one of its rivals would be seen
15 as extinguishing not only current competition between
16 those firms but also either extinguishing or perhaps
17 amplifying the prospect for greater competition in the
18 future.

19 The term "potential competition," by contrast,
20 really is well defined in the law. The courts have
21 spent a considerable amount of time parsing what's
22 called the potential competition doctrine, and they
23 developed a bifurcated concept of potential
24 competition, distinguishing between perceived potential
25 competition on the one hand and actual potential

1 competition on the other hand.

2 The essence of these two types of competition
3 is not immediately obvious from their names, so we'll
4 spend just a minute focusing on, you know, what the
5 courts have left us in this area. Perceived potential
6 competition is focused on the present competitive
7 effect that's thought to result from an incumbent's
8 perceptions about the prospects for future entry. The
9 acquisition of a perceived potential entrant,
10 therefore, is thought to lead to a reduction in current
11 competition as that constraint that's being imposed by
12 the threat of future entry is eliminated.

13 So the potential for the acquisition to
14 increase competition through the realization of
15 synergies or otherwise is really not part of the
16 perceived potential competition doctrine, but as we'll
17 discuss over the course of the afternoon, it remains
18 part of the standard antitrust merger analysis.

19 Actual potential competition, by contrast, is
20 focused on the future competitive effect that's thought
21 to result from future entry. Don't ask me why they
22 call it "actual," though. The acquisition of an actual
23 potential entrant doesn't change current competition in
24 any way, but it's seen as a matter of concern because
25 it eliminates the increase in future competition that's

1 expected to result from that future entry.

2 As with the perceived potential competition,
3 the prospect of increased competition from the merger
4 is not part of the doctrine, but it remains part of the
5 analysis in practice and part of our discussion.

6 So as I said, these definitions are not
7 intuitive to most people, they probably aren't
8 intuitive to you, they never were to me, but that's
9 what the courts have given us, and my suggestion is
10 that we use that as our guide for this afternoon so
11 that we don't find ourselves talking past each other.

12 As I noted at the outset, these issues really
13 are pervasive throughout the analysis. The impact of
14 nascent and potential competition really begins at the
15 very first steps of merger analysis, when we determine
16 the base price to which we're going to apply the
17 so-called SSNIP, the small but significant
18 nontransitory increase in price that's applied in the
19 hypothetical monopolist paradigm.

20 It continues through the identification of
21 market participants, the assignment of market shares,
22 and measurement of market concentration. In defining
23 the competitive effect of concern, that's where we are
24 most profoundly influenced by notions of nascent
25 potential competition. It's here where antitrust

1 merger analysis takes us into issues like the potential
2 competition doctrine, but it was dissatisfaction with
3 that potential competition doctrine that led to the
4 development of other alternatives to the traditional
5 market definition, that were thought of perhaps being
6 better ways of incorporating concepts of nascent and
7 potential competition into the analysis. We can talk
8 about how well we have done with those. Those are
9 things like innovation markets or technology markets or
10 R&D markets.

11 Entry analysis, of course, is inherently about
12 potential competition, as is efficiency analysis, and
13 efficiency analysis doesn't even make the page here,
14 reflecting the short-shrift it usually gets in merger
15 analysis, but it most assuredly is a part of the
16 consideration of the impact of nascent potential
17 competition.

18 The treatment of efficiencies and other forms
19 of dynamic -- what I call dynamic response, such as
20 rapid entry or committed entry, raises a point of
21 practical application that, you know, I believe
22 warrants further discussion this afternoon. While
23 guidelines and analytical frameworks, you know,
24 generally purport to be burden-free and try to avoid
25 giving you relative weights of evidence, there has been

1 a decided drift in how we look at these issues.

2 It's been a drift in the direction of what I
3 regard as somewhat asymmetric treatment of potential
4 competition and nascent competition, and that drift was
5 reflected first in the 2006 DOJ and FTC commentary on
6 the Merger Guidelines, and later in the agency's
7 revision of the 2010 Guidelines.

8 I think the agencies are properly focused on
9 protecting nascent and potential competition. It is
10 something that warrants protection. The panel
11 discussion will explore the appropriate scope of that
12 protection, but it is certainly warranted in some
13 circumstances.

14 Where there's been a decided reluctance has
15 been in recognizing or at least fully crediting nascent
16 potential competition as market forces that can be
17 relied upon to ensure continued competitive performance
18 in markets that are affected by mergers among incumbent
19 firms, firms that are well established in the market
20 and that are not either nascent or potential
21 competitors.

22 So as the agencies sharpen their focus on
23 nascent and potential competition, my suggestion is
24 that the burdens of proof and evidentiary standards
25 that are imposed on that analysis be imposed in a

1 symmetric way, so that we're equally likely to consider
2 and recognize and credit a nascent or potential
3 competitor as a market participant as we are to look at
4 it as a market force of interest in, you know,
5 traditional horizontal merger analysis.

6 Having introduced the primary ways in which the
7 issues of nascent and potential competition analysis
8 affect our merger analysis, let me go into each of them
9 in a little bit more detail and then go into how the
10 framework might be filled out a bit.

11 So in implementing the hypothetical monopolist
12 paradigm, the agencies typically apply the SSNIP to the
13 current market price, but nascent and potential
14 competition in a market may mean that future prices are
15 going to be quite different than current market prices,
16 and it may mean that we can reliably predict those
17 prices to be at a lower level.

18 The guidelines recognize this effect and
19 suggest that in those circumstances that anticipated
20 future prices be used for applying the SSNIP. So all
21 other things equal, using these lower anticipated
22 future prices will lead to a definition of more narrow
23 markets, the identification of fewer market
24 participants, and the recognition of fewer other
25 entrants. This is just one way in which nascent and

1 potential competition is slipping into the analysis
2 that most people may not be paying attention to.

3 In the identification of market participants,
4 you know, separate and apart from treatment of the
5 benchmark price, the Guidelines are recognizing that
6 market participants are not limited to firms that are
7 currently producing and selling the relevant product,
8 right? The Guidelines explicitly recognize that new
9 entrants, firms that are committed to entering but
10 haven't done so, will be counted as market
11 participants, all right?

12 They will also include so-called rapid
13 entrants, firms that are expected to be likely to
14 respond to noncompetitive performance by supply
15 responses that don't involve the expenditure of
16 significant sunk costs. Those firms will also be
17 counted as market participants. So the Guidelines are
18 already looking at a number of these nascent and
19 potential competitors and thinking about ways to
20 include them in the analysis. In some sense, the
21 Guidelines have converted horizontal merger analysis,
22 so they're just subsuming some aspects of what we call
23 potential competition analysis.

24 Both these new entrants and these rapid
25 entrants look and feel a lot like so-called actual

1 potential entrants, which is why I suggest that, you
2 know, horizontal merger analysis subsumed a great deal
3 of what was previously thought of as a separate
4 doctrine. It's become an issue, an objective test
5 really, of the timing, the likelihood, and the sunk
6 costs associated with their entry.

7 So even after these market participants have
8 been identified, nascent and potential competition
9 issues come into play in how we assign market shares.
10 The shares of the incumbent firms may be discounted
11 based on reliable predictions of the impact of nascent
12 and potential competition, and because shares is a zero
13 sum game, then some portion of the share has to be
14 attributed to those nascent and potential competitors.

15 Use of projected shares necessarily affects the
16 measurement of market concentration, because market
17 concentration is itself a function of share, but even
18 if there's not some quantitative adjustment in shares,
19 and, therefore, some quantitative adjustment in
20 concentration, the Guidelines recognize that there is a
21 significant qualitative difference in the analysis when
22 an incumbent proposes to acquire a potential entrant.

23 In practice, you know, we see a comparable
24 adjustment made in analyzing the merger of an incumbent
25 firm with a nascent competitor. Particularly when

1 we're looking at coordinated effects analysis, the
2 nascent competitor is likely to be regarded as a
3 so-called maverick, but defining the competitive effect
4 of concern, as I suggested earlier, really is the
5 hotbed for the inclusion of nascent and potential
6 competition issues into our analysis, and this is felt
7 in horizontal merger analysis, in potential competition
8 analysis, you know, and in vertical analysis.

9 In horizontal analysis, most often we talk
10 about price effects. The Guidelines go beyond price
11 effects because nascent and potential competitors may
12 affect product quality, may affect product variety, and
13 may affect the level of innovation in the relevant
14 market. I've grouped all these together as output
15 effects because output really is the best way of
16 measuring what's going on, particularly when you have
17 price and quantity moving simultaneously.

18 The Guidelines have also, you know, explicitly
19 focused on innovation effects as a competitive effect
20 of concern. These innovation effects are increasingly
21 the focus of the agencies in practice. What innovation
22 effects are of concern? There's a concern about the
23 reduced incentive to continue innovations that may be
24 started by the acquired firm, the reduced incentive to
25 initiate development of new products, but there's also,

1 you know, potentially an increased incentive and
2 ability to innovate that might derive from the
3 combination of complementary capabilities between the
4 incumbent firm and the nascent or potential entrant.
5 The Guidelines recognize this as well and take it into
6 account in an efficiencies analysis.

7 Here again, this asymmetry issue that I
8 mentioned earlier comes into play, with agency practice
9 seeming to reflect an expectation that reduced
10 innovation incentives are the more likely outcome
11 resulting from mergers, rather than an increase in
12 innovation. The source of this asymmetry is perplexing
13 to me, because despite all the focus on innovation, we
14 do not have a generally applicable theory of innovation
15 that links innovation to mergers or links innovation to
16 market structure.

17 Economists have written countless models that
18 attempt to predict innovation, and within the confines
19 of the assumptions of those models, they work, but
20 determining which of these countless models to apply in
21 a given real world situation, where the real world
22 situation doesn't conform to the assumption of any of
23 the models precisely, remains a dark art at best.

24 The potential competition doctrine is perhaps,
25 you know, the most focused embodiment of these issues

1 in merger analysis in the U.S. Over the years, the
2 courts and the Commission have imposed significant but
3 appropriate evidentiary requirements on making out a
4 case under the potential competition doctrine. I think
5 that those requirements reflect, you know, considerable
6 uncertainty we all have over how reliably we can look
7 forward and predict what's going to happen in the
8 future.

9 While the Supreme Court's accepted the notion
10 that perceived potential competition states a claim
11 under Section 7, they've twice reserved on this issue
12 when thinking about the actual potential competition
13 doctrine. I think that's simply the inherent
14 conservatism of the Court, addressing only issues they
15 absolutely have to address, and not dealing with other
16 issues that they can duck.

17 Section 7, after all, is focused on whether the
18 acquisition is likely substantially to lessen
19 competition, but left unstated in the statute is
20 lessened competition relative to what? In practice, we
21 have all filled in the answer there, and it's lessened
22 competition relative to what would happen absent the
23 acquisition. So this counterfactual is inherently
24 forward-looking, requires us to consider what
25 competition would be in the future, both with and

1 without the acquisition.

2 So just as General Dynamics teaches that we
3 have to consider factors that can reliably be said to
4 predict, you know, diminished future competitive
5 significance for incumbents, we need to apply the same
6 sort of thinking to nascent and potential competition
7 and ask where we can reliably predict what the future
8 effects of nascent and potential competitors might be.
9 Again, this symmetry problem comes into play, and, you
10 know, our going-in biases affect how we look at that
11 issue on each side.

12 I'm running well past my time here, but we will
13 try to wrap this up.

14 MR. SAYYED: You can keep going.

15 MR. DENIS: The perceived potential competition
16 doctrine, three primary elements here, market
17 structure, uniqueness, and effect, right? The market
18 has to be structured in such a way that entry likely
19 would have a procompetitive effect. Normally we look
20 at concentration as being the indicator there.

21 Uniqueness is a second requirement. This
22 acquired company, the potential entrant, has to be one
23 of few comparable potential entrants.

24 And, finally, an effect, the prospect of entry
25 by this firm has to actually have an effect that alters

1 incumbent behavior in some procompetitive sort of way.

2 The actual and potential competition shares the
3 first two elements with the perceived potential
4 competition doctrine, market structure and uniqueness,
5 but adds two others, right? The actual potential
6 entrant actually has to have a plan, right? There has
7 to be a subjective intent to enter, and objectively,
8 the trier of fact has to conclude that they have the
9 capacity to enter.

10 Finally, that entry has to be likely. You
11 know, the Commission's B.A.T. decision is probably one
12 of the more focused opinions on this point, and on the
13 likelihood requirement, the Commission applied an
14 elevated standard of proof. There had to be clear
15 proof that entry was, in fact, likely.

16 So because those elements of proof were
17 difficult for plaintiffs, there arose a number of
18 alternative doctrines to try to get around the
19 potential competition doctrine yet incorporate concepts
20 of nascent and potential competition into the analysis.
21 You know, they are themselves innovations. These are
22 the concepts in innovation markets, technology markets,
23 and R&D markets. Given where we are on time, we will
24 leave the details of these to discussion on the panels.

25 So filling out the framework, where do we need

1 to go with this? We have a well-developed framework.
2 It's been applied for years. We'll talk about how well
3 it's been applied, but there certainly are points that
4 could be filled out a bit.

5 The empirical foundation is probably the first
6 and most obvious. To use the term that Chairman Simons
7 has used, you know, we have limited, empirically
8 grounded economic analysis on the effects of nascent
9 and potential competition, and this is certainly an
10 area of research to the extent we have professors in
11 the room. We encourage your best and brightest
12 graduate students to pursue this.

13 Part of getting there may be by doing more in
14 the way of retrospective analysis. The Commission has
15 certainly pioneered these efforts in the past. We have
16 a much greater need for retrospective analysis of our
17 predictive tools in this area than in other areas.
18 This is not a real damning criticism of this area of
19 the law, and it's true throughout what we do in merger
20 analysis. We have a number of tools that we use that
21 we haven't quite tested out yet.

22 When we think about upward pricing pressure,
23 where we spend a considerable amount of time without
24 having any strong evidentiary foundation for knowing
25 that upward pricing pressure theory is actually

1 predictive of what's going to happen in mergers. We
2 have some reasonably good empirical evidence that it's
3 not predictive. So this is an area where actual
4 nascent and potential competition, you know, shares a
5 weakness with horizontal merger analysis, and, you
6 know, a little more in the way of retrospective
7 analysis and testing of our predictive tools is in
8 order.

9 Probability, we're talking about two things
10 that are inherently probabilistic events, you know, a
11 nascent competitor becoming, you know, more competitive
12 in the future, a potential entrant coming into a market
13 in the future. These things are not black and white.
14 They may happen, they may not, and we don't have a
15 generally accepted threshold of what the probability of
16 success must be before we need to protect this nascent
17 and potential competition or before we recognize it as
18 a market force in looking at horizontal merger
19 analysis.

20 I think we need one, and there actually may be
21 a bit of an implicit one that the Commission has
22 already adopted. For those of you who are familiar
23 with DAMITT, which I mentioned earlier, the Dechert
24 Antitrust Merger Investigation Timing Tracker, you know
25 at our firm we have a habit of digging into what the

1 agency's actually doing to try to infer what's going on
2 behind the curtain of nonpublic investigations. So
3 with the help of my colleague, Konsta Medvedovsky, we
4 took a look at the Commission's enforcement practice in
5 pharmaceutical mergers to see whether that might tell
6 us a little something about, you know, what is the
7 probability of success that you have to have before
8 you're really going to count these nascent and
9 potential competitors.

10 And, you know, we can talk later about the
11 details of this, but our preliminary view suggested
12 that the answer might be something north of 60 percent,
13 and we get there by looking at the Commission's
14 enforcement practice involving pipeline branded
15 pharmaceutical products, but certainly when you look at
16 the pharmaceutical area -- and Mike Moiseyev's here and
17 he knows this better than anybody -- the Commission has
18 considerable experience, has a well-developed
19 reputation for thoughtful enforcement in this area, and
20 does not go chasing after low probability events.

21 The last point here is the temporal dimension
22 of the analysis. You know, we don't have clear
23 guidance on the time frame. If you remember back to
24 the '92 Guidelines, we used to talk about supply
25 responses occurring within a year in response to a

1 SSNIP that lasted a year. We talked about entry
2 occurring within two years from initial planning to
3 significant market impact.

4 But in the 2010 Guidelines, we moved away from
5 bright-line tests towards something that was far more
6 nebulous. We talked about whether rapid entrants would
7 occur in the near future, and we talked about whether
8 committed entry would be rapid enough, whatever "rapid
9 enough" happened to mean.

10 So we've kind of lost track of, you know, a
11 firm temporal dimension for anchoring our consideration
12 of nascent and potential competition. That's something
13 that I think will need to be revisited in order to give
14 us a little more clarity about how these doctrines are
15 going to be applied when it comes to platform
16 acquisitions and other related concepts.

17 So just to sum up, I think we have an
18 analytical framework in the U.S. that, you know,
19 provides fairly rich consideration of nascent and
20 potential competition issues. How well it's considered
21 is something that I hope you'll join us in discussing
22 in the panel discussions to follow.

23 MR. SAYYED: Thank you, Paul.

24 So I will now introduce the panel. Each member
25 of the panel will give some opening remarks, and then I

1 think we'll focus on, you know, how robust, how
2 complete, how sufficient is this analytical framework
3 that Paul laid out and potentially offer alternatives
4 or additional considerations that the agency needs to
5 take account of.

6 So I've already introduced Susan and Paul.
7 Lina Khan is on the panel. She is presently a Fellow
8 at Columbia University Law School.

9 John Newman is an Assistant Professor at the
10 University of Memphis School of Law.

11 Bill Rogerson is the Charles and Emma Morrison
12 Professor of Economics at Northwestern University.

13 Steve Tadelis, who has been on a panel earlier
14 in this three-day set of hearings, is a Professor of
15 Economics, Business, and Public Policy at the
16 University of California, Berkeley, Haas School of
17 Business.

18 And Will Tom is a partner at Morgan Lewis.

19 There is more information in their bios or
20 background on the web.

21 Right now I'll turn it over to Lina to begin.
22 We will go right down the row. We will give Susan and
23 Paul a chance to respond, and then we will have each
24 panelist respond to each other. And, of course, we'll
25 take some questions from the audience.

1 MS. KHAN: Great, thank you. Thank you to the
2 FTC for inviting me and to OPP for putting these
3 together. I know it's taken a lot of work.

4 So I am going to discuss potential competition
5 in the context of digital markets, specifically
6 discussing how safeguarding potential competition in
7 these markets is especially important. There's been
8 significant debate in the last few years about the
9 growing dominance of a small number of tech platforms
10 and the role they now play as key arteries of commerce
11 and communications.

12 I think a key fissure in that debate is whether
13 any of the dominant platforms are already using their
14 dominance in ways that undermine competition such that
15 it should be within the purview of the antitrust laws.
16 I think wherever you fall within that debate, steps
17 taken by these firms to solidify their positions
18 through eliminating future challengers should pose a
19 huge concern to everybody.

20 That is, even if you believe that the current
21 dominance of these firms is nothing to worry about
22 because we're going to see the, you know, inexorable
23 forces of creative destruction swoop in and dislodge
24 their dominance, that can only be true if tomorrow's
25 innovators are not blocked by today's incumbents.

1 So in light of this, I think preventing mergers
2 that entrench the positions of leading incumbent tech
3 firms by eliminating future challengers should be a key
4 priority for the antitrust agencies. When thinking
5 about potential competition challenges, I think there
6 are a few areas that deserve significant attention.

7 One is entry barriers. So entry barriers are
8 important to this analysis because, as we heard from
9 Paul, the potential competition framework includes an
10 analysis of whether there are some limits on the
11 entrants that are positioned to enter. In digital
12 markets, data and analytics capabilities can be a
13 significant barrier to entry.

14 Some would argue that aggregation of data does
15 not pose a competition problem because data are
16 nonrivalous, but I think in practice, data that is
17 significant for competition purposes might be costly
18 and difficult to obtain, so there's going to be little
19 incentive to share.

20 This is not new to the FTC. The FTC recognized
21 that data can serve as a significant entry barrier, so
22 in the Nielsen-Arbitron case, it determined that
23 proprietary data held by the firms would be key inputs
24 for downstream services that were still nascent, and
25 the consent order included divestiture of certain data

1 assets.

2 I think another reason that it's important to
3 consider the role of data as a barrier is that data
4 advantages can be self-reinforcing, which means that
5 for a new entrant, gathering enough data can test an
6 incumbent, will be a significant challenge.

7 So what does this mean for potential
8 competition analysis? I think the fact that data does
9 serve as an entry barrier suggests that in many digital
10 markets, there will be a significant limit on the
11 potential entrants, which is what renders potential
12 competition analysis so salient, and by extension of
13 that, because potential competitors are less likely to
14 merge, it is especially crucial that when they do
15 merge, antitrust safeguards that potential competition.

16 So, the second challenge is what I call the
17 Onavo problem. So Onavo is a company that Facebook
18 acquired in 2013. It's a VPN provider that grants
19 users heightened security, but it also allows Facebook
20 to track in extremely close detail which rival apps are
21 diverting attention from Facebook, which means that
22 Facebook can detect, at the very earliest stages of a
23 company's growth, which competing apps might pose
24 competitive threats.

25 This information then shapes Facebook's

1 acquisition strategy and enables it to purchase apps at
2 very early stages, such as tbh and Moves, which are
3 presumably identified as quickly growing. So Onavo is
4 one example of the significant information asymmetries
5 that exist between platforming intermediaries and
6 enforcers or who in the competitive significance of a
7 deal may be less obvious if it doesn't have access to
8 the same granular information about the usage level of
9 rival apps.

10 And so I think this means that agencies should
11 be more willing to issue second requests for even
12 seemingly small acquisitions and then make sure that
13 information collected in second requests include
14 competitive intelligence gathered through devices like
15 Onavo.

16 I think it also means that there may be
17 acquisitions that don't significantly undermine
18 competition in the relevant market but that do
19 structurally position the incumbent to detect nascent
20 rivals much earlier, information that they can then go
21 out and use to make early acquisitions. And so I think
22 these acquisitions that don't affect the relevant
23 market but do structurally improve the position of an
24 incumbent to make early acquisitions is something that
25 should also be relevant to the agencies.

1 I want to quickly address two arguments that
2 are sometimes made to caution against aggressive
3 enforcement in these markets. So one is the idea that
4 there's a risk of short-term, immediate consumer harm,
5 given that an incumbent that acquires a startup may
6 offer the quickest path to market. I think it's a very
7 reasonable consideration.

8 I think business literature and experience
9 suggests that while incumbents may be more successful
10 at delivering innovation that continues on established
11 research paths, it's really the startups and the new
12 firms that are more likely to account for the truly
13 breakthrough, paradigm-shifting innovations. This is
14 for at least two reasons.

15 One is that incumbents may not be eager to
16 invest in innovations that are likely to lose them
17 value on their existing investments, and the second is
18 that even in instances when it's incumbents that are
19 making the breakthroughs in innovations, in order for
20 them to do that, they need some outside competitive
21 pressure. So even if there is some short-term consumer
22 harm here, I think we need to be careful about weighing
23 that against the long-term gains in innovation.

24 The second argument that's sometimes made is
25 that aggressive enforcement could result in a negative

1 effect on the capital markets for startups. If
2 acquisition by an incumbent is an exit strategy that's
3 motivating startup funding, then limiting these
4 acquisitions could lead to fewer startups. I think
5 that's also a very fair argument, but it's somewhat
6 incomplete.

7 I think new research by Ian Hathaway and Hal
8 Singer shows that venture capital, first financing, and
9 seed stage activity is contracting more rapidly or
10 growing more slowly in sectors where, say, Facebook and
11 Google and Amazon are likely to enter, corroborating
12 the kill zone story that we have heard reported other
13 places. So I think concerns about declines in venture
14 capital are very legitimate, but so far there are other
15 sources of that decline.

16 And I guess I'll close by identifying a few
17 paths forward for the agencies that could help address
18 concerns about potential competition. So one is, as
19 Paul also mentioned, more merger retrospectives.
20 Merger enforcement, of course, is rife with
21 uncertainty, and as merger enforcement has become more
22 fact-specific, oftentimes the information that's most
23 relevant won't be available for a few years after the
24 merger has been consummated, and if that's the case, I
25 think it makes sense to do more merger retrospectives

1 to identify when acquisitions did, in fact, stifle
2 important competition and learn from that and consider
3 undoing those mergers.

4 And the second is to review acquisitions by
5 monopolistic firms as potential Section 2 violations,
6 and so this is something that Former Commissioner
7 McSweeney also proposed, and there's precedent for
8 this. So in 2017, the FTC challenged the Mallinckrodt
9 ARD's acquisition of certain assets from Novartis under
10 Section 2 on the theory that this acquisition was a
11 defensive move to extinguish a nascent competitive
12 threat to its monopoly. The settlement, therefore,
13 involved a license to third parties to develop the
14 relevant assets.

15 And so this didn't involve a digital market,
16 but I think it is a good model for how the agencies
17 might consider evaluating acquisitions by dominant
18 firms. So I'll close there. I think generally, you
19 know, antitrust has been haunted by this fear of
20 false-positives, and I think in the context of
21 potential competition, we should be rebalancing towards
22 more comfort with false-positives with a recognition
23 that oftentimes that's necessary in order to prevent
24 false-negatives. So I will leave it there.

25 MR. SAYYED: Okay. Thank you, Lina. You can

1 applaud. I didn't mean to get in the way of you
2 applauding. Thank you.

3 We'll turn to John now.

4 MR. NEWMAN: All right. So I'm going to start
5 off by making a claim that I think would have been
6 really uncontroversial five years ago. It's starting
7 to feel a little risque, though, these days, and that
8 is that our current basic legal framework, at least as
9 applied to sort of core issues like horizontal mergers
10 and acquisitions, is not totally broken.

11 So how do I base that claim? I'd say that we
12 can look at the types of cases the agencies have been
13 bringing. I'm going to focus on digital markets since
14 a lot of the talk about nascent competition has to do
15 with digital spaces.

16 The agencies have been bringing a surprisingly
17 broad variety of cases, different types of cases in
18 different digital markets, along a spectrum, right? So
19 you had FanDuel-DraftKings, where there were two actual
20 competitors that were merging. You had CDK-Automate,
21 where you had an actual rival merging with a sort of
22 nascent rival. And then you had Nielsen-Arbitron,
23 which was a combination of two potential competitors,
24 neither of which competed in the relevant market of
25 concern at the time of the challenge.

1 None of these cases attracted a deluge of
2 criticism, so to me that tells me two things. The
3 agency is being active and they're not making egregious
4 mistakes. So if the basic, basic legal framework seems
5 to be functioning fairly well, are there nonetheless
6 some sorts of areas that are voids in the current
7 enforcement regime? And another way to put that
8 question is to say, what's prompting all the calls that
9 we're seeing for stronger antitrust enforcement in
10 digital markets?

11 To me, there is a big gaping void in the
12 current framework, and that has to do with zero price
13 markets. So none of those cases I just mentioned
14 involved zero price markets, despite the near ubiquity
15 of that model at least with consumer-facing platforms.
16 So none of these cases involved a zero price market.

17 A lot of people have responded to that void in
18 enforcement by urging a focus on data extraction or big
19 data. To me, that's misguided for a bunch of reasons,
20 the biggest of which, though, is that data extraction
21 is just a really messy thing from a consumer
22 perspective. So a lot of data extraction, when it's
23 used internally by a firm to improve the product, is
24 good for consumers. The concerning usage -- that is,
25 you know, extracting data and then selling it to third

1 parties who then target consumers with advertisements
2 or using it to target advertisements -- that really
3 reflects derived demand.

4 So the demand for data here is derived from the
5 demand for advertising, right, the demand for
6 attention. So to me the core area of concern and where
7 there seems to be a void in current enforcement
8 structures and efforts lies around attention markets,
9 attention competition.

10 So my proposal is that where we see
11 acquisitions of direct rivals, even if they're nascent,
12 we should be looking harder to protect attention
13 rivalry. Cases in the past that seem to, in
14 retrospect, maybe represent false-negatives would
15 include mergers like Facebook-Instagram, Google-Ways,
16 Zillow-Trulia, cases where attention rivalry is at the
17 core of the merger.

18 So that immediately runs into, I think, a
19 laundry list of objections. A couple of them were ably
20 addressed by Lina. A couple more, objection number
21 one -- and I'll see if I can respond to this -- so all
22 digital firms compete for our eyeballs, so they all
23 operate, from an attention perspective, in one big
24 market that's really unconcentrated. I think that
25 totally misses the mark.

1 So attention is the currency in these markets.
2 So the objection is essentially the exact equivalent of
3 saying all firms compete for money, so there must be
4 one big market that's really unconcentrated, which is
5 laughable.

6 The second objection, we already look at harm
7 to innovation on the user side, the zero price side,
8 the attention rivalry side of a lot of platforms. This
9 is true or it seems to be true, at least, if you look
10 at something like Zillow-Trulia. The agency reported
11 that it looked for harm to innovation on the user side
12 of the platform. Is that enough, though? Is that
13 sufficient to allay all concerns or find all concerns?

14 I don't think so. Unfortunately, we don't
15 have, as we've heard today, a really strong economic
16 theory or econometric tools that we can use to assess
17 innovation effects in a merger context, and to sort of
18 worsen the problem, the qualitative issue that we would
19 usually rely on in the absence of a nice economic
20 theory is not likely going to be there.

21 So if we think about what we'd be looking for,
22 it would be maybe a board presentation, right, where a
23 CEO is trying to sell an acquisition to the board by
24 saying, oh, after the merger, we're not going to
25 innovate anymore; never going to happen. So the types

1 of qualitative evidence we would need isn't going to be
2 there, I think, in a lot of cases. So focusing solely
3 on harm to innovation in these contexts is not going to
4 be enough to catch all the potential anticompetitive
5 effects.

6 Finally, I think -- and this is maybe the most
7 salient or the most trenchant criticism of the idea of
8 regulating attention markets in a more interventionist
9 way -- is that market definition, market effects are
10 going to be really hard to measure here, right? We
11 lack prices, and that's our favorite tool to use.

12 Here I think there actually will be useful
13 qualitative evidence that we could use. So if you go
14 back and look at investor statements from
15 Zillow-Trulia, to use one example, post-acquisition,
16 you've got the CEO of Zillow Group saying, in an
17 investor call, a publicly available call, that now
18 we've got 70-plus percent of the market for online real
19 estate portals. That's pretty compelling, and it's
20 qualitative, right? But it's pretty compelling stuff,
21 and if that's the kind of stuff that's available
22 publicly, one can only imagine what's being said
23 internally.

24 Second, quantitative evidence, and here's where
25 I would like to sort of urge the FTC to look harder in

1 a specific way. With digital firms in particular,
2 there is often a great deal of AB testing that goes on
3 in the marketplaces, really easy to do that in a
4 digital market. To the extent that the FTC could ask
5 for the results of AB testing when firms are changing
6 advertising loads, and looking at the competitive
7 results of that, I think that would be a fantastic idea
8 and would help give us an idea of what happens in a
9 digital market when a dominant firm increases
10 advertising loads to users. Where does that
11 substitution go to? And it could be a really useful
12 tool for us to use.

13 MR. SAYYED: Okay. Thank you, John.

14 We will turn to Bill Rogerson now.

15 MR. ROGERSON: Great. Well, thank you very
16 much for having me here today, and thanks for doing
17 such a great job organizing this very timely
18 conference.

19 My understanding is the first panel is supposed
20 to focus on two questions. First, what framework
21 should we use to evaluate mergers between incumbents
22 and nascent competitors in high-tech industry? And
23 second, is the current law and the current version of
24 the Merger Guidelines consistent with using the correct
25 framework, or would the law or the Guidelines have to

1 be changed or altered in order to use the correct
2 framework?

3 I'm going to focus more on the first question
4 of what the correct framework should be because I think
5 this is a question that economics can shed the most
6 light on, and I'm an economist; however, let me very
7 briefly say, regarding the second question, that I
8 agree with a lot of what has been said earlier, that I
9 view the law and the Merger Guidelines as relatively
10 general statements, flexible general statements of
11 general principles that are pretty sensible, and my own
12 nonlawyer view of it is that one could interpret
13 existing law and the existing Merger Guidelines as
14 being completely consistent with a sensible and correct
15 welfare analysis of the problem. So I don't think
16 there's any need to change the law or even to change
17 the Merger Guidelines. I think all the right
18 principles are in place.

19 If I was on the next panel that's supposed to
20 address should we get a little tougher on any mergers
21 or have we been looking at these mergers as carefully
22 as we ought to using the correct framework, I'd
23 probably say, given the events I've seen in the last
24 five years, looking back on them, that possibly
25 regulators should be a little tougher or look more

1 closely at a number of mergers, and perhaps there have
2 been a number of mergers that have been approved that,
3 at least in retrospect, with hindsight, one wonders why
4 they were approved or whether they really should have
5 been or whether there was enough evidence at the time
6 to decide that perhaps that they shouldn't go forward
7 with, but I don't think there's really any need for a
8 change in the law, and I think the basic elements of
9 the correct framework are in place.

10 What I'm going to do today is focus on one
11 specific issue related to what the right approach is,
12 and what I'm going to do is describe two different
13 social welfare problems that we could attempt to solve
14 when we were choosing a policy on how to evaluate these
15 types of mergers, all right?

16 The first policy is going to be not quite
17 correct and be extremely complicated. The second
18 policy is going to be exactly correct and fantastically
19 more complicated than the extremely complicated policy.
20 And one message I want to leave you with today is, is
21 that I wonder whether or not we should be considering
22 using the not quite correct policy because it's a type
23 of welfare evaluation, although it's extremely
24 complicated, and I could imagine evidence being brought
25 to it and evaluated, whereas the second perfectly

1 correct question I'm not so sure this is the case.

2 Okay. So let me start, just as a benchmark,
3 with describing what I think the standard competition
4 problem is when two mature firms come to the DOJ or the
5 FTC and say we'd like to merge, okay? Because there --
6 you know, and, of course, we really just look at the
7 competitive -- try and assess the competitive effects
8 of the merger, see to what extent it would cause --
9 competition would be reduced and price would go up,
10 quality would go down, or perhaps even look at
11 innovation effects, on the one hand, and then on the
12 other hand, ask if there are compensating efficiencies,
13 and try and do some sensible analysis, as best we can,
14 to predict whether or not consumer welfare would be
15 higher or lower with the merger, okay?

16 Now, what changes when one mature firm and a
17 nascent competitor come to the agencies and say we'd
18 like to merge? So we have a big incumbent who wants to
19 merge with a startup that has created a new idea, so
20 it's already been in the market for a while, thinking,
21 doing innovation. It's created the idea for a new
22 product, and perhaps it's already begun to introduce it
23 to the market, but there's still a lot of uncertainty.

24 Maybe the product is still going to evolve. It
25 isn't quite clear how consumers will use it or how many

1 consumers will want to use it or whether they'll view
2 it as a substitute for the incumbent's product or not
3 or to what extent they'll view it as a substitute. So
4 there's a huge amount of uncertainty about exactly how
5 this nascent product will fit into the market.

6 Well, I think there are two different welfare
7 problems you could consider when you are asking should
8 we approve this merger, okay? The first one I'm going
9 to call the ex post problem, and the reason I call it
10 the ex post problem is I'm going to say let's take as
11 given that we have that startup today who's already
12 done all of the startup innovation that he did. He's
13 already come up with a new idea, tried it out a little
14 bit in practice, and he's ready to go, or, you know,
15 he's nascent, but he's done a lot of work already.
16 He's already done this preliminary innovation, okay?

17 Well, at that point, taking that as given, the
18 competition problem we're looking at with the mature
19 firm and the nascent firm is very similar to the
20 problem we look at with two mature firms, only there's
21 a lot more uncertainty about exactly what the
22 competitive effects are and what the nature of the
23 efficiencies are, right? But in principle, it's the
24 same type of problem. We've got two firms. We want to
25 assess the competitive effects. It's going to be

1 harder to do this because it's more forward-looking,
2 relying on more predictions. We're not quite sure if
3 the -- you know, number one, would the startup succeed
4 if it was by itself, or really has it only come up with
5 an idea that would be useful for an incumbent firm?

6 Perhaps it was never even really trying to
7 think of a stand-alone idea. Really perhaps the
8 efficient way to organize innovation in this industry
9 was simply that little startups think of new ideas that
10 existing incumbents are better at implementing. So
11 that could be what's going on.

12 On the other hand, it could well be an idea
13 that could grow into a new product that really would
14 challenge the rival, okay, but it's uncertain. So if
15 we went ahead and did this analysis, we'd still try and
16 determine whether consumer surplus will be higher or
17 lower with or without the merger, but there's going to
18 be more uncertainty. So it's going to be a much harder
19 problem and maybe harder to draw the conclusion that
20 the merger will be bad.

21 On the one hand, if we allow the merger, the
22 incumbent firm will get this technology and use it in
23 some sense, although we don't even really know how the
24 incumbent firm will use it, okay? If we disallow the
25 merger, it's possible the startup will just go down the

1 drain or it's possible that if the startup survives,
2 the product still won't be nearly as good as if the
3 talented incumbent, who knows how to implement a new
4 product, had taken it over.

5 On the other hand, the startup might succeed
6 beautifully, and we'd not only have the product
7 available to consumers, but we would have more
8 competition, and everyone would be better off. So
9 there's a lot of uncertainties, but nonetheless, it's
10 fundamentally the same problem. Two firms have walked
11 up to you, and you have to say, will consumer surplus
12 be higher if I allow the merger or I don't allow the
13 merger, okay? So that's what I'm calling the ex post
14 problem. It's a slightly more complicated version of
15 the two mature firms problem, okay?

16 But the point I want to leave you with or the
17 point I want to stress here is that ex post problem
18 isn't necessarily the theoretically right problem to be
19 considering, okay? Why is that? What is the ex post
20 problem ignoring? Well, the ex post problem is saying
21 I already have this startup. Now should I let him be
22 bought or not? He's already done his innovation, and
23 now what should I do with him, okay?

24 If you were really setting a merger policy in
25 the real world, surely you'd like to take or

1 potentially you'd want to take into account the fact
2 that when I choose a merger policy, I'm going to make a
3 startup innovation more or less profitable for
4 startups. In particular, if I make it easier for
5 incumbents to buy startups, doing startup innovation
6 will be more profitable, and there's likely to be more
7 startup innovation.

8 And, in fact, if it turns out that this is one
9 of those industries where the efficient way to organize
10 innovation is to let little guys think of new ideas and
11 then big guys implement them, I might be getting in the
12 way of just the efficient way of doing R&D and
13 innovation in this industry if I started blocking a lot
14 of these mergers, because they wouldn't do them.
15 Startups wouldn't do them in the first place if they
16 couldn't sell their product to the incumbent.

17 Well, I could consider that problem, too, and I
18 could call that the ex ante problem, right, looking at
19 the effects of the policy before startups have done
20 their innovation. Now, I'd still want to answer the
21 first question of, given this merger with this startup,
22 will consumer surplus go up or down if I allow the
23 merger? But that might not be the end, right?

24 If I want -- and I think, although I haven't
25 yet worked this out in a formal model, if we wrote down

1 the formal model in a well-behaved model, we would
2 predict that the fully optimal solution might be to be
3 a little more lenient on mergers than the one that just
4 implemented perfectly efficient ex post policies.
5 That's because innovation is generally good for
6 consumers.

7 So it might be desirable, at least in theory,
8 to commit to a policy where you purposefully commit to
9 approving some mergers that are inefficient ex post in
10 order to create better innovation incentives ex ante,
11 okay?

12 Now, the second problem, the ex ante problem,
13 is the perfectly correct problem, okay? But it's a
14 complete order of magnitude higher than the ex post
15 problem, which is already a complete order of magnitude
16 harder than the standard problem, okay?

17 Usually when I hear of experts on existing
18 antitrust laws kind of get into the details of how they
19 would analyze an actual merger between an actual
20 incumbent and an actual startup, they do some version
21 of what I would call describing the ex post problem;
22 that is, I think they try and ask the question, this is
23 hard to do, but I am going to ask, would consumers be
24 better off if I allowed this merger? And they really
25 don't consider the issue of what effect will this have

1 on innovation incentives of startups going forward.

2 I think that might be the right idea. I'm not
3 sure, but I want to submit to you that this might not
4 be a bad idea for two different reasons. I think that
5 it's possible that this ex post problem is a problem
6 that's simple enough that courts could actually
7 evaluate it, and if you ask courts to evaluate problems
8 where there's just going to be completely no factual
9 basis for arriving at any sort of possible reasonable
10 conclusion, you're just inviting them to give their own
11 opinion. And so it might be better to restrict us to a
12 fairly good question that they really can potentially
13 answer, that's going to rely on some objective facts
14 that can be presented before the court.

15 The second thing is, I'm not sure the two
16 problems would necessarily yield that different an
17 answer anyhow. I think if you've got a correct ex post
18 policy, you're still going to allow plenty of mergers
19 where the mergers would have never had any hope really
20 of launching a separate firm. They're really just
21 little ideas that the incumbent would have used anyhow.
22 And if you apply that policy sensibly, I think you're
23 going to allow a lot of these mergers, and there still
24 will be good merger incentives.

25 And secondly, there's a countervailing effect.

1 If you loosen up your merger policy to get the startups
2 to invest more, the incumbent is going to invest less,
3 and that's going to be bad. So there's a countervailing
4 effect. If you try and loosen up policy away from the
5 efficient policy, trying to get more mergers, to more
6 innovation, it just may be that the incumbent will
7 frustrate you by investing less.

8 So, on balance, I'm not sure that the slightly
9 easier problem isn't that bad a problem in any event,
10 and at a minimum, I think it's a problem that courts
11 could potentially address. Maybe the way this really
12 would work out in practice, often in real cases people
13 always talk about what's the probability that we have
14 to show that the startup would succeed? How high does
15 that probability have to be? How certain do we have to
16 be that the firm would survive by itself and actually
17 be a good competitor?

18 All right, maybe in a theoretical world, you
19 could think of, well, there would be a level to set
20 that probability at that produced efficient decisions,
21 ex post efficient decisions, and maybe you want to move
22 it around a tiny bit if you were trying to do this
23 fully optimal problem, even though no one knows how to
24 do that, okay?

25 And I might imagine that the real problem that

1 courts and enforcers will always think of themselves as
2 solving is they take that probability as given,
3 whatever it -- you know, it seems to be, given the case
4 law, and then they just try and investigate whether the
5 merger is ex post efficient or not. Over time, through
6 some mysterious process that lawyers know about, courts
7 maybe end up doing the right thing even though it's
8 hard to calculate what that is. I have no idea, but I
9 would submit that it might make sense for us to focus
10 on this slightly simpler, incorrect problem, even
11 though it is incorrect.

12 MR. SAYYED: Okay. Thank you, Bill.

13 I think this is the second panel I've
14 moderated, and I think what people may discover is I'm
15 not a very good disciplinarian, so I have envisioned
16 this panel as sort of setting up the next two panels,
17 and so I have allowed people to go a little bit over
18 their allocated time, but one thing I do want to do is,
19 after Steve and Will, give Paul and Susan a chance to
20 respond. So just keep that in mind as you do your
21 comments.

22 So we'll turn it over to Steve, and then Will.

23 MR. TADELIS: Thank you, Bilal, and thanks to
24 the FTC for having this. I'm also grateful that I'm
25 actually speaking, because the way things were going,

1 that wasn't certain.

2 Like Bill, I do believe that the current
3 welfare analysis is the preferred tool, not
4 surprisingly. I'm an economist, but I think these
5 tools need to be carefully applied, because one thing
6 that isn't said enough is that not all platforms are
7 created equally. They don't all have the same business
8 model. They don't all have the same barriers to entry.
9 So there's a lot of discussion that people seem to lump
10 together.

11 I heard this earlier. Oh, the Google/Facebook/
12 Amazon/Apple, right? These are all different
13 companies, different business models, and the devil's
14 in the details, and I think that's something that is
15 not said enough, which is why I wanted to start with
16 that.

17 Now, going to a theoretical -- a broad
18 theoretical perspective, there is no question that
19 nascent competition is something we appreciate because
20 of two main influences it has. One, it keeps companies
21 at check in terms of pricing; and second, it's a great
22 source of innovation.

23 Now, the first is noncontroversial. You know,
24 without competition, dominant firms might take
25 advantage of the market, price higher, produce less

1 quantity. That's an easy one.

2 The innovation thing is not as easy. So going
3 back to 1962, Ken Arrow, a very celebrated economist,
4 suggested that competitive markets are really what is
5 needed for innovation, the reason being that in a
6 competitive market, if you manage to innovate, get a
7 slight cost advantage or a slight quality advantage,
8 then you're going to gain a lot of market share from
9 the rest of the competitors, and that gives you a
10 tremendous amount of incentives to innovate.

11 Twenty years earlier, Joseph Schumpeter,
12 another celebrated economist, said something very
13 different, that in the long run, competitive markets do
14 not provide true returns or super normal returns, and,
15 hence, there's not much reason to innovate. You
16 actually need market power in order to get the gains
17 from innovation and to have those incentives in place.

18 And there have been a lot of studies, not
19 enough maybe, to try to tease this apart. A recent,
20 very celebrated article in the Quarterly Journal of
21 Economics, which is one of the leading journals in
22 economics, suggests that there's an inverse U-shape
23 relationship between competition and innovation;
24 namely, some kind of Goldilocks story. Too little is
25 not good, too much is not good, some healthy middle

1 appears.

2 Now, I was very happy that Paul mentioned that
3 we should encourage our graduate students to work on
4 this topic. As it so happens, one of my graduate
5 students, who is on the job market this year, has
6 written a beautiful paper where he did something akin
7 to retrospective analysis, which is not easy to do,
8 spent a year and a half gathering data, where he took
9 data from the DOJ's cartel breakup history, which
10 clearly was an exogenous shock to competition, because
11 one of the things we worry about and the reason
12 empirical work is so difficult here is that competition
13 and innovation are both determined not only by the
14 relationship between them, but by what we call latent
15 or lurking variables, and it's really hard to tease
16 that causation/correlation story.

17 So what he did, he went back 30 years,
18 collected data of breakups in different markets,
19 defined the market carefully, treatment control.
20 Obviously, like any study, there are some assumptions,
21 but what he showed is actually that more competition
22 creates less innovation measured by patent investment
23 filings, by patent breadth, and by R&D investments. So
24 I think the verdict is out about what is the right
25 amount of competition and, by extension, nascent

1 competition in order to get innovation from the theory
2 side.

3 Now, let me turn a bit to practice, because in
4 theory there is no difference between theory and
5 practice, but in practice, there is, and I was inspired
6 by Susan and a handful of other economists who actually
7 spent time in industry. I spent two years at eBay
8 building and leading a team of economists. I spent a
9 year at Amazon, also leading a team of economists and
10 kind of, you know, seeing how things actually work and
11 their relationship with startups and innovation more
12 broadly.

13 Now, startups are the source of this nascent
14 competition that we're talking about here, and the
15 reason startups are created is because the founders and
16 the people who invest in them believe that they will
17 get returns in the future. No returns, no investment.
18 That's kind of straightforward.

19 And startups are uncertain. You know, I'm,
20 again, echoing something that Bill said. There's a lot
21 of uncertainty in these innovative endeavors, so we
22 need to focus what differentiates success from failures
23 when we think about startups who engage in investment.

24 So, first of all, it could be bad products.
25 Now, by and large we believe that venture capital

1 financing and other financing are going to be a pretty
2 strong gateway -- you know, stupid product, I am not
3 going to give you money. Of course, Theranos, and you
4 might think differently, but by and large, that is one
5 mechanism in place. You might have a good product.
6 You start investing. You need to acquire customers.
7 That's something that Susan spoke about at length.

8 If you don't have enough money to engage in
9 marketing to get your customers or the marketing costs
10 are a lot more than you thought they would be, you
11 might burn all your investment capital and then die not
12 because you have a bad product but because you didn't
13 manage to get that early start, the so-called chicken
14 and egg problem.

15 Last, but not least, is poor execution, and I
16 can't stress enough how many companies fail because of
17 poor execution, something that, as an academic, I never
18 appreciated. It's, like, oh, here's the model. In
19 theory, it works. What's the big deal? Well, again,
20 in practice, things are very different. This is
21 precisely where acquisition exits have a tremendous
22 amount of value. Again, I'm echoing something that
23 Bill said.

24 Because execution is so difficult, it is those
25 large companies who succeeded time and again who have

1 put together the apparatus that helps with execution,
2 and that is complementary to the success of many of
3 these startups. So if we go to that question, kind of
4 like that ex post idea that Bill promoted, we have to
5 ask ourselves, if we allow this merger to happen, what
6 will probabilistically happen in the future? And are
7 there really barriers to entry for future competition
8 that might be foreclosed if we allow certain mergers to
9 happen?

10 And in platform markets, which is really what
11 we're talking about here, those barriers to entry are
12 primarily about indirect network effects, and those are
13 going to be a barrier if, one, multihoming is costly,
14 and, again, Susan talked about multihoming a lot; and,
15 two, acquiring new customers is difficult, which,
16 again, Susan mentioned at length.

17 And these are tightly connected, because if
18 multihoming is easy, acquiring customers is easy. So
19 my observations from my experience on the tech sector
20 more broadly, but especially retail marketplaces --
21 since everybody else ignored the "Time's Up" sign, I
22 might do that, too --

23 MR. SAYYED: Don't worry.

24 MR. TOM: Don't worry. I'm the competitor
25 waiting in the wind.

1 MR. TADELIS: I know.

2 Then first of all, for many products and
3 services, multihoming requires two or three clicks and
4 two queries. So whenever I choose to buy something,
5 within less than two minutes, I could compare Amazon,
6 eBay, and Walmart -- and I often do if it's a more
7 expensive product -- and truth be told, if it's a \$12
8 product, I'm not going to bother, because if I'm
9 screwed by 40 cents, that's okay. I can live with
10 that. Again, every time I do those comparisons, I find
11 the prices to be extremely similar.

12 Second, every time I take a ride, I have Uber
13 and Lyft on my phone right next to each other. In 45
14 seconds, I will have that price comparison and time
15 comparison. Sometimes I'm in more of a hurry and I
16 will pay a dollar more to get there faster. Sometimes
17 I'll rather save that dollar and wait another few
18 minutes.

19 Then the second thing is that early-stage entry
20 has become extremely cheap and very easy to do
21 precisely because of a lot of platforms that came up
22 like cloud computing services. What used to be a
23 capital expenditure, buying millions of dollars of
24 servers, is now pay-as-you-go computing and storage,
25 and that makes the early stages of entry very, very

1 easy, and here I'm echoing something that Lina said.
2 Barriers to entry are really critical to look at, and
3 for startups in the tech sector, barriers to entry in
4 early stages have declined dramatically.

5 Last, but not least, VC funding is really
6 thirsty for potential entrants. One example is
7 Jet.com. Four years ago, the company was founded.
8 They raised close a billion dollars in venture funding,
9 and shortly after that, they were bought by
10 Walmart.com, and now they are driving Walmart's -- most
11 of Walmart's online platform.

12 So going to another point that Lina mentioned,
13 and she quoted Hal Singer from the previous panel, who
14 mentioned this decline in VC funding. Well, there's a
15 study by Oliver Wyman -- albeit funded by Facebook, so
16 full disclosure, that's what I read -- but it shows
17 that VC funding is at record highs. What has changed
18 is where the VC funding is coming in.

19 Rather than coming in at early stages, it is
20 now coming in at later stages of investment. Well, if
21 you think about the reduction in barriers to entry to
22 start a startup, that makes complete sense. That is a
23 market reaction. Easy to enter, hard to execute, so VC
24 is coming into that later execution phase.

25 So I'm going to conclude with very quick --

1 very quickly with three points. So, first, I am
2 convinced that the current tools, guided by solid
3 economic thinking and those that guide empirical
4 analysis, are adequate to deal with the topic that
5 we're talking about today.

6 Second, as we move forward, I think we really
7 have to be careful to do things on a case-by-case
8 basis. There is no one-size-fits-all tool or
9 application, and in that respect -- and this is, again,
10 something that Lina mentioned -- I am a huge fan of
11 retrospective analysis, and I wish we did enough -- we
12 did more of it. I don't think we're doing enough of
13 that retrospective analysis. Government agencies that
14 have amazing data when they evaluate mergers could be a
15 wonderful source for that kind of analysis.

16 Last but not least, I think that evidence
17 suggests that in the so-called platform markets, entry
18 barriers are low, multihoming is easy, nascent
19 competition is not under threat by these acquisitions,
20 and I think on the contrary, acquisitions help spur
21 execution, which then lead to more opportunities for
22 innovation.

23 Thank you.

24 MR. SAYYED: Thank you, Steve.

25 So let's turn to Will.

1 MR. TOM: Thanks, Bilal.

2 I am going to confine myself to two categories
3 of comments, one on the nature of the tools and the
4 second on the management of the tools.

5 So on the nature of the tools, I fully agree
6 with Steven that the tools are adequate. I think the
7 agencies have a very full toolbox. In fact, I think
8 the toolbox is kind of overflowing, and therein lies a
9 risk.

10 So I think the technical term for what has
11 happened to the toolbox over the last couple of decades
12 is the tools have evolved in response to changing
13 circumstances, is that the tools have become squishier.
14 So take, for example, the temporal issues that Paul
15 identified in terms of the one-year/two-year kind of
16 thing and the much more qualitative kinds of measures
17 that found their way into the 2010 Guidelines. I think
18 that was an effort to avoid some of the inaccuracies of
19 kind of a Procrustean bed of bright-line rules about
20 time periods, but you see the analog in a lot of areas
21 besides time periods; for example, market share.

22 So market share and vertical theories, and I
23 think the first time this really became clear to me was
24 in the Time Warner-Turner merger that the FTC handled
25 more than a decade ago, and the notion that you see in

1 the analysis to take public comment is that the share
2 of foreclosure is a function of what is actually needed
3 by the complements, and so, you know, there the theory
4 was the barriers that would be posed by new programming
5 entities by control of more of the conduit, and the
6 notion that you'll see in the analysis there was to
7 launch a significant new program or programming
8 network, you needed to be able to reach about 60
9 percent of the subscribers nationwide.

10 Well, you know, the inverse of 60 percent is 40
11 percent. If you can foreclose 40 percent, that's
12 enough. You don't need the traditional monopoly share
13 or anything like that. And so instead of a bright
14 line, you know, suddenly it was a measurement that
15 depended on the circumstances of the case and the
16 competitive theory involved, okay?

17 So as these tools have gotten squishier, the
18 risk of misunderstanding has increased, and one example
19 near and dear to my heart is innovation markets, which
20 is a term that the 2017 IP Guidelines has finally
21 gotten rid of, and probably a good thing even though
22 there was nothing wrong with the underlying concept.
23 It's just that as interpreted and applied, nobody
24 seemed to understand what that underlying concept was.

25 The concept came about as a direct result of

1 the GM-ZF merger in which you had two companies that
2 barely competed at all in the downstream goods markets,
3 just as a geographic matter, but it happened that to
4 innovate in this product market, you needed a massive
5 amount of manufacturing facilities, and there was an
6 iterative process between the manufacturing and the
7 innovation, and these were the only two companies that
8 had it.

9 So even though they didn't compete much
10 downstream, they competed heavily in innovation, and
11 the benefits of that leapfrogging competition was felt
12 worldwide, even in markets in which they did not
13 compete, in the goods markets. And so the focus of the
14 innovation market theory was on specialized assets.

15 So if you had a type of innovation that anybody
16 in his garage could come up with, you really didn't
17 worry too much about the restraint on innovation that
18 came about from the merger, because you didn't know
19 where the next breakthrough was going to come from, and
20 so it didn't make sense for the antitrust enforcers to
21 worry about.

22 That whole case hinged on the specialized
23 nature of the assets needed to innovate and the fact
24 that very, very few players had it. So, you know,
25 that's one set of issues that posits an example of the

1 danger of the risk of misunderstanding as these
2 concepts become more elastic.

3 I think, you know, currently, this notion of
4 acquisitions of data may be another area that we really
5 ought to think hard about before we leap at the latest,
6 shiniest theory. I don't think these are really zero
7 price markets. I mean, for the most part, when you're
8 looking at mergers of two companies with significant
9 caches of data, you're really talking about data
10 acquisitions as input purchases.

11 They're getting data. Those data are useful to
12 them in their business and helpful to them as they
13 compete downstream, and they are paying a price to get
14 that data. It's not a monetary price. They're paying
15 in the form of offering consumers services.

16 So, you know, the old joke is that if you're
17 paying a zero price, you're not the consumer, you're
18 the product, okay? And I think, you know, that that
19 has a lot of truth in how we ought to think about these
20 mergers.

21 Okay, so another point about the nature of the
22 tools is that as these tools become squishier, if you
23 will, the complexity of the tradeoffs has increased,
24 and, you know, look, the asymmetries that Paul pointed
25 to in terms of when we look at potential entry as a

1 potential anticompetitive harm and when we look at
2 potential entry as curing a harm from a merger, they're
3 not always symmetric.

4 I think in some sense they don't need to be.
5 In a broader sense, what you're looking at is a
6 decision theory framework, right? What are the
7 consequences of being wrong and the probabilities of
8 being wrong and the administrative cost of getting it
9 righter in both dimensions? And you make those
10 tradeoffs against each other, and the probabilities
11 don't necessarily have to balance if the consequences
12 don't balance. So I think it's very much case by case,
13 and, you know, maybe a great example of how granular
14 those case-by-case determinations might be.

15 You know, I was always an admirer of Chairman
16 Muris' handling of the Genzyme case in which he really
17 drilled down into, you know, what are the incentives
18 affecting the behavior of the CEO of the acquiring
19 company? And, you know, sometimes I think you have to
20 do that.

21 There are harms that we have to be cognizant of
22 in these kinds of areas where we're looking at nascent
23 competition. To reach for a somewhat old technology
24 example, Lilly-Sepracor, where, you know -- again, more
25 than a dozen years ago, and Commissioner Anthony made

1 some speeches about this one.

2 You had a branded pharmaceutical company
3 acquiring an isomer or a company that had an isomer of
4 its product. It appeared that the isomer was a product
5 improvement. Some argued against the merger on the
6 theory that Sepracor was the greatest potential
7 competitive threat to Lily. The problem was that this
8 nascent competitive threat, you know, by law would not
9 be able to market this nascent competitive threat for
10 four years because it clearly infringed Lily's basic
11 patent.

12 And so, you know, I think there was a case
13 where both the probabilities and the potential
14 consequences weighed clearly in favor of letting the
15 merger go through, because, you know, the probabilities
16 were, you know, weighing the near-term benefit of the
17 greater execution and the removal of the blocking
18 position against this somewhat theoretical benefit of
19 the future competition four years from now, and the
20 consequences of that tradeoff was the benefits to
21 patients now, health benefits, versus, you know, some
22 theoretical benefit of price competition some years
23 down the road. So I think you need to make those
24 tradeoffs carefully.

25 Okay, let me just turn very quickly to a couple

1 of words about management. When I was at the
2 Commission, there was a Commissioner who was very fond
3 of behavioral economics and was an advocate of applying
4 it at every possible turn, and I could understand how
5 it applied to our consumer protection mission, and I
6 never could quite get how it applied to our competition
7 mission until it hit me one day that if you turned the
8 telescope around and trained it on the enforcers,
9 behavioral economics would tell you quite a bit about
10 the cognitive biases of the people within the building
11 who were doing these investigations and making the case
12 recommendations and voting on the case recommendations.

13 When it struck me, it seemed like a brilliant
14 insight, until just a couple of days ago when I was
15 searching the web for something else and I stumbled
16 across a really nice article written by Bill Kovacic
17 and Jim Cooper that made exactly that point. So
18 there's nothing new under the sun, but we should pay
19 attention to the fact that narratives are powerful.
20 They're especially attractive when they seem like novel
21 insights, you know, and my feeling about or, you know,
22 my belief that, gee, I had this brilliant idea about
23 behavioral economics, might be an example of that,
24 where you weigh much more heavily things that are novel
25 and exciting and fun, and you stick to them even if a

1 sober analysis of the potential consequences might lead
2 you in the other direction. So that's point one on
3 management.

4 A second point is, you know, attitudinal
5 approaches. Former Acting Chairman Ohlhausen has
6 spoken a lot about regulatory humility, and that, I
7 think, scratches the surface of what enforcers might
8 think about as they approach some of these new
9 complexities. I also think we should think about some
10 process approaches to managing these tools.

11 One thing that always struck me was there has
12 been an unwritten rule that's grown up at the FTC about
13 the number of meetings you get with the bureau
14 director, and it's colloquially referred to as the "one
15 meeting rule," and I think it makes a lot of sense in
16 traditional horizontal mergers where, you know, the
17 volume is such that if you allowed more than one
18 meeting, you'd never do anything else, and the
19 analytical paths are straightforward enough that
20 additional meetings wouldn't help very much.

21 But in novel and cutting-edge areas, I would
22 really like to see that unwritten rule abolished. I
23 think there's nothing worse than having the staff go
24 down a particular route or, you know, pursue a
25 particular hobbyhorse, maybe driven by some of these

1 cognitive biases I was talking about, and work for
2 months and months or years on a matter only to -- you
3 know, when management finally pays attention, to find
4 that there are whole dimensions of the issue that they
5 have overlooked. So a "one meeting rule" -- devil's
6 advocate -- I think can be very useful and maybe ought
7 to be formalized.

8 People have talked about retrospectives, and I
9 heartily endorse that, although they're highly
10 resource-intensive. And so, you know, all of these
11 things I think become evermore important as these tools
12 become just a little more ephemeral and difficult to
13 follow clear and well-traveled roads.

14 Thanks.

15 MR. SAYYED: Okay. Well, I think we are
16 actually out of time. So I am not going to eat into
17 the next panel's time. So we are going to take a
18 ten-minute break, and we will be back here with the
19 second panel on nascent competition.

20 (Applause.)

21 (End of Panel Number 3.)

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1 PANEL 4: NASCENT COMPETITION:
2 ARE CURRENT LEVELS OF ENFORCEMENT APPROPRIATE?

3 MS. WILKINSON: Welcome back, everyone, to
4 our afternoon session on Nascent Competition in Digital
5 Markets. My name is Stephanie Wilkinson. I am an
6 attorney advisor in the FTC's Office of Policy Planning
7 and I will be moderating this next panel.

8 So we just heard a really good discussion
9 during the last panel regarding the analytical
10 framework for evaluating acquisitions of nascent or
11 potential competitors by established incumbent
12 platforms and digital markets. We are now going to
13 consider whether enforcement levels are appropriate for
14 these types of acquisitions, which for the sake of
15 brevity I am going to refer to as nascent acquisitions.
16 We will start with brief opening remarks from each of
17 our distinguished panelists and then continue with Q&A.

18 So without further ado, I am going to turn
19 this over to Daniel Sokol. He is a law professor from
20 the University of Florida Levin College of Law and a
21 senior of counsel in the Washington, D.C. office of
22 Wilson Sonsini Goodrich & Rosati.

23 MR. SOKOL: Thank you. It turns out I am the
24 only one with slides. So here is what I was thinking
25 about -- and it would have been helpful had I

1 coordinated with the prior session because some of
2 these themes have been covered, which means it was a
3 successful session. And what I will do is I will
4 reposition, the way that either incumbent or new
5 entrant has to when something interesting happens.

6 So I thought my own framing of how to think
7 about these markets was slightly different than other
8 people's. It was not Paul's focusing on law; it was
9 not some of the others focusing on economics. I
10 thought about it in the following ways by giving two
11 possible examples. One is what does nascent
12 competition mean; one is where we have a nascent
13 competitor; one is where we have a nascent market.

14 So the nascent competitor is the
15 Facebook-Instagram story, potential, a new rival in
16 social networking and/or photo sharing where the market
17 in each of these was a little bit developed. The
18 alternative was, I would say, more Google-Admob where
19 the market itself was really, really new, so all the
20 competitors were nascent. And it is not clear that
21 this market would have actually succeeded. So even if
22 the firms somehow were rivals -- not clear to me that
23 they were exactly -- there is a lot less risk in this
24 secondary type because it is not clear that the market
25 is going to develop in the same way.

1 So does the current legal framework for
2 mergers work? Yes. And here the proof is, peer
3 reviewed empirical studies. So actually this goes to
4 another definitional question of what do we mean by
5 tech. Because does tech specifically mean platform
6 markets? That is where we have been focused. Or does
7 tech mean broader technology related markets? So we
8 heard, for example, Genzyme-Novazyme, a fascinating
9 case, you know, and I think rightly decided. So that
10 was in the pharma setting. So does tech also mean
11 pharma? Does tech also mean devices? Does tech also
12 mean hardware?

13 Going to our very first panel today, does
14 tech mean FinTech in a way that is, say, a different
15 kind of mechanism? And here I want to thank Steve for
16 walking through like how actually platforms are not all
17 made the same. So these are some introductory
18 thoughts. I am going to zip right through these in the
19 interest of time.

20 So venture capital actually is riskier. The
21 law of venture capital, which I teach, is also riskier.
22 And so we have various legal tools along those lines.
23 And I give some examples for that of why that is the
24 case. But you have heard already quite a bit of that.
25 So I am actually going to focus on something else. Two

1 different things.

2 One is the changing VC ecosystem. So again
3 if we are thinking that tech equals platform tech, then
4 it is fascinating that up until now what we have not
5 really heard about are, for example, three very large
6 tech companies in China with a number of other large
7 companies. If we are looking, for example, by market
8 cap or by revenue, these are significant players as
9 well and they are also significant investors in the --
10 there is significant Chinese investment in the
11 ecosystem. How do we know? Because this past quarter
12 was the first time Chinese venture capital passed that
13 of U.S. venture capital. Yet, this is not what we have
14 had the conversation about as of yet at this hearing,
15 so I raise that.

16 The second is we have talked simply about
17 venture capital. Let me suggest to you that there is
18 this other category called corporate venture capital.
19 So I think one of the -- though this has existed for a
20 long, long time, decades, Intel was really the first
21 tech company, as I would define tech, to spend lots of
22 resources in this area for corporate venture capital,
23 billions over the course of years. The last year in
24 the deal book, I think formal corporate venture capital
25 was roughly some \$30 billion.

1 And the way that they are trying to make
2 investments in corporate venture capital is much the
3 same way that we are seeing in traditional venture
4 capital, but somehow it might benefit the company in
5 new and interesting ways. People forget after Peter
6 Thiel invested in Facebook. Do you know who one of the
7 next major investors was? A little company you have
8 never -- a venture capital company you have never heard
9 of called Microsoft. Okay? We see this kind of
10 innovation in corporate venture capital.

11 But based on what Will Tom said, I am going
12 to throw in yet a third thing not on the slide. This
13 is how you know I am repositioning. And that is there
14 is a lot of investment just short of actual financial
15 investment. So think of any kind of strategic
16 alliances, licensing agreements, joint ventures, et
17 cetera, just short of actual merger type ownership
18 integration but something akin to a financial
19 investment.

20 So we will zip through yet again. So I think
21 I am going to preview something that the next panel is
22 going to talk about and that is for years I pushed on
23 Commissioners on both sides of the aisle the importance
24 of having a tech group. I have a different vision for
25 what this might look like than what you have heard

1 before.

2 I think very clearly a tech group needs to be
3 under the purview of the Bureau of Economics. There is
4 a reason for this. Because it turns out -- and this
5 goes to something Bill Rogerson raised and so I think
6 it was masterful for a number of reasons, but I want to
7 summarize some of the takeaways I got from his talk.

8 A, it turns out that we learn by analogy and
9 we have seen certain things before and we are applying
10 it to new circumstances. I think that is just as true
11 for law as it is for economics. But herein lies the
12 issue in this required integration of all the panels
13 that we have just heard. It turns out that what we
14 have to understand is if law -- and antitrust law is
15 based on economic analysis, the economic analysis is,
16 in turn, based on how do we understand the technology.
17 If you misunderstand the technology, our assumptions
18 are wrong and what we are looking for empirically is
19 also wrong. This is why we put it in there.

20 The second thing that I would do is that say
21 it turns out all tech is different. So, you know, the
22 person who understands devices does not understand
23 on-line platforms.

24 The third thing is we have a few different
25 ways of seeing how these experimentations work. One is

1 the competition market's authority in the U.K. that is
2 doing spectacularly interesting work in this area. The
3 other is the President's Council of Advisors on Science
4 and Technology where you actually bring in experts from
5 the field for a while. Wouldn't that be awesome if we
6 had very high level experts coming into the Federal
7 Trade Commission the way we do with the spectacular
8 economists that spent two years from the academy? And
9 I will just end there. Thanks.

10 MS. WILKINSON: Okay, thank you, Danny.

11 Next we will hear from Diana Moss, who is the
12 President of the American Antitrust Institute and
13 adjunct faculty in the Department of Economics at the
14 University of Colorado at Boulder.

15 MS. MOSS: Thank you, Stephanie. And thanks
16 to the Commission for holding these hearings and to OPP
17 for mustering the significant resources to plan and
18 organize them, and especially to Stephanie and
19 Elizabeth here for really doing a lot of prep work on
20 this particular panel, which I think hopefully will
21 show through in the discussion here today.

22 So just for openers, I want to make three
23 broad framing remarks. One is, what we are here to
24 talk about, the level of enforcement, antitrust
25 enforcement involving digital markets and especially

1 nascent -- acquisitions of nascent competitors is
2 adequate or should it be higher or lower, what should
3 it be.

4 So my observation is that history tells us
5 that the levels of enforcement, this type of
6 enforcement is pretty low actually. So AAI collects
7 data on enforcement levels across long spans of time.
8 We just filed a letter on the SMARTER Act and included
9 data in there showing about a two-and-a-half percent
10 challenge rate across both agencies from about 2000 to
11 present day.

12 So if you look at the number of acquisitions
13 in the digital market spaces, you know, over the last
14 three decades, we are looking at -- these are major
15 acquisitions. Rough cut numbers, do not cite or quote.
16 But we are looking at upwards of almost 700
17 transactions. And I would query everybody in the room
18 here go back through your mental Rolodexes and ask
19 yourself which acquisitions have been challenged by the
20 FTC or the DOJ, and the list is very short.

21 That does not mean that enforcement is too
22 low or too high. It means that it is a question. It
23 raises a legitimate question. So it is not because the
24 agencies are not looking or seeking and finding or not
25 finding potential violations of Section 7. It could be

1 because the agencies are not using the right lens and
2 that would be my argument. That it is a lens problem.
3 We are not asking the right types of questions. We are
4 not looking at stepping through the merger guidelines
5 methodology in a way that would be conducive to
6 properly identifying and framing potential competitive
7 harms in digital markets. So I think there is a lot to
8 be learned there.

9 So second, I want to try in my comments today
10 to dispel some myths and arguments that have sort of
11 driven, for lack of a better time, forbearance from
12 enforcement in the digital market spaces. One argument
13 is, well, we just do not have the tools. You know, the
14 toolkit is not adequate enough. Antitrust is too slow
15 for the digital markets, it cannot keep up. These were
16 all arguments made in Microsoft, which turned out to be
17 absolutely patently false. Antitrust absolutely could
18 take on the challenges presented by Microsoft many
19 years ago and it can do the same today. So it is not a
20 tools issue by a long shot.

21 Second is, well, it is difficult to predict
22 what these nascent technologies are going to be doing.
23 How are they going to develop? Are they going to turn
24 into significant competitive threats? The failure
25 rates are high. You know, what do we do? Do we throw

1 our hands up and say, you know, hands off, we are not
2 going to get involved here or do we actually try and
3 dig down and develop a set of tools and frameworks to
4 help us enforce Section 7 in a coherent way.

5 Third, in terms of dispelling myths and our
6 arguments, is this argument that, well, if we lean on
7 the digital market acquisitions too hard we are going
8 to kill the goose that laid the golden egg and that is
9 this model of entrepreneurship that is financed by
10 venture capital that creates small startups that are
11 incubated by the platforms and that are taken into the
12 fold by the platforms which creates this sort of
13 symbiotic or even other type of model.

14 My response to that is we should not be
15 waylaid by those arguments. Antitrust is not about
16 picking winners and losers. It should be neutral to
17 the type of business models that underlie a lot of
18 innovation and how entrepreneurship spurs innovation.
19 Entrepreneurship is about people. It is about places
20 and it is about process. There are lots of models of
21 entrepreneurship. Antitrust should not be deferring to
22 or favoring any particular model of entrepreneurship.

23 Finally, I believe the current tools that we
24 have in our toolkit -- and I think this has been spoken
25 to -- are certainly adequate and flexible enough. We

1 have models. We have theories of competitive harm. We
2 have many observations about conduct involving firms in
3 markets with very high levels of concentration.

4 But what we need to do is use the consumer
5 welfare standard to the full extent of its
6 capabilities. And that would be what I call a dynamic
7 consumer welfare standard. That means we look at
8 dynamic effects on the competitive effects side. That
9 means looking at short-term price effects, but also
10 longer term dynamic effects around quality, variety,
11 innovation, even choice, consumer choice. But we also
12 look at dynamic effects on the efficiencies side.

13 Right now, arguably, and I am sure many of
14 you will disagree with me, antitrust has really
15 suffered greatly from looking at very static effects on
16 the competitive effects side, but then allowing very
17 dynamic efficiencies as justifications for
18 acquisitions. That is a very asymmetric, unbalanced
19 implementation of the consumer welfare standard. We
20 should be looking at a dynamic symmetric implementation
21 of the consumer welfare standard in this particular
22 space. I will leave it at that.

23 MS. WILKINSON: Okay. Thank you, Diana.

24 Next we will hear from John Yun, Associate
25 Professor of Law and Director of Economic Education at

1 the Global Antitrust Institute. Prior to joining GAI,
2 John served in various roles at the FTC's Bureau of
3 Economics.

4 MR. YUN: Thank you, Stephanie. Thank you to
5 the FTC for having me. It is exciting to be part of
6 this panel.

7 So I am going to make you really happy,
8 Stephanie. I am going to talk about one minute and
9 then let's just get started with the questions and get
10 this thing rolling.

11 Basically, when we are talking about nascent
12 competitors or technologies and potential competition,
13 we are in a dynamic setting. I think that is a good
14 place to be. Static is important but dynamic clearly
15 is harder, but it does not mean that it is not
16 important. In fact, it is probably more important and
17 I think that holds for efficiencies and entries as
18 well.

19 So the point I think I would like to make --
20 and it is something that Diane just mentioned -- is
21 symmetry and I think there should be symmetry in how we
22 approach both dynamic harms as well as dynamic
23 benefits, static harms and static benefits and I think
24 that is the approach that we should have. Clearly,
25 elimination of competition, whether static or dynamic,

1 is important and relevant and we have to look at it,
2 but so are efficiencies and entries. I think that is
3 the story that we need to be sort of focusing on rather
4 than one side or the other, I think, to be fair.

5 So what guides us ultimately will be the
6 evidence of each particular case. We like to
7 generalize broadly what we learned or did not learn
8 from certain cases, but each case is going to be
9 different when you are in the dirty business of
10 bringing a case and analyzing a case and I think that
11 is sort of another takeaway I would like to sort of
12 establish. So with that, I will conclude my comments.

13 MS. WILKINSON: Okay. Thank you, John.

14 Next we will hear from Jonathan Kanter, a
15 partner at Paul, Weiss, Rifkin, Wharton and Garrison.
16 Prior to entering private practice, Jonathan served in
17 the FTC's Bureau of Competition.

18 MR. KANTER: Great, thanks. It is an honor
19 to be here alongside my fellow panelists and here at
20 the Commission.

21 I first stepped foot in the halls of the FTC
22 as a summer intern in 1996 after my first year of law
23 school and, at the time, the Chairman of the FTC was
24 Chairman Bob Pitofsky. He was revered then inside the
25 building, outside the building, and everywhere he went.

1 Seldom would you encounter a finer antitrust mind and a
2 finer leader in the antitrust bar. He was a model of
3 rigor, sophistication, and intellectual capability.

4 And in thinking about this session and the
5 hearings generally, I am drawn to some of Chairman
6 Pitofsky's writings. And if would indulge me, I am
7 going to read from them because I think it is a helpful
8 backdrop not just for this panel but the hearings
9 generally.

10 Chairman Pitofsky, who -- I think no one
11 would argue -- was seen sipping locally-roasted cold
12 brew in Brooklyn while listening to a 180 gram vinyl,
13 taking care of his pet rooster, I think he was a very
14 serious and rigorous antitrust practitioner.

15 "It is bad history, bad policy and bad law to
16 exclude certain political values in interpreting the
17 antitrust laws. By 'political values,' I mean, first,
18 a fear that excessive concentration of economic power
19 will breed antidemocratic political pressures, and
20 second, a desire to enhance individual and business
21 freedom by reducing the range within which private
22 discretion by a few in the economic sphere controls the
23 welfare of all.

24 "A third and overriding political concern is
25 that if the free-market sector of the economy is

1 allowed to develop under antitrust rules that are blind
2 to all but economic concerns, the likely result will be
3 an economy so dominated by a few corporate giants that
4 it will be impossible for the state not to play a more
5 intrusive role in economic affairs."

6 Chairman Pitofsky then discusses some of the
7 inevitable criticisms and goes on to say, I quote,
8 "Despite the inconvenience, lack of predictability, and
9 general mess introduced into the economists' allegedly
10 cohesive and tidy world of exclusively microeconomic
11 analysis, an antitrust policy that failed to take
12 political concerns into account would be unresponsive
13 to the will of Congress and out of touch with the rough
14 political consensus that has supported antitrust
15 enforcement for almost a century."

16 So against that backdrop, we are talking
17 about nascent competition, dynamic competition. And
18 one of the questions that often comes up is, well, how
19 do we take the tools, how do we take the merger
20 guidelines, how do we take all these things that we
21 have come so familiar with and use as crutches to try
22 to understand these issues in a dynamic space?

23 And the answer really is not trying to fit
24 the facts into a model and not trying to fit the
25 realities of the market into a box, but if the boxes do

1 not fit then we need new ones. Or they were not the
2 right ones in the first place. And so I do think with
3 that having been said, there are some helpful
4 guideposts that we can use when thinking about nascent
5 competition both from a Section 2 perspective as well
6 as a Section 7 perspective.

7 So first is the Microsoft case still provides
8 a very helpful framework for understanding the impact
9 of nascent competition. It talked about exclusion of
10 a nascent competitor. It is interesting to note that
11 in the Microsoft case the Court said when you excluded
12 a nascent competitor you had to own the acts of your
13 own deeds or the results of your own actions. And if
14 you break it, you buy it. So you didn't have to prove,
15 in that case, that the nascent competitive threat would
16 have resulted in something that came to fruition, but
17 that it could have.

18 And so in thinking about that, there are a
19 couple things I guess I would encourage the Commission
20 to think about and the bar to think about. First, when
21 should there be heightened concerns? I think Chairman
22 Simons noted rightly that often if you are looking at
23 market power, you look at the biggest companies. Well,
24 bigger is more suspicious and I do not think it is
25 controversial to suggest you are likely to see more

1 problems when you have companies with market power and
2 large market share.

3 Winner-take-all or winner-take-most markets
4 are likely to be more concerned for nascent competition
5 that could be disruptive. Monopoly maintenance,
6 acquisitions that intend to create a monopoly or
7 maintain a monopoly are the kinds of things that should
8 result in heightened concern. Impact on dynamic
9 competition.

10 Markets where there is social utility, news
11 or information, these markets have traditionally and
12 the law has traditionally looked on them with greater
13 scrutiny and greater concern because of the social
14 value and we should not lose that and that fits well
15 with Chairman Pitofsky's remarks.

16 The behavioral realities of participants on
17 the platform. So let's not try to pretend that
18 consumers are homogeneous. They are idiosyncratic and
19 often behave in unpredictable and sometimes
20 "irrational" ways.

21 Last thing is does the transaction or the
22 conduct relate to a conflict of interest and will the
23 transaction or the conduct change the incentive and
24 ability to engage in that or exercise conduct as a
25 result of that conflict of interest in a way that harms

1 the integrity and the output on the platform itself.

2 MS. WILKINSON: Okay. Thank you, Jonathan.

3 And, finally, we will hear from Sally
4 Hubbard, a senior editor with the Capitol Forum where
5 she covers monopolization issues and data regulation in
6 high-technology markets. Previously, Sally served as
7 an Assistant Attorney General in the New York State
8 Attorney General's Antitrust Bureau

9 MS. HUBBARD: Thank you to the FTC for having
10 me here today. And I want to give the standard
11 disclaimer that I am sharing my own views and not the
12 views of my employer.

13 I want to echo actually a lot of what
14 Jonathan just shared. Since this panel is about
15 enforcement levels, I can sympathize with enforcers
16 since I was an Assistant Attorney General. The
17 litigation realities for challenging these types of
18 mergers are pretty harsh. My view is that current
19 antitrust doctrine is really missing the forest for the
20 trees. And I do not think this is an accident. I
21 think it is as a result of a decades long campaign by
22 Chicago School economics and corporate defendants to
23 really weaken the antitrust laws. So this is the
24 reality that enforcers are facing.

25 And in recent years, though, however, I have

1 been able to step back from those harsh litigation
2 realities as a writer focusing exclusively on Google,
3 Apple, Facebook, Amazon and antitrust. What I have
4 gotten to do is have the luxury of looking at the big
5 picture. I get to look at the forest, and what I am
6 seeing is really more like a cleared Amazon Rainforest
7 than a healthy competitive landscape.

8 As Diana mentioned, there has been hundreds
9 of acquisitions by the big tech platforms. I am
10 talking about Google, Apple, Facebook, Amazon.
11 Hundreds of acquisitions, billions of dollars' worth of
12 deals, and many of those deals have allowed these firms
13 to maintain their monopoly power, extend their monopoly
14 power or eliminate competitive threats.

15 So when enforcers are looking at tech
16 platform acquisitions, they should not get distracted
17 by promises of short-term consumer welfare enhancements
18 because what benefits consumers is competition. A
19 short-term product improvement that is labeled
20 "procompetitive" does not justify the elimination of a
21 competitive threat. After all, Section 7 of the
22 Clayton Act prohibits mergers and acquisitions where
23 the effect may be substantially to lessen competition
24 or to tend to create a monopoly.
25 The Clayton Act does not qualify this prohibition by

1 saying unless the merger creates efficiencies or unless
2 the merger leads to low prices in the near term or
3 unless the merger allows an entrepreneur to exit
4 competition.

5 And let's not forget the second part of
6 Section 7. It prohibits acquisitions where the effect
7 may be to tend to create a monopoly. This means, as
8 others have pointed out, that enforcers should
9 scrutinize acquisitions by dominant platforms more
10 heavily than acquisitions by firms that lack market
11 power. But as you have heard on some of these panels,
12 our familiar metrics that we like to rely on as
13 antitrust enforcers are not really that reliable,
14 right? Prices, market shares, market definitions,
15 markets are very fluid. Those handy tools that we are
16 used to relying on can fail us when we are looking at
17 acquisitions of tech platforms.

18 But I want to remind everyone that price
19 effects are merely one of the several metrics that are
20 used to assess whether competition may be lessened and
21 low prices are not the goal in and of themselves.
22 Competition is the goal. Competition is what maximizes
23 consumer welfare in the long term.

24 And the product definition markets can lead
25 enforcers astray because the biggest competitive threat

1 to platform incumbents are likely to come from firms
2 that are in seemingly different product markets
3 altogether. Why is that? Well, because startups that
4 want to challenge tech giants and their core
5 competencies cannot actually get funded.

6 So if our typical proxies are not much help,
7 enforcers should be able to show competitive effects
8 directly. They should not have to prove the
9 second-best proxies. And this is what the horizontal
10 merger guidelines already say. But often courts do not
11 go along with this.

12 So where do we go from here? I see about
13 four main options for enforcers. The first is to bring
14 hard cases and try to change the legal doctrine and the
15 current standards. You got to pick the ones that have
16 the best facts, but you also have to know there is a
17 good chance you are going to lose. And if Congress
18 agrees with you and disagrees with the courts, that
19 could help spur option number two, which is a
20 legislative fix.

21 There have been some proposals like the
22 Klobuchar Bill. The odds of any of these things
23 passing is a question, especially as these tech giants
24 keep increasing their lobbying budgets.

25 The third option is for the FTC to get

1 creative with the tools that are available. Use
2 Section 5. Use rulemaking authority as Commissioner
3 Rohit Chopra has recommended. Know that privacy
4 regulations can also open up competition, as can
5 interoperability. And even make second requests
6 automatic when you are dealing with such dominant
7 platforms.

8 Now, the last option is not really an option
9 in my book, but that is to do nothing and allow tech
10 platforms to eliminate competitive threats into
11 perpetuity. Thank you.

12 MS. WILKINSON: Okay. Thank you, everyone,
13 for these opening remarks. We will now move into the
14 Q&A portion of the panel.

15 As a reminder to the audience, if you have
16 questions that you'd like to submit to the panel,
17 please fill out one of these cards. We will have
18 people walking around the auditorium and collecting
19 these cards and then they will make sure they get sent
20 up to me.

21 So I would like to start off the panel by
22 asking everyone some broad foundational questions. Are
23 current levels of merger enforcement in digital markets
24 appropriate? Should the antitrust agencies be more
25 concerned about false positives or false negatives when

1 making enforcement decisions regarding nascent
2 acquisitions in digital markets? And are there
3 particular cases where you believe the antitrust
4 agencies either went too far or did not go far enough
5 in their enforcement efforts?

6 And for such cases, I would be interested in
7 hearing feedback that could be instructive for future
8 investigations, such as whether there is an alternative
9 analytical framework that you believe the agencies
10 should have used to evaluate these acquisitions or
11 whether there are facts that the agencies may have
12 missed that were reasonably available at the time of
13 the acquisition and, if known, might have resulted in a
14 different outcome.

15 I'll open that up to the panel.

16 MS. MOSS: Do we volunteer?

17 MS. WILKINSON: Sure. Diana, going first.

18 MS. MOSS: Okay, thank you. So very good
19 question. I have just a couple remarks on this. One
20 is, frankly, it is difficult to say whether we should
21 be concerned about false positives or false negatives
22 for two reasons. One is we have had relatively little
23 enforcement in the digital market spaces. So when you
24 do not have any observations to work with, it is kind
25 of hard to tee up those counter-factuals.

1 Second, we do not have the benefit, as we do
2 in nondigital markets, of a lot of merger
3 retrospectives. So we have now heard all day long how
4 valuable merger retrospectives are. And, of course, we
5 are dealing with a lot of data and evidence mainly
6 through the work of John Kwoka and all the scholars who
7 have produced individual retrospectives that really
8 support the notion that we should not be so concerned
9 about false positives; that four-to-three mergers, for
10 example, are almost incredibly surely to be damaging
11 and that enforcement actually supports higher levels of
12 challenges in cases of four-to-three mergers.

13 We are just not there. You know, we are in a
14 warp. We are in a time warp here because enforcement
15 in digital markets is really just evolving at this
16 point and we have not done retrospectives. We can talk
17 later about what those retrospectives might look like.

18 My second point on this particular question
19 is -- you know, is the framework correct? Is the
20 enforcement level correct? Well, you know, I think the
21 way you think about the framework is in the digital
22 market spaces, much like in nondigital market spaces,
23 you are talking about three fundamental types of
24 consolidation. One is horizontal mergers. For example
25 Google-Softcard, Facebook-Instagram. You are talking

1 about vertical mergers that combine firms in adjacent
2 markets. That would be in Google-ITA, that was online
3 travel and back-end travel software; Apple-Shazam, that
4 was music identification technology and music digital
5 procurement technology. But we are also talking about
6 conglomerate mergers in the digital market spaces.

7 I think this is the big one. It is that
8 antitrust has never done well with conglomerate
9 mergers. It barely does very well with vertical
10 mergers, cite CBS-Aetna, and look at our press release
11 on the AAI website.

12 Horizontal mergers, it does pretty well
13 looking at overlaps and the elimination of head-to-head
14 competition. We have lots of tools to help that
15 analysis along. But it really sort of deteriorates
16 from there. Vertical is a challenge. If vertical is a
17 challenge, conglomerate is going to be an enormous
18 challenge.

19 So mergers like Microsoft-Linkedin, I would
20 put in the conglomerate merger space. You can argue
21 with me on that. Facebook-Face.com, that was social
22 networking and facial recognition. Google-DoubleClick
23 combined ad serving through pay-to-click and ad serving
24 through banner and exchange ads. These are all mergers
25 that fill -- that occur in more broadly defined

1 markets. And that is very much in keeping with the
2 digital platforms because it is all about linked
3 services and products, connectivity, and the
4 development of value-added services to users and
5 consumers.

6 Antitrust does not think well that way. It
7 is all about transactions. It is all about buyers and
8 sellers and suppliers and distributors. So we really
9 do need a different frame of reference.

10 And when we get to the conglomerate mergers
11 and talk more specifically about competitive effects, I
12 think we have even more problems there.

13 MR. YUN: Can I weigh in?

14 MS. WILKINSON: John?

15 MR. YUN: So I have heard a lot about
16 retrospectives and I agree you have to be for
17 retrospectives. If you are not for retrospectives,
18 something is wrong with you I guess. So I am for it.

19 But if you are actually going to do it, how
20 do we do it and what does it look like? So let's get
21 in our time machine, our back to the future flux
22 capacitor, hot tub time machine, whatever you want to
23 get in, and go back to April 9, 2012, when Facebook
24 bought Instagram. Instagram, at that time, had 50
25 million people. What would we expect for that to be ex

1 ante -- looking ex ante to be ex post as sort of an
2 okay merger? That Instagram would have puttered along
3 to what it was, 50, grown at an historic rate,
4 integrated into Facebook to some degree. And we are
5 like, okay, that was a good merger. It did not seem
6 like it was that important a -- or they discontinued,
7 after a few years, Google Plus Style, and it was just
8 like, oh, it did not really go anywhere. I guess it
9 was not important again. Or it gets very successful.
10 It becomes one billion users or 19 times its size,
11 which is reality today.

12 So when I look at that growth from 50 million
13 to one billion, you know, in a pretty short period of
14 time I do not know what to do. That does not strike me
15 as, on its face, anticompetitive. It seems like it
16 expanded tremendously and reached a lot of consumers.
17 I do not know it for a fact, so I am not going to
18 assert it, but I am sure Facebook has poured plenty of
19 technology into that product.

20 So that is, I think, the difficulties we face
21 with these counter-factuals and what is the right one
22 for these types of things. Suppose that Facebook's
23 purchase of Instagram increases probability of success.
24 Let's just assume that, whereas it was 50 percent times
25 three, which is a compound percentage of 12.5 percent

1 of success in a market. There are a lot of hurdles
2 these younger firms have to overcome and there is some
3 probability they fail and probability they succeed.

4 What if they increased it 20 percent, 30
5 percent, 40 percent? That compound probability
6 doubles, triples. So is that an efficiency we
7 recognize? Would that, in a retrospective, be
8 something we credit the agencies for getting right?

9 And those are just the questions I have and I
10 am not asserting Facebook-Instagram is the model of a
11 procompetitive potential acquisition or it is
12 anticompetitive. It is just I think there are some
13 difficulties in really coming up with the right
14 counter-factuals when there has been exponential
15 growth. So that is sort of something I wanted to throw
16 out there.

17 MS. WILKINSON: Sally?

18 MS. HUBBARD: The Facebook-Instagram merger
19 is one of the ones that I think is kind of the biggest
20 mistakes to have let through. One of the warning signs
21 that there was that could be a little bit of a red flag
22 to look out for in the future is that Facebook was
23 paying \$1 billion for Instagram at that point.
24 Instagram had no revenue and they had 50 million users.
25 What did Facebook see that it was worth a billion

1 dollars to them? So that is a red flag to look out
2 for.

3 And then what has been the impact of this
4 going forward? I have written about how I think a lot
5 of the fake news and privacy problems that we are
6 having with Facebook right now are related to the fact
7 that it is a monopoly. It does not have the pressures
8 of competition to discipline it. I think competition
9 and the economy keeps firms on their best behavior,
10 either that or regulation, right? I prefer
11 competition.

12 I know after the Cambridge Analytica scandal
13 a lot of my friends said, oh, well, I am quitting
14 Facebook, but I am still on Instagram. They did not
15 even realize that -- you know, they did not have a
16 choice. They did not have a way to vote with their
17 feet and say, no, it is not okay for you to give our
18 data away without our permission.

19 So I think -- and another thing is that
20 Facebook basically has Instagram as its fall-back Plan
21 B. It is really behaving in an irrational way, letting
22 its brand reputation go so downhill with the way it is
23 really not fixing the problems. But it knows it has a
24 Plan B, which is Instagram.

25 So I think that is actually one of the most

1 problematic of the mergers, but I think pointing to
2 that offer price is one thing to look at there.

3 MS. WILKINSON: Okay. Jonathan?

4 MR. KANTER: So all helpful points. I am
5 going to stay away with commenting on any specific
6 transaction or specific company, but I do think it is
7 helpful to make a few observations here.

8 One is, we seem to understand, or at least we
9 feel like we kind of understand these issues, in the
10 context of Section 2, right. And so if excluding a
11 company, it would be a problem, then maybe buying a
12 company is a problem. Maybe it is not. But is the
13 analysis when you are talking about nascent competition
14 really all that different? And should it be different?
15 Maybe not. I think that is something worth
16 considering.

17 Second is, this kind of goes back to
18 something that Danny was talking about, which is -- and
19 to some degree, Diana -- I think we get tied up in
20 formalistic distinctions, like horizontal and vertical
21 and conglomerate, right. I mean, it is like trying to
22 watch 4K TV through an 11-inch black and white TV set.
23 I mean, those are distinctions that really do not apply
24 to a multidimensional, three-dimensional age.

25 And I think sometimes the problem with the

1 law focusing so much on economic theory is it gets
2 anchored in theories that are kind of stayed. Those
3 kinds of distinctions, as being the anchors for how we
4 evaluate these kinds of problems, tend to throw us off
5 and away from the issues that really matter. And so I
6 think we have to figure out better ways to look at the
7 dynamic nature of competition.

8 When I think about it, you know, people often
9 talk about Schumpeter and so long as, you know, the
10 next thing is on the horizon, everything is going to be
11 fine, but the issue on platforms is that the next thing
12 on the horizon is often this new nascent threat that
13 comes on the platform. And so you have to make sure
14 that there is enough room on the platform for these new
15 threats to emerge and to breathe.

16 And I am sympathetic to what John was saying.
17 I mean, these are hard issues. How do you figure out
18 which deals to block and which ones not to block, when
19 to take action and when not to? And I get that, it is
20 hard. But I think the paralysis due to concern about
21 false positives has resulted in perhaps an
22 overcompensation to the point where maybe we are not
23 addressing problems that need to get addressed because
24 we are dependent on defending our tools that we are not
25 spending enough time rethinking them.

1 MS. WILKINSON: Okay. Thank you. Danny?

2 MR. SOKOL: Some very quick points. So
3 sometimes we have merger retrospectives, we call them
4 academic empirical work. The problem is a lot of times
5 we all look narrowly at the Iowa economics literature.
6 There are not as many of these studies as we would
7 like, but, in fact, they do exist, in finance and
8 information systems, in marketing, strategic management
9 and operations management.

10 And specifically to the point of
11 Facebook-Instagram, you know, we have that. It is
12 called an A publication to get you tenured at any of
13 the schools where we had business school professors
14 earlier, Steve, Judy, Robin, Bill. That was in
15 management science. Li and Agarwal's 2017 paper,
16 Platform integration and demand spillovers in
17 complementary markets: Evidence from Facebook's
18 integration of Instagram. And, in fact, what they find
19 is that the deal was procompetitive and it actually
20 also helped the larger of the third-party complementary
21 app developers. So I think we can put that one to
22 rest.

23 Broadly, I would say merger retrospectives
24 are helpful in a different way. It helps frame a
25 broader political debate, something John raised

1 earlier. So I think one problem that the agencies have
2 had here relative to other -- oh, this is the first
3 time I have ever been told I need to speak into a
4 microphone. Normally, my voice carries.

5 So the other thing is relative to, say, DG
6 Competition, I think the U.S. agencies do a less good
7 job in this particular area. And that is in mergers,
8 in deals that they allow to go through, they do not
9 give the kind of detailed commentary, particularly for
10 high-profile deals, particularly for platform deals
11 that we have seen DG Comp do. And I think that this
12 goes to some of the political questions that get asked
13 because people are frustrated because the agency simply
14 is not sharing its knowledge I think as effectively as
15 it could. It is a different form of storytelling, but
16 I think one that is highly important.

17 The other thing is I want to put in a plug
18 for the work of AAI because AAI really has tried to
19 think interdisciplinary-wise, along a number of
20 different areas to sort of think what do we know and
21 how can we sort of bring in tools from different
22 disciplines to help tell a more nuanced story. So just
23 a little plug there.

24 But actually a plug back to something that
25 John brought up earlier, like how do we think, for

1 example, about quality? So I want to plug somebody in
2 the audience and that is Debbie Feinstein because when
3 she was head of BC, one of the most fascinating,
4 nuanced and, I think, compelling speeches that she gave
5 was to talk about how do we look at quality and how do
6 we listen to particular stories, specifically in the
7 hospital merger context, for qualitative evidence,
8 where again, qualitative evidence does not get treated
9 the same way in courts as the cost-based evidence does.
10 And I think she gave a very nice framework for how the
11 agency should use that. So final plug. Thanks.

12 MS. WILKINSON: Great, thank you.

13 Okay. So let's now move on to questions
14 regarding product market because we have heard a lot
15 about this over the last few days with platform
16 markets. How should relevant antitrust markets be
17 defined when evaluating nascent acquisitions? Would
18 defining markets more broadly allow the agencies to
19 challenge more of these acquisitions?

20 And as you are answering that, think about,
21 on the other hand, if markets are defined more broadly,
22 do we also have to consider how that will impact market
23 structure and our ability to allege that competition is
24 substantially lessened? In other words, if we define
25 the market more broadly and we have to include more

1 firms in the market such that the market shares and
2 HHIs become more diluted, would that actually reduce
3 our ability to challenge some of these nascent
4 acquisitions?

5 Also, how would this impact our ability to
6 allege a narrow product market in subsequent cases, if
7 appropriate?

8 John?

9 MR. YUN: So taking a step back, I know Paul
10 Denis went through the classification of what is
11 nascent and potential competition. So I do not want to
12 -- well, I will rehash a little of that, but I do want
13 to get some terminology clear because I think it helps
14 us answer this question. If done right, I do not think
15 we go anywhere in terms of broadening or narrowing.

16 So here we go. A nascent competitive threat
17 came out of Microsoft largely, as we sort of talked
18 about it today, and it was about emerging technologies.
19 In that case, it was Netscape and Java and Middleware,
20 as those being sort of technologies that were not in
21 the relevant product market, per se, but either would
22 be in the future or would facilitate others, including
23 themselves, in the future. And that was sort of the
24 idea. And sort of on its face, that is a reasonable
25 enough conjecture and hypotheses, and I think that is a

1 good way of looking at it.

2 Potential competition is -- I like to think
3 of it actual versus potential entry. Actual entry, we
4 know it is a competitor today and it is competing and
5 it affects price. Potential competition, as I perceive
6 it -- and I know others use it a bit differently -- but
7 I think generally as a guideline, this is in sentence
8 one of the merger guidelines. We hear it a lot. Oh,
9 we need more stuff happening in FTC. Sentence one,
10 "Guidelines outline the principal analytical
11 techniques, practices, and the enforcement policies of
12 the DOJ and FTC with respect to mergers and
13 acquisitions involving actual or potential competitors.

14 So there the relevant market is the
15 relevant market. It is just they are not in today, but
16 there is some projection, whether it is tomorrow or two
17 years or three years, that they will be in the future.

18 Now within potential competition, there are
19 further delineations. What is it? It is actual
20 potential competition and that -- how I would think
21 of it is just an entrant that has not come in yet but
22 could.

23 Then there is the perceived potential
24 competition where there is not really an entry story,
25 it is just their presence constrains prices today so

1 they are a competitive influence. And then there is
2 potential potential competition, which is the
3 Nielsen-Arbitron, which I like to think of as a
4 potential entrant in a potential market. I think that
5 maybe is a little helpful. Or future market. I think
6 that is more fun, future. So those are the
7 terminologies.

8 So if we do those right, I do not really
9 think we need to go in broader stuff because when we go
10 broad -- and I think others have probably picked up on
11 this -- we have to be careful. If you are saying,
12 well, Instagram was a competitor and it was not a
13 nascent competitor, but it was sort of a competitor in
14 a differentiated space, then you are expanding the
15 market.

16 Well, some people would say, no, no, you do
17 not have to do that, you can sort of in a nonlinear say
18 they were unique. I think you are getting into very ad
19 hoc, dangerous sort of use of antitrust, using the
20 words of antitrust, but you are really sort of
21 gerrymandering the market at that point.

22 So long story short, definitions are
23 important, but I think within each structure you can
24 work within the existing framework.

25 MS. WILKINSON: Okay, good.

1 MR. KANTER: Yes, I think I agree with John.
2 I think the U.S. vs. Microsoft framing of nascent
3 competition is the right way to think about this. I
4 mean, there certainly are important questions about
5 whether product A is a substitute for product B and
6 whether they are existing or potential competitors.
7 And I think that is something that the agencies will
8 look at and, you know, have traditionally looked at.

9 But when you are dealing with platform
10 technologies, more often than not these technologies
11 have very strong feedback effects. They have -- they
12 are winner-take-all or winner-take-most. And the
13 threat, the platform threat is likely to come from
14 disruptive technologies, things that get in the way of
15 that feedback loop. And that is, you know, that is
16 really where the nascent threat was the case in the
17 U.S. vs. Microsoft in terms of the applications barrier
18 to entry.

19 And if you are thinking about acquisitions or
20 if you are thinking about Section 2 cases and you are
21 looking at nascent threats, it is really important to
22 see it in the context of that feedback loop and
23 understanding the realities of the way the market
24 functions. That is hard to do. And I think sometimes
25 one of the challenges we have is that we are trying to

1 fit things into market definition boxes like sort of
2 the question, you know, would suggest. I think that
3 often leads to kind of missing the mark in terms of
4 where these issues really lie.

5 MS. WILKINSON: Diana?

6 MS. MOSS: Stephanie, can I just add, I mean,
7 this is a good discussion for sure, but on the market
8 definition issue, I think it is important to add that
9 market definition should not be the step one in the
10 merger analysis process.

11 So if you go back to the merger guidelines,
12 we have heard a lot about the guidelines. I would hope
13 and think and expect that the agencies, given how
14 experienced they are, would be looking to things like
15 direct evidence first when presented with a new
16 acquisition involving a nascent competitor. There have
17 been enough acquisitions as I cited to earlier. There
18 is water under the bridge. There should be lots of
19 observations in terms of which deals have eliminated
20 head-to-head competitors, which deals -- where do we
21 have natural experiments, for example, to see what
22 happened to entry, after an acquisition and even exit.
23 So direct evidence should play a heavy, heavy role
24 here.

25 Then I would offer up that the agencies, as

1 they usually do, will have a good theory of harm going
2 into a case before they even get to market definition,
3 right, whether that theory of harm is vertical in terms
4 of classic foreclosure or concerns over coordinated
5 effects or, you know, simple elimination of a small
6 rival in a concentrated market to drive up price. So
7 but when we do get to market definition, which has to
8 be gotten to unless you really have a strong case for
9 direct evidence, that, you know, we would be working
10 very hard and carefully to translate sort of standard
11 economic antitrust concepts over to the more complex
12 digital markets.

13 So where we have bilateral transactions in
14 traditional markets, we have ecosystems of exchange in
15 the digital spaces, where we have easily identified
16 buyers and sellers in traditional markets. We have
17 suppliers that both sell and compete. So that is more
18 complex.

19 Revenue generation means value proposition on
20 the digital market side, right. We have prices as
21 metrics of exchange, whereas in digital markets we have
22 eyeballs or attention or information as metrics of
23 exchange, right. So where we have easily identified
24 products competing with each other and horizontal
25 plays, we might have differentiated platform offerings

1 over on the digital market side.

2 These are relatively easily translatable
3 concepts, which brings us to market definition which
4 could include any number of relatively narrow markets
5 but also broader ecosystem-type relevant markets that I
6 genuinely think there could be made a case for that.
7 So simple markets like data, cloud services,
8 connectivity services, content and advertising, those
9 are simply defined markets depending on the theory of
10 harm. But antitrust, I think, has to widen the lens to
11 think about these broader markets that might include
12 connected services not just in adjacent markets, but in
13 related markets that very much are endemic to the
14 platforms and how they create value added for their
15 users.

16 MS. HUBBARD: Yes, I would just like to
17 second what Diana said about really focusing on the
18 theory of harm. And I think that is really even more
19 important with tech platforms because it is not going
20 to be so obvious where the harm might be as the markets
21 are fluid. And looking at the competitive effects
22 first instead of just saying, okay, this is a market --
23 as we see it, you know, Facebook is a social network,
24 Instagram is a photo-sharing app, even though really
25 what everybody did on Facebook was share photos, but it

1 takes just a deeper dive into the competitive effects
2 analysis and the theory of harm before kind of jumping
3 to a conclusion about what the relevant product market
4 is.

5 And the markets are fluid, too. I mean, they
6 change. They have a lot of different -- you know, as
7 Jonathan said earlier about it being vertical,
8 horizontal, conglomerate. They are multi-faceted.

9 MS. WILKINSON: Okay. Danny?

10 MR. SOKOL: A lot of what I would say is
11 covered. So the only thing that I will respond to is a
12 comment that Jonathan raised which is that we may need
13 new boxes. I would actually suggest that the nature of
14 antitrust, both on the law side and the economic side,
15 is that we look at older situations and try to reason
16 by analogy, because ultimately you have to convince the
17 finder of fact, a judge. And it is about how do we
18 make the world administrable.

19 So what is Microsoft? Microsoft, by analogy,
20 was Lorain Journal, right?. What is economics of
21 platforms or economics of new economy? I think Shapiro
22 and Varian's book, Information Rules, was brilliant
23 because it said actually traditional economic tools can
24 be applied in the setting that we have seen before.
25 And, oh, by the way, let's be careful for how we define

1 markets, right, if we do not define them narrowly
2 enough, we are going to lose.

3 I am going to actually go back to something
4 that Paul Denis raised earlier, which is the 1982
5 California Law Review Symposium. I would actually
6 suggest that people reread the work in that symposium
7 by Don Baker and Bill Blumenthal, who made exactly that
8 point back in the day that, actually, we are going to
9 see more enforcement in highly specialized markets.

10 So what is old is new again, not just Steve's
11 haircut.

12 MR. KANTER: Could I comment on that because
13 I think this gets to dangerous territory, and I
14 appreciate your remarks, Danny, and respect them
15 greatly. But this is where I think the realities of
16 the marketplace have to be factored and weighed above
17 traditional models or traditional boxes.

18 So these technologies are transformative in
19 many and fantastic wonderful ways. But they have
20 changed industry almost forever, right. And if you
21 talk to people who operate in these markets, the rules
22 of engagement have shifted in so many sophisticated
23 ways that if you are trying to sort of figure out a
24 model for how competition works and take the realities
25 of these complex markets and put them into those models

1 for how competition works, they are not going to match
2 up.

3 So some of the discussion is, well, how do we
4 modernize that? How do we look at -- you know,
5 economics is supposed to help us understand how markets
6 work so that we can make more informed decisions
7 regarding antitrust enforcement. But I would say that
8 we -- one, we need to update those models because a lot
9 of them are a little stale for how markets actually
10 function in today's economy.

11 Two is the technology is really hard and
12 detailed and sophisticated and there needs to be
13 greater expertise really to parse through it. And
14 there has been discussion about a Bureau of Technology
15 or something to start really understanding the impact
16 of data, understanding kind of the feedback effects and
17 network effects, understanding which technologies are
18 likely to impact feedback loops and network effects.

19 And I think technological expertise is just
20 as relevant to antitrust as economics expertise, and I
21 would not put it in the Bureau of Economics. I think
22 the Bureau of Economics is important and fine just
23 where it is. But why is one sphere of expertise more
24 important than another when it comes to antitrust,
25 right? I do not see one as mutually exclusive to the

1 other.

2 MS. WILKINSON: Any further response on this
3 question?

4 MS. HUBBARD: Plus one to not putting the
5 Bureau of Technology under the Bureau of Economics.

6 MR. YUN: So I am going to be -- so you have
7 to be for merger retrospectives and you kind of have to
8 be for a technology group at the FTC. But I am going
9 to say no technology group at the FTC, Bureau of
10 Economics or not, because I think -- you know,
11 technology, I do not know, maybe I am being naive. But
12 I think it is a huge field and every case has disparate
13 issues even within the realm of economics and -- I
14 cannot imagine within the realm of technology.

15 So having a staff sort of on hand roving to
16 do technology on cases that involve highly technical
17 issues in completely different technological areas, I
18 think it makes more sense to bring in experts early in
19 that field, so let's get a budget ready. It is not
20 about the money. It is about getting the right person
21 at the right time.

22 So let's not wait last minute, of course, but
23 let's get the right person in that field specifically.
24 I think we will do a lot better.

25 MR. KANTER: Economics is pretty broad,

1 though, right. So why wouldn't you have the same
2 approach when it comes to economists and economics?

3 MR. YUN: Well, IO is broad, but it is
4 reasonably cabined within a certain area. Economics is
5 broad and you can bring economic historians on -- we
6 have in the past -- but they still are guided by basic
7 IO principles of the guidelines and how we assess
8 mergers. You learn your trade.

9 MS. WILKINSON: One minute.

10 MR. SOKOL: Since I had the slide on tech, I
11 will just throw in one thing. I think that the
12 advantage of having something within an agency is that
13 you create institutional memory and I think that that
14 is really important.

15 MS. WILKINSON: Okay. Thanks.

16 Moving on from product market now, I would
17 like to focus on what kinds of competitive effects and
18 entry barriers should we be most concerned about when
19 evaluating nascent acquisitions in digital markets,
20 especially considering that many of these markets are
21 considered zero price? Conversely, what kind of unique
22 benefits and efficiencies should we credit when
23 evaluating these acquisitions?

24 MS. MOSS: Thanks, Stephanie. I will stab at
25 this one. But I want to take my time, limited time, to

1 really talk about one particular play. Acquisitions of
2 nascent competitors can occur in all sorts of different
3 plays. It can be sort of off the platform, like a
4 Facebook-Instagram kind of thing, or it can be to the
5 side of the platform or it can be right on the
6 platform.

7 So I want to focus just briefly on a class of
8 transactions or players that involve acquisitions where
9 the platform is very much involved, where the platform
10 controls critical access to data, for example, to
11 search functionality, to distribution through payment
12 systems, for example, to the ultimate consumer, where
13 there might be network effects that really amp up the
14 market and the strength of the reaction. So this
15 specific class of transactions where you have a
16 platform that may or may not be invested in a
17 particular business acquiring a nascent competitor and
18 bringing it onto the platform. That, I think, deserves
19 some very, very special attention because it is all
20 about access.

21 There is no entry for that type of nascent
22 competitor because you would have to enter at the
23 platform level at multiple levels. You would have to
24 create a whole new platform, but that is the business
25 model for these types of rivals. So entry is really

1 not the issue. They are trying to get access to a
2 platform which controls lots of functionality and is
3 really the lifeline and the channel and conduit to the
4 ultimate consumer.

5 So, you know, that is the kind of thing for
6 which we actually have lots of history and models and
7 data points on conduct. I mean, I know this sounds
8 silly, but I am a former federal regulator and some of
9 my biggest projects in the earlier part of my career
10 were developing opening access rules for electric
11 utility systems, right, where you had a vertically
12 integrated transmission owner and you wanted a small
13 generator, an independent generator wanted to get on
14 the system. They had to get access to transmission.
15 They had to wheel the power through the system.

16 I mean, that is a general model that
17 antitrust and regulation has dealt with. Antitrust
18 should deal with it by getting the antitrust laws right
19 without having to turn to regulatory types of concepts.
20 But the competitive effects that we worry about with
21 that particular play are things like a platform
22 potentially changing the rules of the game, hindering
23 or hampering potentially interoperability, changing
24 algorithms to make it more difficult to interoperate on
25 the platform.

1 I think this concept of having your own
2 private label as a platform is -- we heard this earlier
3 in the day -- a really important concept. Think about
4 shelf space in a grocery store where Safeway has its
5 own private label. You have a big food manufacturer,
6 who is the category captain, controlling shelf
7 placement for that particular group of products or
8 services. It is a similar concept, right. It looks
9 like brand competition, but it is really not. It is an
10 illusion of competition, especially when the platform
11 acquires a smaller nascent competitor.

12 So, you know, we want to talk about data
13 sharing, for example, the use of data, critical access,
14 critical input. Data is a really important input, a
15 strategic asset, to control that, to shape or to
16 control competition in those spaces. So this
17 particular play, I think, is very important to think
18 about and we have some really good thinking in history
19 and models that are framed around the access problem
20 and how antitrust can get to that through merger
21 control.

22 MS. WILKINSON: Okay. Sally?

23 MS. HUBBARD: Diana, I am just a little
24 confused about what you are talking about because I
25 know I have actually spent the last couple years just

1 documenting these instances where the tech platforms
2 are kind of burying and denying access as the problem
3 you are identifying, this access problem.

4 MS. MOSS: Right.

5 MS. HUBBARD: Basically denying -- like I
6 say, they are controlling the game -- they are
7 controlling the arena in which the game is played and
8 they are also playing the game themselves. So they can
9 be the platform, be playing on the platform, and then
10 bury anyone else who also tries to play on the platform
11 against them, like bury their vertical rivals on the
12 platform. You know, like Amazon putting its basic
13 product at the top of the search results or Google
14 putting its shopping products on the top of the search
15 results.

16 But I have not seen many, like, acquisitions.
17 Is there an example? I mean, I see this all the time,
18 this burying, this denying of access to competitors.

19 MS. MOSS: Right.

20 MS. HUBBARD: But I just have not seen any
21 acquisitions.

22 MS. MOSS: Well, I think it is --

23 MS. HUBBARD: Or I am not thinking of them.

24 MS. MOSS: No, it is a good question, Sally.

25 So, you know, for example, Google's acquisition of Waze

1 was an acquisition of a smaller rival where Google had
2 that own capability, that own functionality itself. We
3 could find examples in Amazon. For example, Amazon is
4 pushing into drug distribution. That may be
5 efficiency-enhancing given the problems we are seeing
6 in the drug distribution markets and the PBMs. But
7 they are acquiring PillPack, which is going to be a
8 source of important input.

9 So these types of acquisitions where the
10 platform has their own private label and then there is
11 a nascent competitor and then that nascent competitor
12 is absorbed by the platform, you know, the question is,
13 well, how does that affect competition, how does it
14 affect consumers, right?

15 And, you know, my argument would be we need
16 to be focusing much more on innovation theories of
17 harm. I heard someone say here earlier that innovation
18 theories of harm are dead. They should not be dead;
19 they should be top of the list. How do these
20 acquisitions potentially stifle incentives to innovate?
21 And I am not talking about the special goose that laid
22 the golden egg and the VC -- venture capitalists or
23 whatever. I am talking about different types of
24 entrepreneurial models, all of which are valid and
25 absolutely out there.

1 So we need to be thinking about how these
2 acquisitions affect incentives to innovate and affect
3 consumers in terms of prices and quality and security
4 of their data, for example, as a quality issue, a
5 nonprice competition issue. These are all things that
6 should be considered under a flexible, dynamic,
7 symmetric consumer welfare standard.

8 MS. WILKINSON: Okay. Would anybody else
9 like to weigh in?

10 MR. YUN: So whenever I see barriers to entry
11 in the context of this, you know, inevitably something
12 about big data come up. I feel like I am randomly
13 talking about big data. No one really -- I was hoping
14 to play off of it. So I just want to talk about big
15 data a little bit for a moment. Let's just go there.

16 So what do we mean by barriers to entry? I
17 think there is a problem when we label something as a
18 barrier to entry or not and it is just check a box, it
19 is a barrier to entry. So inevitably we think of sort
20 of the Bain approach to that which then means
21 super-competitive pricing and durable monopoly power.
22 And I think the definition has evolved, and I will not
23 bore you with the history of the definitional evolution
24 of barriers to entry. But I think we should really
25 view it as to how the participants in an industry use

1 data in a market and is this a scarce good and are
2 entrants really in need of this and is it -- they
3 cannot obtain it -- what is the history of the market?

4 So for example, you look at something like
5 search engines, something like Google. It is
6 inevitably going to be brought up that Google and
7 Facebook have big data and that sort of creates
8 and enforces their market power. And then the question
9 is, how is data being used? Is it just the existence
10 of data or is it part of a larger production function
11 along with other inputs? And those inputs are maybe --
12 maybe data is a big part of it, but those other inputs
13 are as well, including the algorithm, the quality of
14 the employees and the other technologies that evolve
15 around that data.

16 Certainly, data is important and you need it,
17 but there is a real question of how much you need it.
18 For example, the nascent competitive threat story, if
19 you need big data to be competitive, why are we ever
20 talking about nascent competitive threats? They would
21 never be a threat; they would never have big data.
22 They are all nascent, they are small. How could they
23 grow up to be competitive?

24 I reject that. I think we all would reject
25 that story. So I think we have to be consistent and

1 reject the story that big data, in and of itself,
2 insulates big firms from competition. And I think
3 history has shown -- and I will not go through the
4 boring examples that everyone brings out of MySpace and
5 Friendster, which no one uses anymore, and then -- but
6 iTunes and Spotify, a more recent example.

7 MR. SOKOL: How about Tinder? No, I am going
8 to throw this out there. It is late in the afternoon
9 and I have tenure and I can go there.

10 (Laughter.)

11 MR. SOKOL: So it turns out there were plenty
12 of dating websites before -- also, a disclosure, my
13 wife and I met on a blind date thanks to the FTC. So
14 three children later, we call that dynamic competition
15 and innovation.

16 So let me just say that there were plenty of
17 dating websites. Again we met the old-fashioned way.

18 MS. MOSS: I do not know, Danny. It sounds
19 like you might have been on some websites.

20 MR. SOKOL: No, no, no, no, no.

21 (Laughter.)

22 MR. SOKOL: So what I would say is the
23 following -- well, fair enough. What I would say is
24 the following: There were plenty of dating websites
25 before that. They had tons of data. But do you know

1 what they didn't have, a great idea, which is
2 apparently, from what I understand from my students, it
3 is not dating as I would imagine, it is dating in
4 quotes. But this idea was a binary, do I like them, do
5 I not like them? One is them is left; the other one is
6 right swipe. I do not know which one and I do not want
7 to know.

8 The point is, all of a sudden, it did not
9 matter that Match.com and eHarmony and all these sites
10 had tons of data, they did not have that breakthrough
11 idea. Tinder did.

12 MS. MOSS: Stephanie, can -- since we are all
13 in example mode here and it is -- you know, case
14 studies are wonderful, especially in this particular
15 conversation. But I would offer, to give Sally even
16 more examples, you know, would be Apple-Shazam. So,
17 you know, the Europeans just took a look at
18 Apple-Shazam and, you know, I would submit that the
19 Europeans took a very narrow market definition. This
20 goes to my earlier moment about not focusing the lens
21 in the traditional narrow antitrust way when a broader
22 market, a market that is not just broad to be broad,
23 for the sake of being broad, but generally encompasses
24 interconnected, interlinked products and services.
25 That can be defined as a relevant market.

1 You need a good, powerful, clear theory of
2 harm to back that up if you go down that road, but it
3 is entirely possible. But the Europeans took a very
4 narrow lens on Apple-Shazam. It was a theory of
5 foreclosure that by acquiring Shazam, which is music
6 identification paired up with digital music
7 procurement, that they would have access to data that
8 would allow Apple to target customers to steer them
9 away -- to steer them towards getting the tune,
10 actually purchasing the tune on iTunes, and away from
11 rival, Spotify, for example. Well, lo and behold,
12 Spotify apparently never complained about this. So
13 there has been this real robust debate about why that
14 did not happen, why there was no complaining from
15 Spotify.

16 But that is an example of sort of a narrow
17 lens around a relevant market, a well crafted theory of
18 harm, vertical foreclosure, cannot complain about that.
19 But how could that lens have been broadened in a way to
20 capture more than just data markets but also capture
21 sort of the end user experience and choice and under a
22 consumer welfare standard?

23 MS. WILKINSON: Okay. I am going to move on
24 now unless anybody has anything else to say on this
25 topic.

1 MR. SOKOL: Very, very quick.

2 MS. WILKINSON: Okay.

3 MR. SOKOL: So as we look at each particular
4 case, we should also look to see what is sort of the
5 prior history of the companies. Sometimes when
6 companies make acquisitions, they leave the targets as
7 separate subsidiaries and they do not really mess with
8 them. And that, I think, looks very different than a
9 full integration. And sometimes full integration works
10 and sometimes it does not work, and these are all
11 things that agencies should consider.

12 MS. WILKINSON: Okay.

13 So moving on, a key issue for the agencies,
14 when thinking about these cases, is determining when a
15 nascent technology is likely to develop into a
16 significant competitive threat such that we might have
17 concerns if it were acquired by an established
18 incumbent platform. What factors should the agencies
19 consider when predicting the competitive significance
20 of nascent technology firms? How reliable are these
21 factors and how does this issue affect the agency's
22 ability to challenge nascent acquisitions?

23 MR. KANTER: Yeah, I can start. I mean, I
24 guess I raised some of this in my opening remarks. I
25 do think there are signs or things that we can --

1 signposts that we can use to help understand these
2 issues a little bit better, but I do think this is an
3 area where we need better research. We need better
4 rules of the road, so that we can help spot problems
5 sooner and with greater effect.

6 And I think that is part of my point where we
7 have fallen down because we are so defensive as a
8 community that sometimes we forget to look inward and
9 that is why I think this process and these hearings are
10 so important.

11 But a few things to look at. One, is it a
12 winner-take-all or winner-take-most market? Does it
13 exhibit strong feedback effects? Are the nascent
14 competitors relevant to that feedback loop? Is the
15 market share really durable and high, in which case you
16 would have a heightened concern? Does it require entry
17 at multiple levels and multiple stages in order to be
18 successful? Does a platform exhibit conflicts of
19 interest and will the transaction change the extent to
20 which it has the incentive and ability to act on that
21 conflict of interest? Those are some of the signposts
22 that I think we should be using.

23 Also, as I mentioned in the opening remarks
24 -- and I think this goes back to the comments from
25 Chairman Pitofsky -- we do need to be more sensitive in

1 certain markets that involve speech, that involve
2 marketplace of ideas, that involve information that is
3 vital to our functioning democracy. Those markets are
4 really important just as courts, including the Supreme
5 Court have given them heightened levels of scrutiny and
6 importance, so too should the antitrust laws.

7 MS. WILKINSON: Sally?

8 MS. HUBBARD: So some similar points that I
9 wanted to make, which are just kind of some questions
10 to be exploring, you know, how will the acquisition
11 help a tech platform either obtain monopoly power or
12 maintain its existing monopoly power and could the
13 platform get access to new types of data that will
14 fortify its existing monopoly power? So it is not just
15 all data, big data; it is about unique data. And I
16 think that, you know, there is qualitative aspects of
17 data that we need to be considering.

18 How could the acquisition help a tech
19 platform leverage its monopoly power into a new market?
20 How could the acquisition exclude competition through
21 vertical integration -- tight vertical integration or
22 foreclosure of access to APIs? And maybe that is a
23 type of merger condition that could be used more often,
24 as to requiring that open -- requiring APIs be made
25 available to competitors.

1 And, also, as I mentioned before, what is the
2 strategic reason the tech platform is buying the
3 target?

4 MR. YUN: So when I look at this, you know,
5 my bottom line is we are not going to say anything new
6 that the agencies do not do already. I mean, the
7 bottom line is evidence, evidence and evidence. I
8 sound like Jan Brady, Marcia, Marcia, Marcia. A dated
9 reference. Nobody is talking about the Brady Bunch any
10 more.

11 (Laughter.)

12 MR. SOKOL: Old theory of harm.

13 MR. YUN: You know, just being in the agency
14 for 18 years and going through this and for any
15 antitrust counsel who has been on the receiving end of
16 an FTC second request or inquiry into these sort of
17 areas and potential competition theories, they will
18 attest that every stone is looked at. You know, I just
19 find it incredible that there is sort of this notion
20 that there are some new areas that the FTC needs to
21 look at in various things. I mean, just the amount of
22 documents, the amount of data that we get, the amount
23 of analysis that we pursue, the experts that we hire,
24 it is just a very thorough process and I would like to
25 defend the agencies in that respect and I think they

1 are getting it right.

2 (Applause.)

3 MR. KANTER: Let me -- and that was Scott
4 Sher there clapping for the record. Hi, Scott.

5 You know, I agree. Listen, I have great
6 respect for the agencies and the work that they do and
7 having been on the receiving end of many second
8 requests, they are indeed very painful and invasive and
9 the agencies put a lot of effort into turning over
10 stones. So this is not, in any way, an indictment of
11 the work of the tremendous professionals.

12 But where I do think we sometimes end up is
13 we still end up trying to put all the facts that we are
14 gathering into little boxes. And I have even had folks
15 at the agency say that. Well, here are our boxes and
16 how do we fit these facts and this data into those
17 boxes? I mean, we were talking about -- on the
18 previous panel, Susan Creighton, who I think the world
19 of both professionally and personally, she was talking
20 about a rule of per se legality, so long as it is a
21 product improvement. That does not sound like turning
22 over stones and boxes and figuring out effects; it
23 sounds like saying, okay, there is an outcome-oriented
24 rule here.

25 So I think on one hand we do look at a lot of

1 information, we do look at a lot of data. On the other
2 hand, you know, sometimes we do not always know what to
3 do with it in the context of the way these markets work
4 and, you know, we maybe can do better in terms of
5 understanding the realities and the way these
6 marketplace work so that we can appreciate the
7 significance of the data and so that we can appreciate
8 the significance of the massive amount of information
9 that the agencies are considering as part of a
10 transaction or a conduct investigation.

11 MS. MOSS: Stephanie, can I just provide yet
12 another mundane, nondigital market example to
13 illustrate? And that is actually the Maytag-Whirlpool
14 merger, which is now, you know, an old merger. But
15 that merger was allowed by the DOJ. It created an
16 enormous market share for Whirlpool in white goods,
17 something close to like 80 or 90 percent. But it was
18 allowed through because of the -- essentially the
19 nascent competition from the Asian white goods
20 producers, so LG, Samsung and Haier, okay? So DOJ let
21 that merger through on the roll of the dice that the
22 nascent Asian competitors were going to get into the
23 market and discipline the market.

24 You know, there is a fact pattern there that
25 would be very useful to port over to the digital market

1 side. How were the Asians going to be competitive?
2 Well, they were going to have to get access to
3 distribution in the United States. Getting access to
4 retail distribution is really, really tough. There is
5 an analogy to that when you interoperate on a platform
6 or you are acquired by platform. You have to get
7 access to shelf space, you pay slotting fees, you have
8 to develop brand recognition and brand loyalty.

9 So all these factors go to supporting the
10 notion or a set of parameters for determining whether a
11 nascent competitor is enough of a threat. And it needs
12 to be thought out. I do not have all the answers, but
13 it is a tough, tough question, I think as we have heard
14 all day here. What I hope we do not end up doing is
15 coming up, ginning up a bunch of bright-line tests for
16 what is determinative of what is a nascent competitor
17 and their competitive impact, potential impact or
18 influence.

19 MS. WILKINSON: Okay, thank you. We have
20 about a minute and half left and I am going to give the
21 final word to Danny on this topic.

22 MR. SOKOL: Thanks. I will be very fast
23 because I do not know how to speak not fast.

24 So this is really hard to do. And if it were
25 really easy, we should form our own VC fund right after

1 this session. And the reason I say that is the VCs
2 have better information than the agencies ever will.
3 They have control rights. They are in the company
4 every day. They are firing the CEO often before we get
5 to some kind of exit. More often than not. That is
6 why Andreessen and Horowitz found a gap in the market
7 to have a different model.

8 Okay. So what does this come down to? If we
9 are a VC, we look at team, this is something that Will
10 talked about; we look at market, that is something that
11 Bill talked about last session; we looked at
12 scalability, I think that is something everyone has
13 talked about. And it turns out it is so hard even with
14 all of that, most of the returns on venture capital
15 come from the top 5 percent of all VCs. Now, of that 5
16 percent of VCs, more than half of the companies, in
17 their given portfolio for any particular fund, have a
18 return on investment of zero. So they cannot even get
19 it right. Because if it was that easy and they are
20 seeing the best companies and they cannot make the good
21 bets, it is not easy for the rest of us.

22 So I am going to go back to something
23 that -- the first part of what John talked about,
24 agencies work very hard to get this right. Absolutely.
25 Now, the second part of, like, should we be thinking

1 about broader categories? We should be thinking about
2 whatever will give us better information to make better
3 decisions. I think we can all agree to that part.

4 And it is all about getting that information
5 to -- in very, very tough situations, can we get it
6 right? And a lot of times, it is not clear that the
7 people who make a ton of money on this can get it
8 right. So I would say let's keep expectations at a
9 realistic level.

10 MS. WILKINSON: Okay. Thank you. I think we
11 are done.

12 So, everyone, please join me in thanking our
13 panel for an excellent discussion.

14 (Applause.)

15 MS. WILKINSON: And if everyone in the
16 audience can please remain seated, I think we are going
17 to do a quick transition to the final panel of the day.

18 (End of Panel 4.)

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1 PANEL 5: NASCENT COMPETITION:
2 INVESTIGATION AND LITIGATION CONSIDERATIONS

3 MR. MOISEYEV: We're going to go ahead get
4 started. Our last panel of the day, discussing nascent
5 competition, is to take on the very real-world problem
6 of how you go about identifying cases that actually
7 raise competitive concerns and then how you challenge
8 those cases and certainly focusing on the world of
9 mergers and acquisitions.

10 For that, I am joined by a panel of very
11 talented antitrust lawyers, people I've worked with
12 over many years in my career, and several of whom have
13 held top positions at the FTC or Department of Justice.
14 To my immediate right is Rich Parker. He's a partner
15 in the D.C. office of Gibson, Dunn and was formerly my
16 boss, Director of the Bureau of Competition.

17 Next is Debbie Feinstein. Debbie is a
18 partner in the Arnold & Porter law firm. She also was
19 a former boss of mine as Director of the Bureau of
20 Competition and held other positions in the FTC.

21 Next to Debbie is Dave Gelfand. He's at the
22 Cleary Gottlieb law firm, and he was former Deputy
23 Assistant Attorney General at the Department of
24 Justice. I did not work for Dave.

25 Next is Ray Jacobsen. Ray is head of the

1 McDermott, Will & Emery antitrust practice. And then
2 -- now I'm losing sight of the order here, but it's
3 Andrea Agathoklis Murino. She is with Goodwin's
4 antitrust group here in D.C., former attorney advisor
5 to Chairman Kovacic at the FTC.

6 And then Scott Sher at the very end, he heads
7 up the antitrust department at Wilson Sonsini. So a
8 tremendous group of litigators and antitrust lawyers
9 who I hope will help us shed light on some of the
10 really complex issues that we've talked about over the
11 course of the first couple of panels this afternoon.

12 Scott, to start things off, can you explain
13 to me from a practitioner's perspective what we're
14 talking about when we're talking about a nascent
15 competitor? Is that just a potential competitor, or
16 that something else?

17 MR. SHER: Sure, Mike. I don't think that
18 there's much of a difference from a practitioner's
19 perspective, but obviously there are case law
20 differentials. Potential competition is defined in
21 case law as either actual potential competitor or a
22 potential potential perceived potential competitor or a
23 potential potential competitor. And whereas I think
24 it's correct, the last panel talked about nascent
25 competitor being generally described as a company that

1 has a promising technology -- this was from the
2 Microsoft case -- that may or may not be able to bring
3 that technology to market and may or may not need
4 assistance in bringing that technology to market.

5 From a practical perspective, in most deals
6 where you're dealing with small technology companies,
7 you tend not to define them as potential competitors
8 just because you have the framework from the guidelines
9 that gives you less flexibility as to how to
10 characterize them. And more often than not we define
11 these small companies that have interesting
12 and important technology potentially as nascent
13 competitors.

14 MR. MOISEYEV: Debbie, does that make a
15 difference in how the agency or how you would analyze a
16 merger?

17 MS. FEINSTEIN: Okay, so first, it's a little
18 funny to be having Mike ask the questions rather than
19 answer them because he's thought about this more than
20 any practitioner since much of what the division does
21 is potential competition type cases in pharma and
22 elsewhere. So a couple of points.

23 You know, we all think of Section 7 as
24 requiring some degree of likelihood that it will lead
25 to problems, and so where on the spectrum you are is a

1 little unclear, and there hasn't been a lot of case
2 law. We tend to use the word "nascent" when we're
3 talking about a Section 2 Mallinckrodt-type case, no
4 particular reason for that. So I agree that some of
5 the terminology gets blurred and that it's really not
6 that important to talk about the technology.

7 What you're talking about is what's the
8 status of the acquired firm. Let's call it acquired
9 firm. It could be the acquiring firm who's the new
10 technology person, but what's the status of the
11 acquired firm and what will be the affect on
12 competition if it's acquired by the entity that it's
13 being acquired from, and the labels we put on it.

14 And I think if you go and back look at the
15 complaints during the time that I was there, I'm not
16 sure we ever used the phrase "potential competition."
17 We used the phrase "future competition" because in the
18 pharma world it's not's so potential. Once somebody
19 has actually filed with the FDA, the likelihood that
20 they're actually going to come to market is
21 extraordinarily high. So we would talk about future
22 competition.

23 I will say one thing. I've never figured out
24 how one could actually ever bring a perceived potential
25 competition case because the moment you bring it, the

1 acquired company is going to say, well, that's kind of
2 crazy that they perceive us to be a competitor because
3 we're not doing anything. And once that fact gets out
4 there, you've changed the market landscape just by
5 bringing the case. So I think that's one of the
6 reasons you don't see a lot of perceived potential
7 competition cases.

8 But fundamentally the labels you put on it
9 aren't the question. The question is, what's the
10 competitive impact going to be and then -- and we'll
11 talk about this more -- you know, how would I prove
12 that there's going to be that impact. I don't think
13 that the box is all so narrow of the information that
14 we're putting it in. You know, the guidelines tell
15 you, you don't have to start with this methodical,
16 what's the market definition. You're asking the
17 question of are things going to be worse for
18 competition and consumers, and I think the box is
19 pretty big to put a lot of stuff in to get to that
20 question.

21 MR. MOISEYEV: I should have mentioned this
22 at the outset, but this panel is a little different
23 from the previous ones. We're not sort of having
24 introductory comments by everybody and rather just
25 jumping in to questions. That also means that there's

1 greater opportunity, hopefully significant opportunity,
2 for audience participation here. So as we go along,
3 please submit any questions that you have, and we'll
4 try to take them on, time permitting, as we go through
5 this.

6 So with that said, I wanted to raise the
7 question of whether there are any special attributes of
8 high-technology markets that affect merger analysis.
9 We've spent a lot of time over the course of the last
10 few days talking about platform competition, and some
11 of the attributes of high-technology markets are
12 certainly focusing on mergers.

13 Andrea, can you shed some light on that
14 question?

15 MS. MURINO: Sure, I'm happy to. And I just
16 wanted to thank Mike and everyone in OPP for organizing
17 and for having me here today. I agree with what Debbie
18 said, that the purpose here is really all about getting
19 to what the competitive impact is. But I think
20 fundamental to that is understanding that there are
21 some differences when you're looking at certain kinds
22 of high-tech deals.

23 And the one word that always pops into my
24 mind is speed. And the pace of play here is just
25 different than it is in other industries. And I think

1 that has a very meaningful effect on the way that the
2 agency has to go about gathering the facts and
3 assessing the evidence. These markets can be very
4 fickle. These markets are capable of being appended
5 quite quickly, and because of that, some of the data
6 that we provide to the agency, to the DOJ as well, by
7 the time you provide it, it's already old, time has
8 already passed.

9 And so when I'm working on behalf of clients
10 trying to explain competitive dynamics, I find that
11 that's one area where you have to really make sure
12 everybody is on the same page. If there is not an
13 appreciation that things can change on a dime, you're
14 not really able to look at the nuts and bolts of the
15 market in a way that I think is capable of making an
16 accurate prediction, which obviously is what you're
17 trying to do in a merger case.

18 MR. MOISEYEV: Well, if that's the case, is
19 nascent competition something that raises particular
20 problems in these rapidly evolving markets?

21 Ray, do you want to weigh in on that?

22 MR. JACOBSEN: Well, the answer is certainly
23 nascent competition is more important in high-tech
24 markets than in bricks-and-mortar markets because I
25 think in high-tech markets, as we've been talking about

1 throughout your hearings, your concern is innovation.
2 So going back to what Paul Denis was teaching us
3 earlier, you have to ask a bunch of questions, you
4 know, how serious, how substantial is this particular
5 nascent competitor. If they're unique, if they're
6 special, that's one thing. If they're one of a
7 handful, then the loss of that one is not such a
8 factor.

9 Your question talked about the evolving
10 nature of the market. From looking back at all the
11 cases that have been investigated to my knowledge over
12 the last ten years, the dynamism of high-tech is very,
13 very important. And we've seen major companies make
14 acquisitions but have them approved or not challenged
15 by the agency because of the dynamic nature of the
16 industry. So I think there's a strong defense, the
17 dynamism defense, to the concern, but it's clearly a
18 concern in any high-tech market.

19 MR. MOISEYEV: So over the last couple of
20 panels, the notion has been raised that the agencies
21 really are not -- or lack the capabilities of fully
22 appreciating the nuances of how these markets work.

23 Andrea, can you give me an idea of what kind
24 of information the agency should be prioritizing when
25 they're looking at a merger in one of these markets?

1 MS. MURINO: Yeah, so I don't recall exactly
2 how you phrased that. I don't think it's an issue of
3 -- that the agencies aren't capable of understanding.
4 I think this is really hard to do. And I think that
5 what is very meaningful and what is very helpful is
6 being able to talk to businesspeople. That's probably
7 the number one thing I would say that is a little bit
8 different from some of the more brick-and-mortar
9 industries where you have companies that have spent a
10 lot of time developing strategic plans, they have
11 full-blown corporate development units that think about
12 corporate strategy for the long term.

13 Here, you know, some of the folks that I work
14 with, there's just one guy that has an idea and he
15 doesn't write anything down. So from my perspective
16 it's a challenge sometimes to get the agency to really
17 want to listen to that one guy's vision because the
18 agency immediately assumes that it's just self-serving
19 and that they're just saying whatever needs to be said
20 to try and get the deal through.

21 And I think that that's not always the case.
22 I think that a lot of times, because these markets move
23 so fast, because things change so fast, you really do
24 have people who are the key intellectual asset that
25 will tell you what the future is going to look like.

1 That's one category of information I would encourage
2 the FTC to more willingly embrace.

3 It's when I bring in that guy or that woman
4 that is going to be able to explain to you what they're
5 thinking and what they have in mind, it's not because
6 I've spent hours prepping him or her trying to tell
7 them all the buzzwords. It really is because this is
8 the person that has all the information in his head.

9 Now, that said, there are lots of documents
10 that are around. I mean, Scott and I were involved
11 in Bazaarvoice. And everyone will remember what those
12 documents looked like. We were just talking about that
13 with David. But I think that, you know, looking for
14 the traditional asks are also perfectly appropriate.

15 I also like some of the ideas that came from
16 the earlier panel with John Newman and Lina Khan. Lina
17 mentioned usage level of rival apps. I'm not sure that
18 that's a level of data that people really think about
19 when you get into certain kinds of deals, but that
20 could be meaningful.

21 And I like John's suggestion for A/B testing.
22 Now, all that data does come in in certain deals, and
23 I've seen it at the DOJ, I've seen it at the FTC. I
24 think what would be helpful is for the FTC perhaps to
25 develop a more standard ask of some of these high-tech

1 deals and say, okay, if you're doing a pharma deal,
2 when Mergers I sends a voluntary access letter, we know
3 exactly what they're going to ask for before they send
4 it. They're experts. They have signaled to the
5 market, to people like my clients, what they're going
6 to want to know.

7 I don't think we've had the same force of
8 messaging when it comes to some of these high-tech
9 deals. So I think that maybe coming up, spending more
10 time revising what the voluntary access letter would
11 look like in a high-tech deal, to include some of these
12 more odd requests, would be something that could be
13 useful.

14 MR. MOISEYEV: So speaking of that, we've had
15 actually some remarkably spirited debate about whether
16 the FTC should have on staff technologists or
17 technology experts, either embedded in the Bureau of
18 Economics -- nobody wanted them embedded in the Bureau
19 of Competition, which I think is sort of remarkable,
20 but -- or a standalone group.

21 What do you think -- maybe, Andrea, if I can
22 stay with you for a second -- can you tell me what your
23 thoughts are on that?

24 MS. MURINO: Yeah, I think it's a good idea,
25 and I'm not quite sure where some of the hesitancy

1 comes from because I think if you look at -- again I'll
2 just use Mergers I since Mike is up here, you know, we
3 all know they're pharma experts, and they are really
4 good. That staff is really good at pattern
5 recognition. You don't have to explain certain
6 fundamentals of the industry to them because this is
7 all they do day in and day out.

8 I think having a tech team at the FTC perhaps
9 modeled, perhaps not, after what the DOJ has in their
10 -- I guess they call it Technology and Financial
11 Services now, what was Net Tech. But I think that
12 that's a good idea. I think that anytime you have
13 people who get exposure to the same issues again and
14 again, they become faster, they become more able to
15 analyze things more quickly. I think it becomes just a
16 more efficient work stream. So I think that would be
17 valuable.

18 I had never thought about Danny's idea of
19 hosting them in BE, but I think that's something to be
20 explored, for sure. And I certainly would, you know, I
21 think appreciate the value of the specializations.
22 People ask me all the time, can you look at my will,
23 can you do my tax returns, and I always say, I'm not
24 that kind of lawyer. So why not have an FTC shop that
25 says, yeah, that's kind of the industry I focus on.

1 I recognize it's broad. I recognize there
2 are difference between not all tech deals are the same,
3 but it just seems to me that there's a value there in
4 having people who have Google Alerts set up to get
5 breaking news about certain industries, and that's what
6 they think about day in and day out.

7 MR. MOISEYEV: Well, I think as John Newman
8 said, I guess you can't be anti-technologist, or maybe
9 you can.

10 Debbie, you worked -- you headed up the
11 Bureau. Tell me what you think about that.

12 MS. FEINSTEIN: Yeah, I don't get it. So,
13 you know, Mergers I doesn't have any pharmaceutical
14 experts. Last I checked, they don't have anybody who
15 went to pharmacology school. They're lawyers. They're
16 really good lawyers who dig into the facts of each case
17 and have developed learning about how the industry
18 works from working on those cases. But I don't know
19 what a technologist does that would apply to the vast
20 number of industries that we're talking about that are
21 high -- you know, that are technology-based, that are
22 fast-moving industries. And I also think that once you
23 become a government employee in Washington, D.C., your
24 connection to the tech community that might give you
25 the ability to really have your hands close to what's

1 going on might just, on the margin, diminish, is a
2 guess.

3 The way the agency deals with that is to talk
4 to anybody it can, and it does. That's one of the
5 great privileges of being in the Government is you pick
6 up the phone and, for the most part, people talk to
7 you. Professors will talk to you. Experts will talk
8 to you. You can get most of the information for free,
9 although if you really need to hire an expert because
10 you want them to testify to something or to consult
11 with you on something, there is a budget for that as
12 well.

13 But I think the number of technologists that
14 you would need to make a difference, to have somebody
15 for each of the technology areas that the Government
16 would look at and the fact that you may go six months
17 without a case in that technology area coming up, so
18 what would that person do? I really just don't think
19 it's the most effective use of resources.

20 To the extent that somebody thinks that there
21 is information out there that the agency isn't getting
22 and the kind of person and where they should get it
23 from, that's something to talk about, and it would be
24 interesting. I haven't heard somebody say, oh, you
25 know, in this investigation, the FTC missed talking to

1 these kind of people at these kinds of companies and,
2 therefore, they missed that the future was here and
3 they thought the future was there. I just haven't
4 heard that kind of criticism.

5 So I'm with John on this one that I don't
6 think that's the most effective way, if there is an
7 information gap to fill it.

8 MR. PARKER: You know, I have an opinion, and
9 that is I was Bureau Director when they started the
10 patent group, and I think that was a big success. And
11 these were lawyers in the Bureau of Competition, and I
12 think they immediately contributed. I think that if I
13 was an enforcer and I saw all this talk about platforms
14 and nascent this and all this technology, I would want
15 a lawyer in the Bureau who has broad experience in
16 dealing with tech industries, who knows what questions
17 to ask, who's had experience, who has represented
18 startups, has represented big companies, small
19 companies, just that experience so there would be
20 somebody, when we're charging up the hill here, I could
21 ask, do you think we have all the right data and do you
22 think we can win this?

23 And I think it would be helpful to have
24 somebody who had broad agency experience in the tech
25 area to duplicate what Merger I has, for example, in

1 pharma. That's just -- I mean, if I was in charge of
2 this, that is exactly what -- that's exactly what I
3 would want. I would want to go hire a Scott, there you
4 go.

5 MS. FEINSTEIN: But you're talking about a
6 lawyer.

7 MR. SHER: Right, right.

8 MR. PARKER: That's what I'm talking about.

9 MR. SHER: Yeah, I think there's a difference
10 between lawyers and technologists. And not to be
11 apologist for the agencies, I think that there are
12 probably 50, 75 lawyers within the FTC and DOJ
13 currently today who understand technology markets
14 extraordinarily well. You have platform markets in
15 real estate, for example. You can go talk to Jessica
16 Drake who's done a number of the large deals there.
17 You have a question about Google, you can talk to
18 Stephanie Wilkinson or you can go talk to Barbara
19 Blank. These are people who understand generally
20 what to ask for and the sorts of information that
21 they need to accumulate when they are conducting an
22 investigation into one of these markets.

23 I personally find it to be scary almost
24 to consider having actual technologists at the FTC, for
25 some of the reasons that Debbie had mentioned. There

1 are not enough deals in any one given tech market.
2 Tech is not a market, by the way. If it was, then
3 every deal can go through.

4 There are many subverticals in technology.
5 There are many subverticals in search. There are many
6 subverticals in advertising. You can't ask somebody
7 who's an expert in one of those verticals to analyze
8 code in another vertical and say, was this written
9 properly.

10 The other problem is, and the really
11 scary thing from my perspective is, if you have
12 technologists who you're asking to go back and look at
13 code, you're asking a technologist in some instances to
14 go back and look at code that may have been written 15,
15 20 years ago and had been altered over time to
16 accommodate specific problems that existed at the time
17 that the code was written, that somebody is analyzing
18 today with a gloss that's completely irrelevant to the
19 time when code was written.

20 So how did you solve that problem? Well, I
21 think you solve that problem the way you solve the
22 problem in every single merger review. You look at the
23 documents; you look at the developer notes at the time
24 they were written. So instead of going back and trying
25 to discern what the source code is, every single

1 developer who writes code keeps a journal and says,
2 this is the code I'm inserting, this is why I'm
3 inserting the code, and they're not thinking, well, in
4 20 years I might be investigated by the FTC, so let me
5 not tell the real reason why I'm doing it.

6 They actually say, I'm doing it to solve this
7 problem, or I'm doing it to frustrate this issue. So
8 go back and do what you would do in any single deal.
9 Talk to the engineers, review the documents, talk to
10 the executives, talk to industry experts. Again I
11 think -- you know, I've had the good fortune of working
12 on a lot of the deals that have been mentioned today
13 involving, you know, in Google-Waze, Zillow-Trulia,
14 Google-AdMob, FanDuel-DraftKings, Bazaarvoice. Some of
15 them have gone my way; some of them haven't gone my
16 way.

17 But what I can say is that the agency
18 analyzed the deals correctly in every instance. I
19 might not have agreed with the outcome. Maybe I think
20 that they've weighed certain factors differently than
21 what I would have weighed them as. But all the things
22 that people have been talking about over the course of
23 today, the agencies do already and they do it quite
24 well.

25 A/B testing, well, I can tell you that, you

1 know, in an investigation with Barbara Blank, we
2 probably produced 10,000 A/B tests to staff, and they
3 reviewed them all. So, you know, the agencies -- trust
4 me, the agencies understand how to analyze these deals,
5 they're doing it in a way that's consistent with merger
6 policy and with the law. And to contemplate changing
7 because we're dealing with something that's called
8 tech, I think, is dangerous because they're really --
9 sure, there are unique characteristics of technology.
10 There are unique characteristics of grocery stores.
11 There are unique characteristics of pharmaceuticals.
12 There are unique characteristics of defense industries.

13 I think the intense focus on technology, in
14 my opinion at least, is misplaced. The agencies are
15 doing a pretty darn good job in analyzing these deals,
16 and I don't think that we really need to change the way
17 they're doing it. To the extent that people have
18 fundamental problems, to me, it sounds more like a
19 legislative concern and people want a different
20 standard to be applied to the review of technology
21 deals, but that's not a job for the FTC or the DOJ.
22 They're doing it right. If you have a problem with
23 that, you got to go to Congress.

24 I'm sorry, I might have gone off a little
25 bit.

1 MR. MOISEYEV: Any comment that ends with
2 "call your congressman" is fine by me. Having wrestled
3 that issue to the ground, maybe I'll move on to sort of
4 more substantive issues and away from the process.

5 Debbie, you and I have talked many times over
6 the years. I'm going to jump back into the boxes of
7 antitrust, that is unfortunately the world, I think,
8 that we live in. And looking at a potential
9 competition case, I think most of these, in my
10 experience, revolve around how likely the entry has to
11 be before it raises a competitive concern in a merger
12 case.

13 What is your sort of sense of how likely the
14 entry has to be to trigger a Section 7 issue?

15 MS. FEINSTEIN: Yeah, so, I mean, the courts
16 haven't really given us a lot of guidance on this. So
17 in some ways that's freeing to the agencies to say
18 we're going to figure out the level of likelihood that
19 seems right to us, you know, until the court tells us
20 otherwise. And I don't think that the Commission staff
21 follows the BAT clear proof standard unless you define
22 clear proof as something different than I do, which is
23 absolute certitude, 100 percent, and there's no
24 possible obstacle that in the next two years until the
25 product is on the market something could go wrong.

1 I mean, if that's the definition of clear
2 proof, that is clearly too high a standard. But it's
3 got to be something more than a case I worked on once
4 that ultimately did not go -- when I was on the outside
5 and the staff did not end up proceeding with it, but it
6 was somebody very low level thought of entering the
7 product and the staff's theory was, well, you really
8 need to be in this product because others in your space
9 are in this product. I mean, that's not sufficient to
10 go on.

11 You know, what you want to see is that
12 there's a bunch of evidence that all points the same
13 way, that there is, you know, an intent to enter and
14 that it's at a fairly high level, that there are people
15 high enough in the decision-making chain to have made a
16 decision to put real investment and effort behind
17 something. You know, by definition, future entry is
18 not certain because something can always go wrong.
19 But, you know, are you taking clear steps to it? Are
20 you putting real money behind it? Are you talking to
21 customers about it?

22 I always found it sort of astonishing when
23 people would come to us and say, oh, no, no, no, we're
24 really not going to enter. But it's like, you're
25 telling your customers you are, you're entering into

1 contracts with them. How can you come try to tell me
2 that you're actually not making real steps to enter
3 this? So I mean, it's a bunch of different factors
4 that really go to the question of, you know, does the
5 evidence point in one direction as opposed to another
6 direction. It's really the question of why in
7 pharmaceutical deals we look at things that are fairly
8 far along, not when there's just a named molecule
9 because there's so many things that could go wrong. We
10 don't say that it's likely and because the investment
11 hasn't been made.

12 But I think that for the most part there's
13 not a whole lot of confusion about the kinds of cases
14 that will raise questions of potential entry, future
15 entry. So I don't worry that there's some big gap in
16 the -- you know, between the outside lawyers and the
17 Commission staff as to what it is we're talking about
18 when we're talking about entry likelihood.

19 MR. MOISEYEV: Well, let me take that a
20 little bit further because if the evidence sort of has
21 to point one way or another or that there is some
22 significant probability of entry, doesn't that
23 necessarily mean that you're going to lose the ability
24 to challenge potentially anticompetitive deals where
25 the entry is less certain but is greater than zero?

1 Dave, do you want to take that question?

2 MR. GELFAND: Yeah, thanks, Mike. First of
3 all, let me begin by also thanking Bilal and Stephanie
4 and Elizabeth and the policy group for organizing these
5 hearings and also for inviting me, especially for
6 inviting me to participate on such a great panel with
7 such great fellow panelists. I'm grateful for that.

8 So, Mike, you know, this is something that
9 I think is addressed in the case law. I think it's
10 addressed by the standard -- the burden of proof. I
11 think it's addressed in the Guidelines themselves.
12 Section 1 says merger analysis "requires an assessment
13 of what will likely happen if a merger proceeds as
14 compared to what will likely happen if it does not."
15 And I think it's a dangerous thing if you start going
16 down the road of saying that, we're going to have
17 situations where something is not more likely than not,
18 but we're worried about it. And we create a law that
19 allows the Government or a plaintiff to go into court
20 with a nebulous standard of worry.

21 I think you've got a burden of proof, you got
22 to proof by preponderance of the evidence if you're a
23 plaintiff that the transaction is likely to
24 substantially lessen competition. And doing that means
25 proving that the entrant is likely to come in for the

1 most part.

2 Now, a couple of things. I want to pick up
3 on one thing that Ray said, which is you have to think
4 about the uniqueness of this potential entry, this
5 nascent entry. And one thing that I think was a little
6 lost in all of the discussions that I've listened to
7 today is we talk about large companies buying nascent
8 competitors but very little discussion about what the
9 other nascent competitors are out there. Oftentimes,
10 these are markets where ten companies have entered in
11 the same way.

12 And so there also has to be some uniqueness
13 about the nascent competitor or the potential
14 competitor that's being acquired. And, Mike, when you
15 guys looked at Google-DoubleClick, you -- and I worked
16 on that, I should just say as a disclaimer, but you
17 pointed that out in your closing statement that there
18 needed to be some uniqueness there. And so I think
19 that's another important dimension to this.

20 Let me also say that I don't think we need
21 special rules for nascent competitors in certain types
22 of tech businesses. I know that just echoes what a lot
23 of other people have said, but I think maybe I'll make
24 this point. And this actually picks up a little bit on
25 Scott.

1 Lawyers in the Government are damn good at
2 looking at these cases and damn good at building cases
3 based on the documentary evidence, the data,
4 testimonial evidence. They have enormous power to
5 compel testimony in the investigative phase. And
6 you're good at doing it. And the one thing I would say
7 is you're even better than you think, because I think
8 you could make these decisions a whole lot faster.

9 And if I had one thing to say to the agency
10 on this panel, I would say that this does apply
11 especially to some of these technology markets. You've
12 got to make these decisions in fairly quick order.
13 Sometimes the markets are dramatically affected simply
14 by holding up a deal for a year during an investigation
15 and then another six months during litigation. Get
16 your investigation done in three or four months. You
17 can do an enormous amount of work in three or four
18 months. You can get a lot of documents, you can get
19 lot of data, you've got big teams that work on these
20 cases. And that's the best way to enforce the law in
21 this area, not try to create a special standard or, you
22 know, sort of put the thumb on the scale.

23 And by the way, one other thing. Why would
24 you create a special standard for an area of
25 competition that is the most speculative? It's the

1 hardest one to say there's actually going to be harm.
2 Are we just trying to create rules that make it easier
3 to bring cases? That shouldn't be what's going on
4 here. You should live by the rules that exist. If you
5 can't prove a case, then go out and develop better
6 evidence about what nascent competition means, about
7 what the effects are. Do the kinds of studies that
8 some of the panelists today have talked about doing.

9 But you got to do more than just come onto
10 panels and talk about it. You have to publish your
11 results; you have to convince your peers in the
12 scientific area that you practice in, whether it's
13 economics or technology. You got to convince them that
14 there's some consensus around the science that you're
15 developing so that you can then take it to judges and
16 admit it under the rules that apply to expert
17 testimony. So that's what's going to have to happen,
18 not create a new standard that just makes it easier to
19 bring the cases.

20 MR. MOISEYEV: Wow. So I'll remember that
21 next time I call on you, Dave. I appreciate the
22 admonition that a little harder work on our side is all
23 that's necessary to get to the prompt resolution of
24 your client's cases. We should have had Paul Denis up
25 here. He would have been the Grecian courts telling

1 you how that's the singular metric to measure agency
2 performance by.

3 Let me shift to something that really is at
4 the heart of any antitrust case, and that's how do you
5 measure effects. So all of these cases boil down to
6 what's your story of anticompetitive effects. And in a
7 potential competition case, you don't have necessarily
8 the historical experiences to draw on that often color
9 a lot of these cases.

10 What do you do -- I guess, Scott, I'm going
11 to call on you, even though it's sort of unfair because
12 I'm going to ask you to explain the government side.
13 If you're trying to prosecute a case, what kind of
14 effects evidence would I look to try to show that these
15 transactions are anticompetitive in the absence of that
16 type of historical experience?

17 MR. SHER: Right. So that is one major
18 difference between transactions in these markets and
19 transactions in traditional brick-and-mortar deals. A
20 lot of the competitors don't really have a track record
21 of experience. But like what I've been talking about
22 before, the same tools that are available during
23 investigations in these potential competition or
24 nascent competition cases that are available in
25 traditional cases actually do work.

1 So what are some of the things? Why does the
2 acquiring company want to acquire the nascent
3 competitor? What is the procompetitive justification
4 for doing it? Is it output expanding, or are they
5 concerned whether or not the company that they're
6 buying represents a potential competitive threat to
7 their position in the market?

8 And I'll give one example. In
9 Facebook-Instagram, which again I think that the agency
10 analyzed using the correct framework, I represented a
11 third party in that case, so I had a vested interest in
12 maybe concluding that the transaction was problematic.
13 But if you look at what Mark Zuckerberg actually told
14 his investors at the point of time when he wanted to
15 acquire Instagram, which was on the eve that Facebook
16 was going public, he stated that it was a defensive
17 acquisition in order to make sure that Facebook
18 remained in the competitive position that it was in
19 before.

20 That's pretty compelling evidence as to, one,
21 why a transaction is being contemplated; and, two, what
22 the best expert in the industry, the incumbent firm,
23 believes is potential effect of the transaction. So I
24 think again the most important evidence in technology
25 deals is the same evidence that's available in most

1 other deals. Why is the deal being done? What do
2 ordinary course business documents say? What does the
3 potential competitor believe that its position is going
4 to be going forward in the future? And what do other
5 people in the industry believe that that potential
6 competitor represents?

7 Just staying with the Facebook-Instagram
8 example, one potential thing that you might want to
9 look at, something that Andrea had mentioned before, is
10 what are the usage statistics of Instagram. There were
11 10 or 11 or 12 other photo-sharing applications that
12 were in existence and relatively similar in funding
13 size to Instagram at the time that it was acquired by
14 Facebook. What were the usage statistics? It's
15 interesting, if you looked at the mobile usage
16 statistics of Instagram versus some of the other
17 competitors that were available on the market at the
18 time, Instagram was actually doing pretty well.

19 Now, there were substantial challenges, and I
20 understand why the agency didn't bring that case.
21 Instagram had been founded less than 12 months before,
22 Instagram had 11 employees, and Instagram really had
23 come up with the photo-sharing app. So it is a really
24 difficult case to prevail on if you wanted to bring a
25 case like that to court.

1 But if you're considering what are the sorts
2 of things that I should be looking at in deciding
3 whether or not a potential competitor is relevant,
4 they're there. You have the evidentiary tools to
5 decide whether or not on balance it's worth bringing
6 the case or not. And, again, the agency gets it right.
7 You guys look at the right data. You know, you might
8 not weigh it in the same way that I would have weighed
9 it, and you might have, you know, a conflict as to what
10 is the proper enforcement role of the agency. Should
11 you intervene early to ensure that as many as
12 competitors can develop as possible? Or do you allow
13 the market to operate the way it would absent
14 regulation? And that's a philosophical reason to block
15 or not block a transaction, and that really just goes
16 to whether or not the decision-maker weighs the
17 evidence in the same way that other third parties
18 would.

19 So, again, Mike, that was a long answer, but
20 you don't have the pricing evidence, you might not have
21 the market experience evidence, but there are indicia
22 that exist in these markets to determine whether or not
23 you think it's likely that a company that is developing
24 is going to be successful going forward.

25 MR. MOISEYEV: Thanks, Scott. And I do want

1 to spend -- we'll spend a couple minutes talking about
2 some of these cases specifically. I think that would
3 be helpful to hear from you guys. And maybe we've
4 already had the preview on Facebook-Instagram.

5 I wanted to quickly ask Dave about whether it
6 would make sense from an enforcement perspective,
7 whether we should have presumptions in potential
8 competition cases. So we, in the normal Section 7
9 case, you establish a market, you establish market
10 shares, the Government has made its presumption. Now,
11 you don't have that tool available in potential
12 competition cases, and the real question is whether
13 that would be something that would make this a more
14 predictable and sort of a little less wild west area of
15 the law.

16 MR. GELFAND: Well, I don't think there
17 should be a presumption. I know that probably doesn't
18 surprise you, but I don't think we have enough
19 experience, and nobody has articulated what are the
20 characteristics of a potential competition case, that
21 you can look back on a body of experience and say,
22 well, here is a certain set of characteristics and
23 those usually result in anticompetitive effects. There
24 just haven't been enough cases litigated. It's a
25 little bit like the Supreme Court saying the per se

1 rule should only apply once you have a certain body of
2 case law, finding time and time again that something is
3 anticompetitive.

4 And it's not just the absence of cases
5 finding anticompetitive effects that you can say
6 there's enough there to create a presumption. But as
7 far as I know, an awful lot of these transactions are
8 procompetitive for the reasons other people have
9 discussed. They give small entrants like Instagram at
10 the time Facebook acquired them a platform. They give
11 it technology, synergies; they give it capital,
12 engineers, distribution. And so how are you going to
13 create a presumption in a set of cases where, you know,
14 arguably most of the transactions that we're familiar
15 with have actually been procompetitive.

16 So I think it's very different from
17 concentration measures and existing competition cases.

18 MS. FEINSTEIN: If I could interject, I think
19 we kind of do have a presumption, which is the
20 concentration measures. I mean, a lot of times, what
21 we're trying to predict, maybe not as perfectly as
22 this, is the HHI is, is it one of only a few entrants,
23 you know, is it going to be four to three, is it going
24 to be three to two? I mean, that's what we do -- what
25 we did when I was at the agency in the pharma mergers.

1 So I think just broadly there are presumptions, but
2 they're totally in line with do we think this company
3 is going to come in and be significant because if it's
4 market at 1600 and we think that the entity coming in
5 is going to get a 2 percent market share, well, then,
6 we don't worry about that.

7 But if we see lots of evidence that this
8 is a company that's going to come in and take the world
9 by storm and have a really big market share, then I do
10 think we do. So I don't think we need new presumptions
11 because I think we're sort of -- even though we may not
12 always articulate it quite as clearly -- we are
13 thinking in terms of the concentration levels and
14 market structure issues that worry us normally, and
15 we're just sort of applying the same but trying to get
16 at it with different kinds of evidence.

17 I mean, when you look at the cases that we
18 did when I was there where I just remember those
19 better, you know, the evidence would suggest that
20 companies -- multiple companies were thinking about the
21 industry and the impact of a new entrant the same way.
22 You know, in Mallinckrodt, there were two different
23 companies that maybe were going to acquire the assets
24 of the acquired entity that instead got bought by the
25 dominant firm and both of them had very similar

1 internal documents in terms of how quickly they could
2 get to market, what the market share was going to be,
3 and what the price effect was going to be.

4 And that's pretty good evidence, and it fit
5 into the, okay, there's only a couple of people who are
6 going to do this. It's going to have a significant
7 market share, and we're able to show the actual affect
8 on competition because they have both predicted very
9 similar to each other what price they would be able to
10 come in at, what the uptake would be, and, therefore,
11 how the market would react.

12 MR. GELFAND: Okay, so I've been on
13 approximately one million panels with Debbie, and I've
14 never disagreed with her before, but I have slight
15 disagreement. What you described is not a presumption.
16 It's proving the case. Okay, once you carry your
17 burden of proof and you demonstrate anticompetitive
18 effects, fine, then the burden obviously shifts to the
19 other side to rebut that prima facie case. But I think
20 that's different from --

21 MS. FEINSTEIN: Fair point, but to just say
22 one more sentence, which is, I mean, I really don't
23 think there's a presumption in the normal horizontal
24 case because if you think that anybody at the agency
25 ever sits down after they say, "and the market shares

1 are, you know, in the highly concentrated range, I'm
2 done, Your Honor," you're just -- you haven't listened
3 to a case lately because they always go on and do the
4 rest of the analysis. So I do --

5 MR. PARKER: Yeah, but it sure gets you off
6 to a good start in court, having been on the other side
7 of those cases.

8 (Laughter.)

9 MR. PARKER: Your Honor, this thing is
10 presumptively illegal. We got the presumption at this
11 table; I don't know what they have at the other table,
12 but it's not a presumption. That's a good start.

13 I think that antitrust is an interesting kind
14 of common law because it moves with economic learning.
15 And, I mean, Philly Bank was based on certain economic
16 learning at the time. Query how long that's going to
17 last. You look at Legion, antitrust law moves with the
18 economics. It just does. But what I've heard today is
19 we do not have enough information to create a special
20 presumption in this area. So I would say, no, there
21 should not be any presumption here because we don't
22 know what it ought to be.

23 MR. MOISEYEV: Well, let me sort of move even
24 further out on the limb, and that is I think John Yun
25 called it the potential potential -- maybe there were

1 three potentials in there before he got to the
2 competition part of the case, so mergers involving
3 firms, both of whom are developing products for a
4 market that has yet to come into existence.

5 Ray, is that the kind of case that is out of
6 bounds for antitrust, and if it's something we should
7 go after, how do you go about doing that?

8 MR. JACOBSEN: Well, I think there would be
9 two questions that the agency would have to prove to
10 challenge it. One, that there is an unmet need that is
11 going to come into existence; and, secondly, that you
12 have the two merging parties that would be two of the
13 strongest competitors. But I think both agencies have
14 done this a lot.

15 I mean, Rich and I have worked in the Defense
16 industry and, of course, there most of the products are
17 in the future. They don't really know what's the next
18 generation of satellite or weapon system. But what
19 they're concerned about is we do a next-generation
20 satellite, you know, are the two merging parties the
21 strongest competitors. So that issue, I think, would
22 apply with equal force to the high-tech industry.

23 If you can find that the two merging parties
24 are, from their documents and their people and third
25 parties, the most likely competitors for an unmet need,

1 and you have to identify what that is, and it needs to
2 be in the reasonably near future, then clearly I think
3 that's an easier case really, I think, for the agency
4 to prove because it's got substantial facts about the
5 merging parties and what they can do so they can focus
6 on, okay, how do we articulate what that unmet need is.

7 MR. MOISEYEV: Let me shift away from -- I'm
8 sorry, Debbie, do you want to weigh -- so we faced
9 something like that in Nielsen-Arbitron. I don't know
10 if you had any thoughts of the challenges. That was a
11 case we did together.

12 MS. FEINSTEIN: Sure. I think it really
13 depends on the facts of the case. Sometimes it's
14 very easy because you can define the market. You know,
15 the only two companies developing a generic
16 pharmaceutical product, I mean, that is a really easy
17 case to bring, right, which is why they always settle,
18 because you can clearly define what the market is. It
19 is the generic, you know, whatever.

20 Sometimes, and Nielsen-Arbitron was one of
21 them, and if you go back and look at the complaint,
22 it's a long description of the product market. One FTC
23 economist once told me that I probably was on thin
24 water if I had too many dashes in my product market
25 definition. And Nielsen-Arbitron comes, you know,

1 close to that in the sense that there were a lot of
2 adjectives, but it's how the customers described the
3 market to us.

4 And so, you know, it's going to be tougher
5 when there's, you know, a debate about how exactly do
6 you say what it is that's being developed when it isn't
7 done. I don't think that ought to keep you from trying
8 to say, hey, look, this is the problem that's being
9 solved. And in that case, it was a problem that was
10 being solved, which is bringing together data from, you
11 know, TV viewers and radio viewers and online viewers
12 and putting it all together.

13 I think it's an articulation issue. And, you
14 know, that's always tougher for, you know, to have to
15 tell a story in court, but it can be done if you have
16 the facts to show, hey, this is what they're out
17 touting to the marketplace they're going to do, and
18 customers are saying, yeah, they came to me with this
19 solution. I may not call it the same thing as the
20 customer down the street, but we all know what we're
21 talking about here. You just have to be able to
22 explain that all to a judge.

23 MR. MOISEYEV: So let me talk about a
24 slightly different situation. That's not a firm that
25 is -- sort of has the idea of entering a market, but a

1 firm that's actually entered the market, so it's sort
2 of day one of their entry. Small share, they're just
3 getting started. Is that analytical framework
4 different?

5 Andrea, do you want to weigh in on that?

6 MS. MURINO: Yes You know, I think -- this
7 is a boring answer, but I don't really think the
8 analytical framework is any different for all the
9 reasons that we've heard on this panel and also on some
10 of the earlier ones. To me, I don't know if professor
11 Yun is still here, but this is the evidence. Marcia,
12 Marcia, Marcia, evidence, evidence, evidence. And so
13 I think that maybe the caliber, maybe the quantity,
14 maybe the quality will vary slightly, but I don't think
15 that you need to have -- there needs to be a difference
16 in the analytical approach. I do think it's pretty
17 well settled that the way that the FTC and the DOJ go
18 about analyzing these deals in terms of that framework
19 is appropriate.

20 But I think that understanding what the facts
21 mean is where maybe it gets a little bit more
22 challenging. And going back to one of the earlier
23 questions, you know, is this something where you want a
24 technologist, I wasn't -- you know, I think generally
25 I'm in favor of the FTC and DOJ having access to

1 experts in their own houses, people who will sit there
2 and educate them, whether a deal is pending or not,
3 about trends.

4 So, if I'm going to central casting and I'm
5 imagining, well, what's the kind of person you want to
6 be giving the FTC input there, there's this Wall Street
7 Journal article a couple of months ago about the new
8 uniform in tech with the khakis and the fleece vest.
9 That's the kind of person I'm imagining that the FTC
10 would have to call upon.

11 Now, whether it's done informally and you
12 just pick up the phone and call them or whether they
13 actually have an office somewhere in the Constitution
14 Center, I think that's the kind of thing where for --
15 particularly for a potential competitor case, someone
16 who knows what the trends are, who can spot them for
17 the FTC, could be very valuable. But don't think the
18 framework needs to be any different.

19 MR. MOISEYEV: Well, Rich, go back in time to
20 when you were sitting at Pennsylvania Avenue, putting
21 together cases for the Government.

22 MR. PARKER: I'm trying to remember back that
23 far.

24 MR. MOISEYEV: Yeah, it was -- we're trying
25 to remember that as well.

1 MR. PARKER: Yeah, good.

2 MR. MOISEYEV: But what kind of evidence
3 would you want to see and want to be able to marshal in
4 bringing a case against a transaction involving either
5 a newly minted competitor or a firm that's about to
6 enter the market?

7 MR. PARKER: Well, I would start with the
8 statute, and I would note that it says likely and
9 substantial. And then I would look at the nascentness
10 -- is that a word? -- of the entrant, and I would say
11 likely is a problem and potential and substantial is a
12 problem. And so here is the kind of evidence I would
13 look to to make those points. And this is really -- I
14 mean, these are hard cases. There's just no question
15 about that. But this is what I at least came up with.

16 And I'd just start with the obvious one, is
17 the big guy paying a gazillion dollars for this? And
18 if that's the case, that indicates likely and
19 substantial, and I'd sure look at the documents
20 underlying the gazillion-dollar price. That's pretty
21 obvious.

22 The second thing is the old-fashioned way of
23 winning an antitrust case is on the documents. So you
24 got to look at what the people are saying internally
25 about how likely this company is to take off and how

1 substantial an effect it will have on them. And I'd
2 look at the documents seriously from both sides.

3 I'd look at patents. I'd say, well, you
4 know, the A side has a bunch of patents, and the B side
5 has bunch of patents. You add those up, what's that
6 make the future of this market look like? I would --
7 and certainly -- I think we've talked about it here --
8 there's got to be uniqueness. Is there something
9 distinctive about the B side here? There isn't anybody
10 else out there doing it, and I mean, there's 12 guys
11 who've come up with this company, you know, in Palo
12 Alto, or there's 12 guys in Los Altos who are doing the
13 same thing.

14 I would most certainly -- I would most
15 certainly want to know that. I'd look at the
16 equipment. I mean, if you -- if these two merge, will
17 they have some sort of monopsony power in hiring the
18 type of technocrats and technical people and scientists
19 to do this? Will they have some kind of a dominant
20 position or some monopsony position in the fancy
21 equipment you have to do this.

22 And, then finally, I would go to -- I would
23 get some expert testimony as to somebody who -- you
24 know, I might even look at an investment banker or
25 somebody, be one of the things I'd look at and say,

1 look, the people -- you know, what do you think? I
2 mean, would you -- does this look like a good
3 investment going forward? I'm not sure you'd call
4 somebody like that because they can always be
5 cross-examined, and they have opinions on everything,
6 but, nonetheless, they might be able to give you some
7 information.

8 And then the type of technologist who really
9 understands these markets, but that's what I'm getting
10 back to is that if I was in that position I would want
11 somebody -- and it's not me, I can barely operate my
12 phone -- but I would -- somebody who knows the Silicon
13 Valley and who knows -- you know, can look at this
14 stuff and say, you know, these guys really have
15 something going here and that's why they're paying a
16 gazillion dollars. I would want to have that kind of
17 information as well.

18 And that's why I thought maybe getting some
19 generalized Silicon Valley technology help might be
20 helpful here. But the key is substantial and the key
21 is likely, and that's the laundry list I can think of,
22 but maybe others have other bright ideas.

23 MR. GELFAND: Well, I was going to just
24 disagree respectfully with one point, Rich.

25 MR. PARKER: But you disagree with me on

1 every panel.

2 (Laughter.)

3 MR. PARKER: But go ahead, that's all right.

4 MR. GELFAND: That one's predictable.

5 MR. PARKER: No, but -- no, but I'm over
6 that. I'm over that last panel, Dave. I don't even
7 think about that last one, but go ahead.

8 MR. GELFAND: This point was made earlier as
9 well. I think there is very little evidentiary value
10 in the size of the price, the amount of the price of a
11 transaction. Sure, go look at the documents, see if
12 you can find evidence that the whole reason for the
13 transaction is to eliminate competition, that's fine,
14 but you're going to do that whatever the price is.

15 There are a whole lot of reasons why
16 companies pay a lot of money for another company. It
17 might be that they're just very valuable, inherently
18 valuable. They might have great people. Companies
19 sometimes pay a lot for people. They might have a
20 product that's going to save the acquirer a year's
21 worth of development costs on their own that itself
22 could have value to it.

23 And I think that the times when I have been
24 most frustrated with an enforcer telling me why they're
25 suspicious about a transaction is when they were sort

1 of superficially saying, well, this is such a high
2 price, we can't imagine why they would be doing this if
3 it wasn't anticompetitive. There's all kinds of ways
4 that you can imagine they would be doing that. Go get
5 the evidence. If you've got evidence that it's
6 anticompetitive, that's fine; otherwise, the price has
7 absolutely no evidentiary value whatsoever.

8 MR. PARKER: All right, so you're defending
9 the case, and the judge says, Mr. Gelfand, you've been
10 telling me what a peanut, what a baby this company is
11 for the last two days, why are you paying -- your
12 client paying a gazillion dollars for this zero
13 company?

14 MR. GELFAND: Well, I'm probably not going to
15 say it's a zero company if they paid a billion dollars
16 for it. I'm going to say it's a great company. It's
17 just not eliminating any competition.

18 MR. PARKER: All right, well, that sounds
19 like substantial and likely to me. I mean, look, so
20 I'm not thinking of the -- I'm thinking somebody in
21 black robes is going to wonder why you're paying a
22 gazillion dollars for this company that's got no likely
23 effect on anything. That's what I'm saying.

24 MS. FEINSTEIN: And if I could interject
25 because I'm in the middle of these two. Let me try to

1 bridge the gap here, but I don't think I'll be
2 successful.

3 MR. GELFAND: I predict I'm going to agree
4 with Debbie on this one.

5 MR. PARKER: I said, Mike, I cannot sit next
6 to Dave.

7 MS. FEINSTEIN: The acquirer could be
8 uniquely able to get efficiencies out of combining the
9 two companies that nobody else could. And a great
10 example of that, I think, and I confess I worked on the
11 case, and Mike will no doubt have a different view, is
12 Genzyme-Novazyme. Genzyme-Novazyme was a consummated
13 deal. I really wonder whether that would have been
14 challenged if it wasn't consummated because you
15 wouldn't have known. But because it was consummated,
16 we were able to show the efficiencies and the unique
17 combination of companies that by working together could
18 create a drug that companies had been working on for 50
19 years.

20 So great, and I can't believe I'm saying
21 this, but President Trump brought the daughter of the
22 CEO of the acquired firm to the State of the Union to
23 talk about the fact that she was in college. We
24 thought she was going to die during the case.

25 There was nobody else who could have seen the

1 value in that or could have developed it because they
2 didn't have the same technology and they were coming at
3 it. So to them -- and I don't think they paid a
4 particularly high price, that's why it wasn't
5 reportable, but they could get value out of it that
6 nobody else could. And it was worth it to them, and
7 those kinds of efficiencies are meaningful.

8 I just want to make the contrary point, which
9 is people are talking about all the ones that the
10 Government misses, but there's a lot that the
11 Government guessed on and got wrong, and that's just
12 going to happen. And my favorite example is gene
13 therapy where the press release talked about how it was
14 going to be saving lives to block this merger and have
15 these two different companies trying to innovate on
16 gene therapy.

17 I've always wondered, if you brought them
18 together and maybe other companies together, maybe
19 there would have been better innovation on gene therapy
20 because you'd had a lot of really smart people in the
21 room together. It's very hard to predict this stuff,
22 but I think there be can be real efficiencies, and
23 that's why somebody might want to pay for a company
24 that to the rest of the world looks not as valuable.

25 MR. MOISEYEV: Much as I would love to turn

1 this into a pharma panel where I'd feel at least on
2 somewhat safer ground, I will -- and also jump in
3 with my own views, I'm suffering the pain of the
4 moderator here, but I want to jump to monopolization,
5 only because there was a whole panel on Microsoft.

6 It's been discussed, I think either
7 implicitly or explicitly on all of the panels that
8 somehow there is an opportunity for the agency to
9 circumvent some of the restrictions in the Section 7
10 case law by looking at the Section 2 case law, or in
11 the Sherman Act. And the Sherman Act, as people have
12 probably pointed out, the risk of competition is
13 something that needs to be preserved. The Microsoft
14 case talks about preserving the nascent competitor, and
15 what better way to eliminate them than to acquire them.
16 You know, I think the lessons of Actavis potentially
17 are exportable there as well.

18 And so with that very loaded question, Rich,
19 can you give me a sense of can I bring a merger case
20 under Section 2 and avoid a lot of the problems that
21 you've been cataloging here?

22 MR. PARKER: You know, it's very -- very
23 interesting. You look at Netscape at the time that the
24 bad conduct -- and I'm going on the District Court in
25 D.C. Circuit opinion. They actually had a big

1 percentage of the number of devices out there, they
2 were a real company. They were a startup. They'd only
3 been around less than two years, but, you know, they
4 did have a decent size, and they did look like they
5 were on a good trajectory. You might have been able to
6 show substantial substantiality.

7 But it's interesting, you get into the
8 Section 2 case and the word "substantial" is not there.
9 You have to show a competitive effect, and it seems to
10 me that the courts are saying, if you're excluding
11 somebody who really is a peanut, that's still excluding
12 somebody, and you can't do that. And by the way, if
13 you're a trial lawyer, okay, can you imagine defending
14 a Section 2 case and say, you know, we may have
15 excluded Paul Denis' company, but he is so small it
16 doesn't make any difference. And then they'd say, Mr.
17 Parker, so you're saying that it's open season on small
18 companies? Well, I mean, that's not an effective way
19 to defend a Section 2 case at all. And so there is an
20 absence of substantiality there that I think is very
21 important in the Clayton Act context.

22 You mentioned Actavis, and I think that --
23 I mean, and I don't want to get Debbie all riled up
24 on me, but Actavis is -- she and I have gone around
25 on this one before. And Actavis, I think you need some

1 -- another trip to the Supreme Court to find out what
2 that means. But there still is the concept that you've
3 got this generic company out there and that what you
4 want to preserve is the possibility that they may jump
5 in with an at-risk launch or something like that, and
6 that somehow has a restraining power on the brand. And
7 so that is a concept.

8 But the difference is, is that sometimes the
9 generic company is Teva, which is probably bigger than
10 the brand, and they do have a product, and they have
11 everything ready to go. So I'm not sure if that is any
12 kind of a precedent here or not, except for the general
13 proposition that the potentiality of somebody jumping
14 in is a competitive dynamic that's worth preserving.

15 MR. MOISEYEV: Well, let me -- I mean, the
16 thing that is confusing is in almost any other kind of
17 merger case it's generally believed that the Clayton
18 Act is more permissive than the Sherman Act. And it
19 sounds like at least in this area, we're hearing
20 something different.

21 Debbie or Rich.

22 MR. PARKER: Yeah, I was going to say it's
23 the substantiality requirement. Like I said, you can't
24 defend a Section 2 case by saying the guy was really
25 little so we can do anything we want to him. And in

1 the Clayton Act, you hang your hat that, you know,
2 buying Paul Denis' company doesn't make any difference
3 because he doesn't make any difference. With all due
4 respect to Paul, but that's what I'm saying. You can
5 make that argument under 7; you really can't under 2,
6 unless I'm missing something.

7 MR. MOISEYEV: That's it?

8 MS. FEINSTEIN: Look, you were going to tee
9 up a question to me, and it's in the script, so, look,
10 I think we could debate all day long about Section 2
11 and Section 7, and we could debate all day long about
12 how -- whether Microsoft and Rambus are consistent or
13 not consistent, and way smarter people than I will have
14 views on this. The important point to think about for
15 merger enforcement is, is the fact that there is some
16 uncertainty about precisely what the law is on
17 potential competition or precisely what the law is
18 about a monopolist buying a nascent competition, is
19 that scaring off the FTC from bringing cases?

20 I can't speak to the DOJ; I'll let Dave do
21 that if he has a view. I don't think it is. And
22 Mallinckrodt is the best example of a case where not
23 only were we not scared off, we were so sure of our
24 case or at least willing enough to take on the case
25 that we got a very big disgorgement figure. So at some

1 point the law may be a deterrent to bringing these
2 kinds of cases but not at the moment. Staff is not out
3 there saying, ooh, we're not sure how we're going to
4 write the footnote about Rambus, so we better not bring
5 this case.

6 They're going, is there a problem? Yes.
7 Let's figure out how to write a really good complaint
8 and tell a story to a judge and, you know, we'll fight
9 about the law if we have to. So far that hasn't
10 happened; down the road it might. And it might be that
11 we're all talking here ten years from now as on a panel
12 that we had earlier, you know, folks were all saying,
13 oh, you know, AmEx got it wrong and the world is going
14 to come to an end because of that decision, and maybe
15 there will be a similar decision on potential
16 competition that we'll all be concerned about, but
17 that's not a deterrent right now to bringing the kinds
18 of cases that I think folks think should be brought.

19 MR. MOISEYEV: We don't have a lot of time
20 left, and I really -- there are a couple of very good
21 questions on areas that I wanted to touch on here. So
22 I want to first ask a question about retrospectives
23 that I think there was a rather lively conversation on
24 the last panel about retrospectives and whether sort of
25 given the uncertainties that you have in these cases

1 about how things are going to evolve, would a good
2 strategy be to wait and see? And if they turn into
3 Instagram that all the kids love, then bring the case.
4 And if they turn into the Friendster or whatever -- I'm
5 hopelessly out of my depth now after two websites, but
6 -- and then that's a great filter, right, the real
7 world, the real world experience?

8 Scott, can you give me thoughts on that?

9 MR. SHER: Yeah. So I think that would be
10 dangerous. I think that would be dangerous for a
11 number of reasons. I think, look, retrospective
12 studies are interesting and sometimes they're
13 important, but if you were to conclude, for example,
14 well, Instagram has become popular so now let's bring
15 the case, you have to ask yourself what's the reason
16 that Instagram has become so good. Has Instagram
17 become so good because inherently it was a really good
18 product at the time it was acquired by Facebook and was
19 actually going to become a large competitor? Or did it
20 become a large competitor because Facebook made it a
21 large competitor or a large presence in the market?
22 And market events, you know, superseded what happened
23 as result of the transaction and you can't really
24 attribute the deal to the reason for Instagram success.
25 So you can say today, oh, YouTube is huge.

1 And maybe we should bring a case to block the
2 Google-YouTube deal. But that doesn't answer the
3 question as to why YouTube is great today. Is YouTube
4 great today because it was going to be great absent the
5 acquisition by Google? I don't know if people remember
6 this, but back in 2005, that website was actually still
7 funded by credit card debt by two people who were
8 running it out of their garage. I mean, was that
9 company likely to become really large as a result of --
10 you know, if it wasn't acquired by Google, or did it
11 become large because it had access to the resources of
12 a Google to make it large.

13 So I think going back and doing that sort of
14 retrospective is very problematic. You can draw very
15 erroneous conclusions as a result of it. I'm not
16 suggesting that retrospectives are bad, but I think in
17 technology markets where things change very rapidly,
18 where there are a lot of reasons why something might
19 become successful or might fail, you have to be really
20 careful to attribute the deal to the reason of the
21 success of the competitor that was acquired. You can't
22 just say, well, the company became big, therefore, we
23 should probably have challenged the deal in the first
24 place. I think you would get a tremendous number of
25 false positives.

1 MR. MOISEYEV: Well, let me -- I mean, I
2 think Professor Yun said that -- I hate to be quoting
3 him, God knows, probably some false premise with my
4 question. But, you know, he said everybody's for
5 retrospectives. Is everybody here sort of for
6 retrospectives, the way Scott apparently is?

7 MR. SHER: Just one more quick thing. I'm
8 not in favor of retrospectives from the -- per se.
9 What I actually think, and I had mentioned this
10 earlier, what I think the agency should do, because
11 there seems to be a lot of confusion by a lot of people
12 who are actually not practicing, well, do the agencies
13 just not understand how to do these deals? Well, they
14 actually do understand how to do these deals.

15 So how do you rectify the problem that no one
16 knows that the agencies understand how to do the deals,
17 but they're actually doing them correctly? They should
18 issue more closing statements. The agency should
19 explain to the public, what did you look at, why did
20 you look at it, why did you reach the conclusion you
21 reached, what other conclusion could you have reached.

22 Some of the best decisions that have come out
23 of the FTC in my opinion over the course of the last 15
24 years are Genzyme-Novazyme, where there was an
25 extraordinarily detailed closing statement, and the

1 cruise line case. And those are cases where the FTC
2 actively took steps to explain to the rest of the
3 market why they took the actions they did. Those are
4 the sorts of things that I think would help increase
5 knowledge as opposed to just going back and saying,
6 well, something is successful, now we should go back
7 and retrospectively challenge it.

8 MR. MOISEYEV: Anybody else have something on
9 retrospectives? If Rich wouldn't use our closing
10 statements against us when we sue him, it would
11 probably be much more -- the agency would be more
12 prolific in that regard.

13 MS. MURINO: I'll just add, I agree closing
14 statements are really valuable and would encourage the
15 Commission to do those very often, maybe even on the
16 level of the way some of the Europeans do it at the
17 E.C. level, some of the member states do it. I think
18 it's a great idea. I also think that internal
19 retrospectives, and I worked for Bill Kovacic, who
20 obviously spent a lot of time thinking about the FTC as
21 an institution, and I think there's value to the FTC
22 doing retrospective studies, even if you don't release
23 it to us. Obviously, I'd prefer you would release it
24 to us. But I think that there's real value to being
25 able to have the staff go back and look at what they

1 did and see what they missed, see what they did well.

2 I think sometimes you can learn an awful lot
3 from that to give you confidence to go ahead. And so I
4 would encourage, even if you're never going to tell me
5 what you find, for you all to go back and think about
6 ways that you did well on this deal and here is where
7 you fell a little bit short.

8 And certainly having the 5(b) authority to be
9 able to get data from parties once those -- once
10 transactions have closed, I know there's paperwork
11 involved, that you have to go to OMB, it's very
12 complicated, and I won't pretend to understand it, but
13 having that ability, I think, means you'd be able to
14 really do something meaningful, even if you never tell
15 me about it.

16 MR. GELFAND: Yeah, I agree with that, but I
17 have to say, like any scientific work, a study needs to
18 be unbiased. And when you've got the people who were
19 making the decisions studying the outcome of the
20 decisions, that is not unbiased study. So I think it's
21 great. I think if the agencies want to do it, that's
22 great. I think they've got a lot on their plates, and
23 it's hard to go back and look at old stuff when you got
24 a bunch of new stuff coming in.

25 MR. SHER: Particularly when David is telling

1 you to go really fast.

2 MR. GELFAND: Yeah, you got to go really
3 fast. You got to go really fast, Paul. I hope you got
4 that down.

5 But, you know, other people need to do it,
6 and we've heard some examples on the panels today, and
7 even though I don't agree with everything people have
8 been saying, I definitely agree with the scholarship of
9 it all. Study this. Convince other people. Don't
10 just say your opinions, do the work, make it
11 verifiable, replicatable, all the things that
12 scientific work is, be unbiased, and eventually this
13 body of work will lead to conclusions.

14 MS. FEINSTEIN: Just one quick sentence. I
15 think the Commission does that all the time. They
16 don't call it a study. They look at the industry again
17 in the next deal, and as part of that, they are looking
18 at whether or not the predictions of the last deal are
19 right.

20 And I think of one in particular, Mike and I
21 worked on it, where there was controversy over the
22 first deal. And when we went back to ask folks,
23 customers, how did it turn out. They, to a one, said,
24 oh, this was a great deal. This was a deal that had
25 been controversial as to whether or not it should be

1 cleared, and the customers all said, yeah, all the
2 efficiencies, we got it, we got lower prices, we can
3 show you, it's in our documents. So, I mean, they're
4 doing that sort of thing, you know, as they're going
5 along.

6 MR. MOISEYEV: I'm sorry, I'm not a panelist
7 here, so I won't -- maybe I should say it in the form
8 of a question, Jeopardy-style here, but I think Dave's
9 point, maybe if you can expand on that, is how do you
10 solve for the problem of the investigators or the
11 confirmation bias that's inherent in those kind of
12 analyses.

13 MS. GELFAND: Yeah, no, I think that's a big
14 problem when people look at their own work and they go
15 back and that's what they're trying to show. You know,
16 it's necessarily going to be untransparent to the
17 public if the agencies are relying on confidential
18 data, they can't publish that data. I don't know what
19 the answer is to that. I think there is value to it.
20 I'm not saying people shouldn't do it to the extent
21 they have time and resources to do it.

22 But I do think, you know, people would be
23 skeptical of the results of, you know, work being done
24 by an organization studying its own success rate.

25 MS. FEINSTEIN: I don't know. People quote

1 the divestiture study back a lot. I mean, look, yes,
2 on the margin, but, you know, if that was just the
3 agency trying to show that it had done great, I think
4 it would have come up with a higher percentage of such
5 numbers.

6 MR. MOISEYEV: We tried to add more input
7 into that.

8 MR. GELFAND: That's actually one of the
9 things I had in mind as I'm thinking about that.

10 MR. MOISEYEV: All right. To avoid too much
11 thread drift here, I wanted to ask -- there was one
12 question that came in, more on this technologist which
13 I think just is something that spurs so much interest.
14 One of the questions was, if we had a budget, which is
15 almost hypothetical, not even worth contemplating, but
16 it was large enough to add ten people to the agency, do
17 you put them or any portion of those in to people with
18 this kind of expertise, given sort of what's happened
19 over the last three days here, what we've heard over
20 the last three days? Is it more attorneys?

21 You know, I probably could answer the
22 question about more economists, more commissioners.
23 There are a lot of possibilities that you can put the
24 resources that I might have my own views on. But, I
25 mean, seriously, I think it is a good question because

1 it asks, you know, what is the need from the outside
2 perspective at the agency.

3 MS. FEINSTEIN: I got asked that question by
4 the Chairwoman, if I could have \$5 million, what would
5 I do with it. I mean, it was a serious question
6 because it was a time when we thought we might get some
7 special bonus. And I said, surprisingly, I'm sure, to
8 the lawyers in the room, sorry, no offense, I said more
9 economists. And the reasons is, A, we don't have
10 enough of them on the cases; and, B, I would love a
11 group of economists who could use the data and do
12 studies and, you know, maybe hire outside economists to
13 do the studies as well, that more studies was the one
14 thing I would want to spend money on.

15 MR. MOISEYEV: Anybody else have thoughts on
16 that?

17 MR. SHER: I agree with -- particularly if
18 you're talking about technology deals. The one thing
19 -- you know, and Debbie and I worked on a deal where
20 there was -- when she was at the Commission. There was
21 sort of a tremendous amount of data. That is one thing
22 that is different about technology deals and about
23 other transactions. There's a tremendous amount of
24 data sometimes. And it's very difficult for the FTC to
25 get up to speed on how to analyze the data really

1 quickly.

2 It would both facilitate, you know, Dave's
3 desire to get transactions closed more quickly where
4 they deserved to be closed and probably would help the
5 FTC make better decisions on whether or not there's a
6 likelihood of effects if there were people who can
7 actually do the type of data analytics that you need to
8 do really rapidly.

9 MR. GELFAND: I would clone Ted Hassi and
10 hire ten of him. And I would do it so that you have
11 -- yeah, I know, he's up there. I always pick somebody
12 in the audience, you know, when I pick on somebody. I
13 would do it because you always need more capable trial
14 lawyers, I think, in any organization whose mission is
15 law enforcement and bringing cases.

16 And I would do it not just so you're even
17 more effective in court, because you're already very
18 effective in court, the Government's winning most of
19 its cases in recent years, but also because you need
20 experienced people to make judgments about when it's
21 time to cut it off and this is not a case we can bring,
22 it's not winnable, there's really no problem here. So
23 that's what I would do. I would hire ten of that guy.

24 AUDIENCE MEMBER: Still got that \$5 million.

25 (Laughter.)

1 MR. MOISEYEV: Or that's half an economist
2 based on the bills we're getting for experts.

3 (Laughter.)

4 MR. PARKER: I just want to say I totally
5 agree with Dave.

6 MR. MOISEYEV: I'm dumbfounded now.

7 MR. GELFAND: Maybe nine Ted Hassis and
8 one --

9 (Laughter.)

10 MR. MOISEYEV: I feel like we've finally
11 reached consensus on our panel. We have a couple of
12 minutes to go, I was just wondering if anybody had
13 anything that they wanted to add before we close out
14 here.

15 MR. GELFAND: I'd like to add a comment to
16 the law students in the audience because I think there
17 might be some of you. This is a fabulous area of law
18 to practice in. There is so much going on, and I hope
19 you've seen through the interactions that have taken
20 place today how great a bar this is and how the people
21 really think hard about these issues, how they have
22 very civil discourse about it, and organizing things
23 like this, Bilal, where people can come together and
24 debate these issues, try to inform the agency about the
25 different perspectives, bringing scholars together with

1 practitioners, with enforcers, I hope law students in
2 the audience appreciate how wonderful an area of
3 practice this is. So that will be my closing remark.

4 MR. MOISEYEV: Well, maybe that's a good
5 place to end. I will say that I feel very privileged
6 to have had the chance -- I disagree with all of you
7 regularly on substance but have learned a lot from you,
8 and I appreciate the opportunity to have been able to
9 moderate this panel.

10 (Applause.)

11 (End of Panel 5.)

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1 CLOSING REMARKS BY DOUGLAS H. GINSBURG

2 MR. MOORE: After a long but informative
3 three days of hearings, we have one final event that I
4 hope everybody could sit for and focus for just the
5 last ten minutes. We have quite a treat. Judge
6 Douglas Ginsburg is going to be giving closing remarks.

7 As many of you know, Judge Ginsburg is a
8 Senior Judge now on the U.S. Court of Appeals for the
9 D.C. Circuit, which he was the Chief Judge from 2001 to
10 2008. He's also a professor here at the Antonin Scalia
11 Law School here at George Mason University. And in the
12 1980s he was the Assistant Attorney General, Head of
13 the Antitrust Division. It may not make the first
14 paragraph of his bio, but one of his finer moments was
15 serving as my boss as a law clerk from 2008 to 2009 on
16 the D.C. Circuit. So it's a pleasure for me to
17 introduce Judge Ginsburg to close us out.

18 (Applause.)

19 JUDGE GINSBURG: Thank you, Derek.

20 Well, you've had a long day, and it's been a
21 long several days, so I'm not going to detain you for
22 very long. But I did want to provide a little
23 perspective from the realm of the gray-headed, the gray
24 hairs.

25 These hearings, as I think you may know a

1 little bit about, are essentially modeled after
2 hearings that were convened by Robert Pitofsky,
3 then chairman of the FTC in 1995. And in those
4 hearings, the Commission considered questions, some
5 of which are familiar to us today, such as -- well, the
6 broad general one is -- was then and is now --
7 how antitrust law should be adapted in light of --
8 and whether it should be adapted in light of
9 developments, innovation and increasing -- at that time
10 increasing globalization.

11 So my brief remarks today are going to focus
12 on the broad aspirations of this kind of review that's
13 taken place periodically. From the 1995 hearings, to
14 the report and recommendations of the Antitrust
15 Modernization Commission in 2007, to the hearings that
16 have been conducted these last few weeks, the
17 authorities, the Commission in particular, had to
18 confront whether and how existing tools should be
19 adjusted to meet new market realities.

20 It's hard to get into the subject without
21 first pausing for a moment to honor the work of Bob
22 Pitofsky, who as many of you know, passed away just
23 last week. Bob was a commissioner of the FTC starting
24 in 1978 for three years, and then again in 1995 came
25 back as chairman until 2001, a pivotal time that shaped

1 the Commission and brought the agency to new
2 prominence.

3 Bob had too many accomplishments to be
4 recounted fully here, but more important than any of
5 those in particular was his approach to antitrust
6 enforcement, which was sharp and thoughtful and crucial
7 to the Commission's ability to confront new challenges
8 that it faced at the dawn of the 21st Century.

9 Throughout his chairmanship, Bob demonstrated
10 that a measured approach to competition policy could
11 reap great rewards for consumers. He vastly improved
12 the Commission's administrative processes in several
13 way, one important example being creating the fast
14 track for administrative litigation that significantly
15 improved the Commission's ability to resolve antitrust
16 cases in a timely fashion.

17 After leaving in 2001, Bob went back to
18 Georgetown University Law School and continued to teach
19 and write about antitrust -- teach antitrust and write
20 about it until the very end of his career. And today,
21 it's thanks to many of his accomplishments at the FTC,
22 and in no small part to the precedent that he set with
23 the hearings in 1995, that the Commission has been able
24 to bring together really top people in academia and
25 government, in law and in economics as well as

1 stakeholders and members of the public, to consider the
2 challenging issues that you all have been dealing with.

3 The 1995 hearings were officially called The
4 Global and Innovation-based Competition Hearings, and
5 they were held over a period of two months. That may
6 seem even more ambitious than the rather tight schedule
7 that Bilal has set out for all of us over the next
8 several months.

9 Tim Muris noted some time ago -- Tim,
10 himself, a former chairman of the FTC and a
11 longstanding member of the Antonin Scalia Law faculty
12 here, a while ago noted that through those hearings,
13 the chairman took advantage of the unique features of
14 the FTC, bringing together as it does in one agency not
15 just the commissioners chosen on a bipartisan basis but
16 the administrative law judges, attorneys, the now 80 --
17 at that point, I think 60 -- Ph.D. economists on the
18 staff, making the agency one of the most important
19 industrial organization economics departments in the
20 world, bringing all of that together with its power to
21 initiate studies to 6(b) authority, to initiate studies
22 and report to the public and to the Congress on matters
23 of competition and concern.

24 The subjects taken up in 1995 ranged pretty
25 broadly in substance as they do this time around. Just

1 to give you a sense of how times have changed and to
2 some degree have not changed, consider these selected
3 topic headings from the agenda.

4 How should antitrust define current
5 generation markets when firms compete on innovation (or
6 product attributes), as much as price?

7 Or what roles do antitrust and intellectual
8 property protection play in promoting innovation and
9 competition? You could have reused these, Bilal.

10 Finally, how do computer companies compete,
11 how do the network and interoperability aspects of the
12 industry affect competition?

13 Throughout those hearings, the Commission
14 heard advice from economists, from legal scholars, from
15 informed members of the public. And then the staff of
16 the Commission distilled those contributions into
17 several projects, some of which had lasting
18 application, not just influence, but application today.
19 For example, after the hearings, the FTC, together with
20 the Department of Justice, revised the guidelines on
21 efficiencies in merger review and made more precise and
22 more demanding the showings that had to be made to
23 prove that claimed efficiencies were, indeed,
24 merger-specific.

25 Now, the FTC staff also embarked on a project

1 with the antitrust division, the joint venture project
2 in order to clarify the agency's policies regarding
3 collaborations among competitors and resulting in the
4 guidelines that were issued in 2000.

5 Not long after, the Congress, in 2002, wanted
6 to know for itself whether the antitrust laws needed to
7 be updated in some way and created the Antitrust
8 Modernization Commission through an act of that title
9 in 2002, creating and tasking a new and temporary group
10 to investigate what should and should not be changed in
11 light particularly of globalization and of rapid
12 technological change, another familiar theme today.

13 And that was a bipartisan, 12-member
14 commission that invited the public to recommend topics
15 for its investigation. The AMC issued its report and
16 recommendations in 2007. And as with the 1995 hearings
17 and those now underway, the AMC's report covered the
18 whole range of topics from criminal remedies to
19 intellectual property, to whether the Congress should
20 repeal the Robinson-Patman Act.

21 And the report concluded that although there
22 were ways in which antitrust enforcement could be
23 improved, the current antitrust laws were "sound" and
24 did not require entirely new or different rules to
25 address the then so-called new economy, in which, and

1 I'm quoting the report, "innovation, intellectual
2 property, and technological change are central
3 features." Pretty contemporary account, frankly.

4 Of particular relevance today, the AMC
5 concluded that because antitrust law is flexible and
6 open to new economic thinking, the agencies and the
7 courts have the tools that they need in order properly
8 to assess new marketplace developments and competition
9 issues as they arise.

10 Now, the current set of hearings, we've heard
11 and we're going to hear, continue to hear from a wide
12 range of experts and stakeholders about how the economy
13 has changed since 1995 and, indeed, even since 2007.
14 And it's true that even a decade ago the agencies
15 likely could not have foreseen some of the competition
16 issues now associated with big data, with privacy, with
17 algorithms and so on.

18 And, indeed, the first case involving a
19 platform business to reach the Supreme Court was
20 decided only a few months ago. So this is all fairly
21 new stuff. With these new market realities, some
22 observers are now calling for really significant
23 changes in the focus of antitrust law. And I'm going
24 to highlight just a couple of them that have emerged in
25 recent years, and we've all heard, read, and perhaps

1 said something about one or both of them.

2 And the first is challenges to the consumer
3 welfare standard. The 1995 hearings did not call into
4 doubt the so-called core aspects of antitrust
5 enforcement regimes, which were said to have "served
6 the country well." Rather, they addressed adjustments
7 that the agency had to make, thought they should make,
8 in order to ensure vigorous competition and consumer
9 choice.

10 Now, as Chairman Simons noted when he gave
11 his opening remarks a couple of weeks ago, now the
12 hearing calls to expand beyond consumer welfare
13 standard and to consider all manner of other concerns
14 ranging from economic inequality all the way back --
15 and I take the word "back" advisedly -- to a concern
16 with the sheer size of firms, a consideration that was
17 explicitly repudiated in 1981, that was unmourned in
18 1995 and 2007, but here in 2018 is the subject of a
19 forthcoming book by Tom Wu, next month, called The
20 Curse of Bigness.

21 Second is the role of intellectual property.
22 As new products are devised to take advantage of
23 digital technology, the importance of IP rights has
24 increased throughout the economy, but the potential for
25 anticompetitive abuse of intellectual property has also

1 become an increasingly important antitrust concern.
2 And there's certain to be a continued debate throughout
3 the present hearings about whether the historical
4 protection that we've afforded to intellectual property
5 should be compromised in order to balance incentives to
6 innovate with market access for competitors.

7 Whether U.S. firms continue to dominate
8 technology markets worldwide is surely at stake in the
9 resolution of that question. Now, I'm not going to
10 belabor you at this late hour with my views on these
11 matters. They have been submitted to the Commission in
12 the remarks submitted by the Global Antitrust
13 Institute, to which I'm signatory, but they are
14 important issues on which a lot of perspectives are
15 going to be brought to bear.

16 In closing, I just want to leave you with
17 some conclusions I'm recycling from the report in 1995,
18 and I think they're still relevant. This is
19 the staff's conclusion. Effective antitrust
20 enforcement requires rules and processes that
21 facilitate accurate judgment in the face of inherent
22 uncertainty. Developing those new rules depends on a
23 cautious approach, reliance on specific facts, a
24 willingness to learn from the past, transparent
25 decision-making, and the articulation of competition

1 values whenever antitrust policy is being made.

2 I don't think we can do better than that. I
3 hope we can do that well this time around. Thank you
4 for your attention.

5 (Applause.)

6 (Hearing concluded.)

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s/Linda Metcalf
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Court Reporter