1 a board of a firm that gets hit with SEC actions, you
2 know, A, I often lose my board seat and, B, I have a
3 hard time getting board seats in the future on other
4 related firms, and so the SEC's action seems to be
5 enough to get shareholders to sort of move in the
6 right direction.
7 Whereas when it comes to private securities
8 litigation, what this study found is not only do board
9 members tend to not lose their board seats when they
10 are the subject of private securities litigation, it
11 actually looks as though their prospects in the future
12 get better. So there are subtle differences depending
13 on the setting and depending on what kind of actions
14 we're talking about. And so, as with most things in
15 life, it's complicated, we can't give the simple one
16 size fits all answer.
17 DR. COOPER: Which is good because it keeps
18 people like us in business, the complicated questions.
19 So now that we've definitely laid the
20 groundwork with this first principle to think about,
21 to think about optimal liability, optimal deterrence,
22 now I want to turn the discussion and focus it more
23 narrowly on the FTC. And to lead off this discussion,
24 I'm going to turn it over to Gus to talk about what
25 are the sources, how can the FTC -- what are the

1 remedies available to it, both equitable and the
2 difference between the equitable remedies and the
3 ability to get civil penalties, and some of the recent
4 challenges that the FTC has faced in court. So I'll
5 leave it to you, Gus, to lead off our last part of our
6 discussion here.
7 MR. HURWITZ: Okay. Let's talk about 13(b)
8 baby, let's talk about FTC.
9 DR. COOPER: Now, before we get into that,
10 I've got to --
11 MR. HURWITZ: I got a laugh from that one.
12 DR. COOPER: Let me also remind everyone
13 that I think Jacob is walking around. If you have
14 questions, I've gotten a few already, but if you have
15 questions for panelists, please make sure to hand them
16 off to Jacob.
17 MR. HURWITZ: So I shall endeavor to
18 parsimony. That is a fraught exercise, however.
19 First, thanks to the Commission for having me here,
20 and I also need to say thanks to the Blue Jays for
21 allowing a Cornhusker into their building. And, also,
22 I'd like to commend the FTC for bringing the hearings
23 out of D.C. and out here to Nebraska and really out
24 here to anywhere other than D.C. for awhile. And it's
25 nice for a change. I'm usually the lawyer playing an

1 economist on panels and this time I'm the quasi-
2 economist who gets to play a lawyer. So it's a nice
3 inversion for me.
4 I should also note that I, through my
5 affiliation with the International Center of Law and
6 Economics, have submitted and am submitting numerous
7 comments into the Commission's competition hearings
8 and proceedings.
9 Okay. So I'm going to assume generally that
10 we understand a fair amount about the FTC's and other
11 state consumer protection authorities' consumer
12 processing remedies provisions. As James alluded to,
13 there are many of them. And I think the best way,
14 easiest way to describe them is to say that they're a
15 total mess. They have accreted to the Commission over
16 the years through different sources of statutory
17 authority for different purposes, different amendments
18 intended to address different things, different
19 statutory authority intended to address narrow
20 concerns that frequently have been expanded by the
21 Commission or the courts to address broad concerns.
22 So, generally, Section 19 of the FTC Act,
23 for instance, is one of the core remedial provisions
24 that allows the Commission, following the adjudication
25 and issuance of a cease-and-desist order, to go to the

1 Article 3 courts and get such relief as the court
2 finds necessary. And this statute, this section
3 expressly allows rescission, refunds and damages to be
4 awarded by the court.
5 13(b), which is the main section that I'll
6 be talking about, is for proceedings that the
7 Commission initiates in Article 3 courts. Initially
8 intended to allow the Commission to get a temporary
9 injunction during the pendency of an administrative
10 proceeding, but it also allows for permanent
11 injunctions, which have been interpreted in
12 interesting ways -- I'll come back to that -- and this
13 applies both to unfair methods of competition and to
14 UDAP claims.
15 There are also provisions under the Clayton
16 Act for unfair methods of competition, not UDAP,
17 Federal Tort Claims Act provisions, and several other
18 various acts that give the Commission particular
19 remedial authority.
20 But let's focus on 13(b), and depending on
21 time, possibly turn to some general thoughts. 13(b),
22 Section 13 was added to the FTC Act in 1973, primarily
23 as a means for the Commission to go to court, while it
24 was going through an administrative hearing, in order
25 to go against a company that had violated the FTC Act

1 on the concern that company's hearings can take a very
2 long time and during that long time all of that
3 company's assets can disappear. So the Commission
4 didn't have any effective remedies. So these
5 injunctions can be used to temporarily enjoin the
6 problematic conduct and to enjoin the company from
7 basically losing all of its assets.
8 In the 1980s, a group of savvy -- that's an
9 interesting word, savvy, does it mean wise or smart,
10 I'm not going to say -- lawyers at the Commission
11 realized, hey, we can use Section 13(b) even more
12 broadly because it also includes this permanent
13 injunction authority. And, initially, this was used
14 in competition cases, but increasingly in UDAP cases.
15 And one of the earliest cases that the
16 Commission brought using 13(b) authority, this is a
17 1982 Fifth Circuit case, really brought a new
18 attraction to 13(b) for the Commission. The Fifth
19 Circuit noted that 13(b) carries with it the
20 authorization for the District Court to exercise the
21 full range of equitable remedies traditionally
22 available to it. Since then, eight other circuits
23 have had similar holdings. So, basically, what this
24 says is when the FTC goes to court under 13(b),
25 seeking a permanent injunction, they can also, and

1 this is pretty standard language, ask the court to
2 award any other equitable relief the court deems
3 appropriate and the court can use that broadly.
4 So equitable relief, what does this mean?
5 So a common law court sitting in equity could order
6 almost any remedy that the judges thought was
7 necessary in order to equitably do justice, to make
8 the parties whole, to make the wrongdoers feel wrong
9 and bad about what they have done. This includes
10 restitution, recision, injunctions, disgorgement.
11 These are all traditional common law equitable
12 remedies.
13 Now, equity, law, I'm a law professor. I'm
14 hoping that for the most of you who are lawyers, this
15 is kind of making you fear that I'm going to say Erie
16 and the Federal Rules of Civil Procedure and things
17 like that. I just said, Erie, there is no federal
18 common law. Federal Rules of Procedure, 1938. We
19 have unified civil courts that address both questions
20 of equity and law. In the post Erie era, post Federal
21 Rules of Civil Procedure era, basically, early mid-
22 century in the Supreme Court, there was a lot of
23 discussion about what's the role of equity in the
24 common law, increasingly, statutory law courts, of the
25 United States.

1 One of the most important first cases,
2 Guaranty Trust, 1945, established this idea of
3 equitable remedial rights doctrine and this was
4 reflected in the 1946 Porter case where the court
5 said, “Unless provided by statute, all the inherent
6 equitable powers of the district courts are
7 available.” And this was reaffirmed a couple of years
8 later in 1950 in the Mitchell case, unless a statute,
9 in so many words or by necessary and inescapable
10 inference, restricts the court’s jurisdiction in
11 equity, the full scope of that jurisdiction remains.
12 So if the statute doesn’t clearly strip the court of
13 authority to employ equitable remedies, the Supreme
14 Court mid-century said, yeah, judges can use these
15 remedies.
16 The 1973 amendments to the FTC Act that gave
17 us 13(b) said the courts can issue injunctions,
18 temporary injunctions, permanent injunctions, and
19 that’s traditional equitable relief. So the courts
20 broadly, starting in the 1980s, said, hey, the door’s
21 open to equitable remedies, following Porter,
22 following Mitchell. Nothing in the statute clearly
23 removes equitable remedies from the courts. So
24 they’re available to the courts.
25 The FTC routinely uses 13(b) to obtain

1 hundreds of millions or even billions of dollars a
2 year in remedies. And this is really a cornerstone
3 tool for the FTC, nowadays, primarily because it
4 doesn't have much other authority to get money, to get
5 damages out of companies that have violated the FTC
6 Act, at least not without going through the process of
7 a fully adjudicated claim or some settlement that is
8 subsequently violated and that first bite at the apple
9 leads to a second set of enforceable consequences.
10 Deep breath. What's going on lately? So
11 the 1980s era was a very different era than the one
12 that we find ourselves in today. It was the era that
13 brought us cases like Chevron, it was the era that
14 fell on the heels of Bell Aerospace and the Chenery
15 doctrine, State Farm, broad judicial deference to
16 agencies. There is a lot of discussion today
17 especially about Chevron, but a lot of discussion
18 today about have we given agencies too much, too broad
19 power? What are the due process, what are the fair
20 notice concerns and implications of how this power is
21 being used?
22 We are operating in a different environment
23 and, frankly, I don't think that the FTC is fully
24 aware of the judicial reception that they are likely
25 to receive, especially at the Supreme Court. I think

1 I can count five, likely six justices at least, that
2 would be quite hostile to a lot of the FTC's
3 interpretation of its enforcement authority. And that
4 could trickle down, that could also affect state
5 attorneys general and state consumer protection
6 authorities.
7 A couple of examples. Most recently, the
8 Third Circuit in the Shire case, rejected the FTC's
9 efforts to use 13(b). This is in the context of
10 unfair methods of competition. But the court said
11 that 13(b) can only be used to enjoin conduct that is
12 occurring or is about to occur, pointing to the clear
13 language of the statute. And expressly, looking at
14 the statutory history and saying the purpose of 13(b)
15 was to facilitate FTC administrative enforcement not
16 to create a new form of action or an avenue for FTC to
17 seek relief. It cannot -- the key issue in Shire was
18 whether the FTC could look to past conduct or
19 hypothetical future conduct. And the court said it
20 cannot be used to take action against long past
21 conduct or hypothetical conduct.
22 In footnote 19 -- it's always the footnotes
23 -- the court says, "We also reject the FTC's stand-
24 alone claim for equitable monetary relief. Assuming
25 relief is available under Section 13(b), the FTC must

1 still meet the 'is or is about to' requirement." So
2 one strike against the FTC's broad use of this
3 authority.
4 You all or many of you might be familiar
5 with the Kokesh case. This is an SEC case. We have
6 heard about the SEC and some of its similar
7 authorities. This is a 2017 Supreme Court case. The
8 SEC has long used an equitable disgorgement tool as a
9 primary remedy with some similarities to Section
10 13(b). In Kokesh, the court said that this is a
11 penalty, subject to a statutory limitation --
12 statutory -- a statute of limitations. Statute,
13 statute, statute. We're in law not equity.
14 And in a unanimous opinion, where several of
15 the Justices during oral argument seemed overtly
16 hostile to SEC practice, the court said this form of
17 equitable relief was not available to the SEC. The
18 court did distinguish Porter noting that, "When an
19 individual is made to pay noncompensatory sanction to
20 the Government as a consequence of a legal violation,
21 the payment operates as a penalty." So if we are
22 talking about noncompensatory damages, we're not in
23 equity.
24 To the extent that 13(b) is used for pure
25 disgorgement, perhaps there's some wiggle room for

1 equitable relief in the traditional 13(b) context.
2 That said, over the last year and a half, two years,
3 there have been a number of cases where Kokesh has
4 been raised, and at the District Court level, the FTC
5 has been reasonably successful at distinguishing 13(b)
6 from Kokesh. That's not surprising because District
7 Courts are generally not going to overturn 30 years of
8 Circuit Court precedent. There are, however, Circuit
9 Court cases -- both the Seventh and Ninth Circuits are
10 looking at this, and it will be really important to
11 follow how these cases develop.
12 As a bonus case, I'm not going to talk a
13 great deal about this, but we have the LabMD case
14 where the Eleventh Circuit Court of Appeals rejected
15 an FTC effort to impose a consent decree or use a
16 consent decree to impose data security requirements on
17 a firm, largely on grounds that echoed fair notice,
18 due process concerns saying that the standards the FTC
19 was trying to enforce were too ambiguous for the court
20 to understand how to implement. Query, if the court
21 can't figure it out how can the firm? That's where
22 the fair notice hook is.
23 So a few general observations from this.
24 Courts have been increasingly hostile to broad grants
25 of authority where there's limited process required

1 for its use, and especially where that -- use of that
2 authority is backed by substantial sanctions. That's
3 not just about the FTC. That's more generally the
4 current administrative law moment that we're operating
5 in.
6 Much of the FTC's authority, including its
7 13(b) authority, including some of its argued uses for
8 its unfairness authority, are based in the 1970s,
9 1980s era precedent, and it really hasn't been
10 litigated much. The Commission has, I will say, for
11 whatever reason -- question mark -- been very good at
12 avoiding Article 3 courts and it will be increasingly
13 interesting to see how the Commission fares as it
14 proceeds into Article 3 courts.
15 To put a very fine point on this, and this
16 is largely my own normative view and assessment of the
17 matter, the Supreme Court is not likely to look
18 favorably upon any agency trying to set broad federal
19 policies with respect to developing areas of broad
20 economic, social, political importance. For the FTC,
21 for other states' consumers protection authorities,
22 figuring out what we do about privacy, figuring out
23 what we do about the tech sector, these are incredibly
24 broad questions, hard, difficult questions.
25 I would say if the FTC, in particular, tries

1 to establish federal policy in this area, there will
2 not be a warm reception at the Supreme Court. That is
3 the job of Congress, not a federal agency, operating
4 under century-old legal authority.
5 Now, clearly into the realm of general
6 observations, I'm just going to make two general
7 observations, one tying the economic and the legal
8 discussions together. Generally, the economic optimal
9 deterrence theory uses penalties of some sort as a
10 lever to affect the quantities, the volume of given
11 types of conduct. Generally, economics does not
12 differentiate between compensation, fines, taxes,
13 penalties, sanctions. The law does. And Kokesh makes
14 this very clear, that this is a minefield that the
15 lawyers need to be aware of as we try and implement
16 the economic theory.
17 More generally, when we're talking about
18 questions like compensatory damages, should there be a
19 civil penalty authority, I actually think that's the
20 less important question for the Commission to be
21 focusing on. The Commission, today, does have broad
22 authority to get fines using 13(b), and arguably,
23 other reputational mechanisms. The extent, the
24 mechanism, the measure, the nature of the penalties,
25 they matter far less I think to me, personally, to

1 industry, I think, and I'm pretty confident the
2 courts, than the process behind them.
3 You should always be asking, what's the
4 purpose of this penalty? What's the harm that we're
5 trying to correct? How does this penalty go to
6 remedying that harm? Especially in the context, for
7 instance, of data security where the problem more
8 often than not is a very difficult immature set of
9 technologies. It is very frequently not that firms
10 aren't trying to do security well, it's that it's
11 unreasonably hard for them to do security well.
12 The Commission's goal should be to improve
13 the overall quality of the ecosystem and inform the
14 broader policy discussions, the Congressional
15 discussions and the like, than try to be single-handed
16 cop on the beat. Always avoid the mentality of the
17 beatings will continue until conduct improves. That
18 don't fly. That violates all sorts of concepts of due
19 process, fair notice, basic legal principles, and as
20 we continue away from the broad deference era, as we
21 continue away from the equitable remedies era, these
22 are going to be harder limitations for agencies to
23 address. Thank you.
24 DR. COOPER: Thanks, Gus.
25 I want to, in our waning moments here, I

1 want to weave in a very relevant question we got from
2 the audience. You had said that, you know, from an
3 economics perspective, we just put that S up there.
4 The S is the sanction. What you call it legally
5 doesn't really matter. But as you point out, because
6 we're also all lawyers on the panel here, when we put
7 our lawyer hat on, it really does matter, as the
8 Supreme Court pointed out in Kokesh and other areas.
9 The Commission has a long-standing, but kind
10 of bipartisan consensus around saying that we should
11 have -- the FTC should have civil penalty authority.
12 You seem a little more sanguine about that. I mean,
13 so do you think -- in some ways, it seems like -- I
14 would see two potential benefits from civil penalty
15 authority. One, we just would get rid of the whole
16 13(b) morass that we may be in now. And, two, their
17 equitable remedies seem to have -- equitable remedies
18 are based on a kind of consumer/fraudster relationship
19 or consumer/firm relationship where money has flowed
20 from the computer to the firm for bad reasons and now
21 we're going to get that money back, whether you call
22 it disgorgement, whether you call it restitution, what
23 you put on it. That makes sense in maybe 90 percent
24 of the contexts when we talk about deception.
25 But in something like data security where I

1 engaged in poor data security that created harm, and
2 let's assume we can monetize it, it could be directly
3 monetizable, but there's some large amount of harm
4 from the data breach. But that doesn't fit into the
5 equity puzzle because there's nothing to be disgorged,
6 especially it's a nonconsumer-facing firm. You could
7 maybe take away the benefits, which often could be
8 negligible -- in fact, that's often the part of a data
9 security case under unfairness, would be that, well --
10 and get by not -- and only if you would have spent
11 just an extra tiny amount, you could have prevented
12 the data breach. So the benefit to the firm is tiny,
13 maybe you can disgorge the benefit, but you can't
14 reach the harm. That's legal. Those are damages that
15 flowed.
16 So would that be -- those are two reasons I
17 would put out on the table that civil penalty
18 authority kind of makes sense. I just wanted to get
19 your reaction because you seemed a little indifferent
20 to it.
21 MR. HURWITZ: So I'm not going to touch the
22 specific data security example beyond saying I think
23 that that characterization of it is dangerous and
24 wrong. I've written extensively on this and submitted
25 comments, including in this proceeding, that discuss

1 my views on this. The damages of most data security
2 incidents are very difficult to figure out. There are
3 broad ranges of estimates. It's dynamic. They are
4 changing over time. And the ex-post evaluation of,
5 well, if you had just done this one thing, you could
6 have stopped this, that's --
7 DR. COOPER: Well, I would agree with that.
8 I was just saying those are just --
9 MR. HURWITZ: Yes.
10 DR. COOPER: Let's assume -- let's leave
11 aside the liability part of it and -- leave aside the
12 liability part of it and let's assume that we can
13 somehow -- like it's a big data breach where lots of
14 credit cards were -- we can trace it, we can say cost
15 a billion dollars. And we know -- know that, and I'll
16 concede to you all the problems that you just --
17 MR. HURWITZ: Outstanding, he conceded. You
18 all heard that.
19 DR. COOPER: I speak for myself and not the
20 Commission or the federal --
21 MR. HURWITZ: So I thought I had you there.
22 So my view is I think it would be fine for the
23 Commission to have I'll even say broad civil penalty
24 authority. I think, in many senses, it would make a
25 lot more -- in many ways, it would make a lot more

1 sense if we were building up the Commission from the
2 ground, if this were a green field, if we were doing
3 this all over, yeah, civil penalty authority I think
4 with some safeguards is fine, dot, dot, dot, but
5 asterisk, star, provided that there be some basic
6 checks that are compliant with widely-held norms of
7 due process and fair notice, governing how it uses
8 that authority.
9 DR. COOPER: Thanks.
10 So I wanted to -- we spent a lot of time
11 talking about remedies. Gus, you spent a lot of time
12 talking about 13(b). But, of course, we have the
13 other side of the house, the administrative
14 litigation. I will throw it out to you, Gus, kind of
15 the right of first refusal, but John and Murat, feel
16 free to jump in as well.
17 So we have this one procedure where, as you
18 alluded to, the first bite of the apple is free. We
19 take you -- we have administrative litigation and you
20 get an order that says, don't violate the law again
21 and often fencing in relief that's kind of related to
22 not violating the law again. And if you do violate
23 the law again, then we can get large civil penalties,
24 you know, $44,000 per violation or something like
25 that, very large. So that's a model where, you know,

1 you have first violation penalty is zero, or whatever
2 the cost of the injunctive relief is, which probably
3 varies by firm, but it's not a monetary remedy, and
4 then it can ramp up to gigantic potential, you know,
5 kill the firm type remedies. Not that I think it's
6 ever been used that way, but they can be, in theory,
7 quite large.
8 And when should we think about -- when is it
9 appropriate, I mean, when does a model like that make
10 sense from maybe an optimal liability or optimal
11 returns perspective? And, again, I'll throw it to Gus
12 or John or Murat.
13 MR. HURWITZ: So I'll start. The reason
14 that we're all here today in this year with all these
15 hearings, that there are Congressional hearings, that
16 there are state AG various suits and activities, is
17 because we're all worried about privacy, security, big
18 tech, a bunch of really hard new economy policy
19 issues. That's what we're talking about.
20 The hard question is, how do we figure out
21 what the rules should be? We have a couple of
22 different mechanisms for this. We've got Congress can
23 do this. Congress doesn't have enough data perhaps to
24 do this. We've got the courts can go through a common
25 law process that takes generations, too slow. We've

1 got agencies. Agencies can do things through
2 adjudication.
3 I think when we're in an era of uncertain
4 hard policy questions, there is a strong argument for
5 a Commission, an agency like the FTC, to have broad
6 authority to figure things out. The question is what
7 do we do with what it figures out. Does the
8 Commission figure out the policy moving forward that's
9 binding on everyone else or does the Commission deal
10 with one-off cases, building up data evidence that can
11 then feed into a broader policy discussion and
12 legislative process. I think that that latter is a
13 pretty good approach.
14 And then we're into a question of the
15 Commission's own fines and remedies. And we are in a
16 paucity of notice. Firms don't know what the rules
17 are. So it doesn't make sense to say we're going to
18 penalize you possibly existentially for something that
19 no one knows if it's right or wrong because this is a
20 changing industry, changing norms, changing values.
21 So instead, we're going to enter in a one-off decree
22 with you saying, this is problematic conduct, don't do
23 it. And Congress might change the rules later, as we
24 say, okay, actually, we've rethought this. But you,
25 as a single firm, can enter into the settlement with

1 us.

2 I think that that makes a great deal of

3 sense so long as the Commission isn't trying to say,

4 and we're going to use this as a define the entire

5 industry's set of norms and standards.

6 DR. COOPER: Okay. John, Murat, do you want

7 to weigh in on this? You know, one thing that we --

8 unfortunately, we're running short of time. But one

9 thing that we haven't gotten to, but I think maybe now

10 is -- we may fit in is the role of information.

11 Throughout, we've kind of touched on it a

12 little bit, but the ability of the regulator -- in

13 this case, the FTC or whoever it may be -- to set down

14 -- you know, we kind of assumed that the actors know

15 where the line between legal and illegal is or know

16 what -- or that the regulators can actually estimate

17 the harm, when we think that there actually -- that

18 the regulators may not be good at estimating the harm

19 or may not be -- or not good at finding out where the

20 line between illegal or legal should be or

21 telegraphing that to the rest of industry -- does a

22 situation -- because one of the -- kind of a standard

23 result in a lot of the tort models is that, at least

24 for in a range of a sufficiently low variance that

25 even if you have symmetric errors in enforcement,

1 you're going to end up with over-deterrence because
2 the risks are not -- the costs of being wrong on one
3 side is not equal to the costs of being wrong on the
4 other.
5 So with that in the background, I mean,
6 something like the FTC's administrative one free bite
7 of the apple, but then once you now know the rule,
8 you're on the hook for potentially very large
9 sanctions. Does it fit into that model or do you have
10 any thoughts?
11 DR. KLICK: Yes, we are almost out of time.
12 But, you know, if you take Murat's model and add
13 uncertainty and things like that, you're right, you
14 can get sort of very different welfare implications.
15 The one thing I would say, though, is even if there
16 are some positives to this one free bite rule, the
17 penalty on the second bite actually should still be a
18 function of harm, right, and it's not as though we
19 should then expand it to we blow everything up because
20 we warned you. No, it still should be tied to harm.
21 But the benefit of doing it in sort of these
22 two stages might be to say, hey, firm, this is how
23 we're going to think about harm, right, and it avoids
24 that uncertainty, but it doesn't make sense to then
25 jump to, and now we're going to blow everything up.

1 DR. COOPER: Murat, do you want to have a
2 final word here?
3 DR. MUNGAN: Just to put it in economic
4 terms, so in the model that we talked about, it was
5 assumed that there is an act that is illegal and there
6 is an act that is legal. But this is not very clear
7 in practice. So when this is not clear, the types of
8 errors that you're talking about may lead firms or
9 other actors to behave as if they're paranoid about
10 what they're doing because they might fear that
11 they're going to be punished for behavior that they
12 think is benign. So they might withdraw from engaging
13 in procompetitive behavior thinking that they might be
14 subject to liability if they act aggressively on
15 competitive dimensions. And this is a very big cost
16 that can be generated if you don't engage in this type
17 of -- what did you call it?
18 DR. COOPER: I think we call it the one --
19 that's what we call it internally, the one free bite
20 at the apple.
21 DR. MUNGAN: Excellent terminology, yeah.
22 If you don't engage in that kind of behavior or that
23 kind of punishment scheme, then you might have these
24 paranoia problems. Like we credit Becker for this
25 model, but way before that Bentimus (phonetic)

1 actually made this point, that such punishment schemes
2 can cause paranoia and harm to society.
3 DR. COOPER: All right. That's a great way
4 to end it. Punishment schemes create paranoia in
5 society. So, anyway, we could go on another three
6 hours so John misses his plane. But, anyway, join me
7 in thanking the panel for such a great discussion.
8 And we'll be back in 15 minutes.
9 (Applause.)
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1 **REVISITING "THE LIMITS OF ANTITRUST"**
2 MR. SAYYED: All right. I think we're going
3 to go ahead and start for those of you still here.
4 I've told the panel a few things. We're probably
5 speaking mostly to the livestream audience or the
6 audience on livestream.
7 So we've got a great panel here, final panel
8 of our sessions to think big thoughts and discuss what
9 really is this question of sensitivity, the Type I and
10 Type II era in thinking about error cost minimization
11 in antitrust cases or decisions. We focused it around
12 now Judge Easterbrook, then just Professor
13 Easterbrook's, famous article, "The Limits of
14 Antitrust."
15 So let me introduce myself and the panel.
16 I'm Bilal Sayyed, the Director of the Office of Policy
17 Planning. And then to, I guess, running down the
18 table here: Thom Lambert from the University of
19 Missouri; Alan Devlin, formerly of the FTC but now
20 with Latham & Watkins; John Thorne, maybe one the best
21 antitrust litigators out there and sort of present at
22 all the interesting antitrust cases, it appears; Bob
23 Litan, formerly of the Justice Department's Antitrust
24 Division, a few other places, presently at Korein
25 Tillery, a law firm -- good law firm located near here

1 in Chicago; and last but not least, and actually
2 representing a very important perspective on this
3 question, Steve Cernak, now of counsel at Schiff
4 Hardin but spent over two decades at General Motors
5 really, you know, sort of providing real guidance to
6 real people on real issues, and I think can offer in
7 some ways a unique perspective. John, of course, was
8 in-house at Verizon and its predecessors and can do
9 the same.
10 We have an hour and 45 minutes. We're going
11 to use every minute of it. I'm going to try to stay
12 out of the way of the panelists. So, with that, I'm
13 going to turn it over to Thom to start, get us going
14 and we'll go.
15 MR. LAMBERT: All right. Well, thank you
16 very much for inviting me to join this thing today,
17 Bilal. Over the course of 14 hearings, we've heard
18 about a number of novel anticompetitive concerns:
19 competition softening due to institutional investing;
20 monopsony power in labor markets; various threats from
21 digital platforms.
22 In this last panel, I'm going to step back
23 and consider a couple of big-picture questions:
24 first, what are antitrust limits in addressing these
25 and similar harms; and then, secondly, how should the

1 enforcement agencies act in light of those limits. As
2 Bilal mentioned, the springboard for this conversation
3 is Judge Easterbrook's 1984 article, “The Limits of
4 Antitrust.” It was actually delivered as a lecture at
5 the University of Texas Law School, without a doubt
6 one of the most influential antitrust articles and
7 probably one of the most influential law review
8 articles ever that's been cited more than 700 times in
9 law journals.
10 Its key idea, the notion that antitrust
11 rules should be designed so as to minimize the sum of
12 error and decision costs really explains, I think, a
13 lot of the Supreme Court's recent antitrust decisions.
14 I had an article in the Boston College Law Review a
15 few years back where I tried to show that each of the
16 Roberts Court’s decisions could be explained in terms
17 of this insight.
18 So what I want to do in my opening remarks -
19 - that’s the benefit of going first, you get to sort
20 of set the stage. I want to break down Judge
21 Easterbrook's prescriptions into what I think are
22 three key parts and then assess for each part whether
23 and how it should be tweaked in light of developments
24 in economics, our understanding of economics, and also
25 changes in market structures.

1 So the three parts are these, what I call
2 the Voltaire point, the incommensurate harms point,
3 and then the screening mechanisms point. So let's
4 starts with the Voltaire point. Now, to get your head
5 around this point, you have to go back to basics. And
6 this may be quite familiar to people in this room and
7 the hard core antitrusters, but it never hurts to go
8 back to basics.
9 Antitrust domain, that is what it addresses,
10 is business behaviors that generate market power,
11 either coordinated conduct that leads to collusion, or
12 exclusionary acts that may create monopoly power.
13 The problem is that many acts of
14 coordination between firms enhance output, market
15 output, and many business practices that usurp
16 business from the perpetrator's rivals thereby
17 excluding them from the market also generate benefits
18 for consumers.
19 So resale price maintenance, for instance,
20 may facilitate collusion, but it may also encourage
21 dealer-provided services by eliminating free riding.
22 Manufacturers' exclusive dealing agreements may raise
23 rivals' costs of distribution, but they may also
24 reduce interbrand free riding and thereby encourage
25 manufacturers to invest in their distributors. Very

1 low prices may injure rivals and drive them from the
2 market, but they offer benefit to the consumers.
3 Now, these are typical of the behaviors that
4 antitrust addresses. They are what I would call mixed
5 bag behaviors. They have some good sides and some bad
6 sides. They may be on net procompetitive, or output-
7 enhancing, or anticompetitive, output-reducing.
8 Now, any time you are regulating a mixed
9 bag, there are going to be some costs -- some
10 inevitable costs here. This picture that you see on
11 the screen is the picture that you get if you Google
12 and hit Google images for, “I made a mistake.” Right?
13 So one form of inevitable costs in
14 regulating a mixed bag is mistakes. You may
15 accidentally preclude something that's output-
16 enhancing, it's welfare-enhancing. So economists call
17 these false convictions Type I errors. If you do
18 that, then society loses out on the benefit of that
19 efficient practice.
20 On the other hand, you may make a mistake in
21 the opposite direction; that is, you fail to condemn
22 some anticompetitive, output-reducing harm. This
23 would be sort of called Type II error. And, of
24 course, if you do that then market power exists or
25 persists, meaning that consumers pay more or quality

1 is reduced, et cetera. So the sum of these false
2 convictions, false acquittals, the sum of losses from
3 mistakes we call error costs.
4 Now, another set of inevitable costs, any
5 time you regulate mixed bags, is just the cost of
6 trying to figure out what's allowed and what's not
7 allowed. Decision costs. These decision costs are
8 costs that must be borne by business planners as they
9 are deciding what they can and can't do, and by
10 adjudicators when they're trying to decide whether the
11 law has, in fact, been complied with.
12 Now, the tricky thing is that antitrusters
13 find themselves in the position of this guy here in
14 the picture playing whack-a-mole. I didn't actually
15 know that whack-a-mole was a real game. I thought it
16 was just a metaphor, but apparently it is a real game.
17 And the idea, of course, is that you smack down a mole
18 in one spot and it just pops up in another spot.
19 Well, these three sets of costs that I've
20 discussed -- false conviction error costs, false
21 acquittal error costs, decision costs -- interact in
22 this way. If you try to avoid false convictions by
23 reducing the scope of a prohibition, then you risk
24 false acquittals. If you try to reduce false
25 acquittals by expanding the scope of a prohibition,

1 then you risk false convictions. If you try to
2 eliminate both of these mistakes at the same time by,
3 say, adding more affirmative defenses or more elements
4 to the liability test, et cetera, then you raise the
5 cost of deciding whether something is legal or not.
6 So you raise decision costs.
7 Any time you try for perfection on one of
8 these ends, you are going to create costs elsewhere in
9 the system. So this is not something that's specific
10 to antitrust. It exists with regulation generally.
11 Folks may recognize this fellow. This is Paul
12 Volcker. He is the guy who came up with this very
13 famous now rule that we refer to as the Volcker rule.
14 The rule was one that lots of people got behind,
15 including the "Wall Street Journal," which is rarely a
16 fan of financial regulations.
17 But the Volcker rule said if you are a
18 federally insured bank you are not allowed to engage
19 in proprietary securities trading to try to earn a
20 profit. Lots of people thought that was a really good
21 idea.
22 Well, the problem is that these federally
23 insured banks need to engage in hedging transactions.
24 It's going to protect their liquidity, et cetera.
25 It's very difficult to distinguish between just a

1 risky proprietary speculative trade and a hedging
2 transaction. And so if you want to write a rule
3 that’s going to eliminate the bad but not catch the
4 good, it's going to be a complicated rule.
5 When the Volcker rule was actually written,
6 it ended up being 1,077 pages long. And that is not
7 to disparage the Volcker rule. It’s just to point out
8 the inexorability of the tension between false
9 convictions, false acquittals and decision costs.
10 All right. So what should we do about this?
11 This is the picture that you get if you Google “my
12 blanket is too small.” I’ve recently had this happen
13 to me visiting my parents. I don’t know if in the
14 olden days apparently people were shorter, but all the
15 blankets in my parents house are too small. And when
16 I got there, I find that I can't cover everything I
17 want to cover. If I pull it up to cover my chest, my
18 feet are going to be exposed. If I cover my feet, my
19 chest is going to be exposed. I’m not going to be
20 happy. I can't get perfection, but what I have
21 learned is I can arrange the blanket in such a way as
22 to cover more of me than otherwise would be covered.
23 I can turn it diagonally and I won't get everything
24 but I'll get more. All right?
25 So what we should do here in light of these

1 limits of antitrust is optimize. Don't try to catch
2 all the bad or let through all the good or keep the
3 rule as simple as possible, but instead try to
4 minimize the sum of these three inevitable costs,
5 false convictions, false acquittals and decision
6 costs.
7 So that brings me to the name of this first
8 point, the Voltaire point. What Easterbrook was
9 basically saying is this: Perfect is the enemy of the
10 good. Don't seek perfection along any of these
11 dimensions; instead try to optimize, not maximize,
12 anything. Craft your liability rules so as to
13 minimize sum of decision and error costs.
14 All right. So what do we make of this
15 Voltaire point since 1984? Well, in my opinion, this
16 is still fully applicable. There have been no
17 developments since 1984 that have changed the mixed
18 bag nature of antitrust behavior or the inexorability
19 of the tension between efforts to reduce the three
20 sorts of costs.
21 We do have a better understanding of the
22 circumstances in which certain business practices may
23 be pro or anticompetitive, and that may help us come
24 up with more nuanced rules. But the tension between
25 these efforts to reduce error costs and decision costs

1 still exist, and I think that the advice to try to
2 minimize decision error cost is still very excellent
3 advice.
4 That brings me then to Judge Easterbrook's
5 second point, the incommensurate harms point. Now,
6 remember that antitrust rules may err in two
7 directions: wrongly forbid output-enhancing
8 behaviors; wrongly deter -- or, sorry, wrongly allow
9 output-reducing behaviors; Type I errors and Type II
10 errors.
11 Both of these are harmful and dangerous and
12 both of these critters that you see on the screen are
13 harmful and dangerous. I live with one and I can tell
14 you that the only reason he doesn't kill me is because
15 he's too small. They're dangerous.
16 But their dangers are of different
17 magnitudes. All right? So Judge Easterbrook says
18 false acquittals allowing anticompetitive conduct are
19 not as -- it’s not as bad as a false conviction
20 condemning procompetitive conduct. A couple reasons
21 for this: One, if you allow anticompetitive conduct
22 there will be a market-wide adverse effect, whereas if
23 you condemn procompetitive behavior you're condemning
24 that behavior in all parts of the economy, not just in
25 individual markets. So there’s economy-wide harm.

1 A second difference here is that false
2 acquittals tend to be self-correcting. The result is,
3 you know, higher prices in the market. Higher price
4 invites entry, and so market power tends to self-
5 correct, whereas false convictions are durable. They
6 require some sort of court decision to overturn the
7 bad rule.
8 Now, how has this incommensurate harms point
9 fared? Well, I would say that this point has fared
10 less well than the Voltaire point. It's basically too
11 categorical. Many anticompetitive harms are self-
12 correcting. Collusion, for example, is hard to
13 maintain and it invites entry.
14 On the other hand, we've seen that many
15 forms of exclusionary conduct don't self-correct so
16 easily. Some actions by a dominant firm to keep its
17 rivals from attaining the efficiency necessary to
18 enter and underprice the dominant firm can last
19 perpetually, especially in markets that are subject to
20 large economies of scale and network effects. And, of
21 course, we're seeing lots of those markets these days.
22 So my panelists here, copanelist, Alan
23 Devlin, has made an excellent point on this and I
24 assume he's going to talk more about it. So I'll just
25 move on.

1 The third point that Judge Easterbrook made
2 was really one about administrative efficiency.
3 Remember that the goal is to craft antitrust rules to
4 minimize the sum of error and decision costs with an
5 understanding that Type I errors are typically more
6 costly than Type II errors.
7 So to accomplish this goal in an efficient
8 mechanism, Easterbrook says that we should adopt some
9 screening mechanisms; that is rules of thumb that are
10 designed to weed out antitrust actions that are likely
11 to entail high error and decision costs.
12 And he suggested these five screening
13 mechanisms: Does the defendant have market power? If
14 not, the challenge practice is unlikely to create
15 anticompetitive harms.
16 Would the challenge practice increase the
17 defendant's profits by reducing competition? If not,
18 then antitrust liability isn't really needed to deter
19 inefficiency.
20 Is the vertical practice widely adopted
21 throughout the industry? Easterbrook says here that
22 for most vertical practices anticompetitive harm can
23 result only if the practice is widely adopted. So if
24 it's not widely adopted by industry participants,
25 don't worry about it.

1 Is the defendant's output and market share
2 falling? Remember to exercise market power, output is
3 constrained so that price rises. So if we don't see
4 an output reduction by the defendant, then most likely
5 this is not an anticompetitive harm.
6 And then finally is the plaintiff a customer
7 or a competitor? Customers are hurt by reductions in
8 competition. Competitors tend to be helped by
9 reductions in competition. So if a competitor is
10 complaining, it’s probably the case that the
11 challenged practice is actually increasing
12 competition, which is obviously detrimental to
13 competitors.
14 Now, how have these screening mechanisms
15 fared? Well, I think one and two have fared pretty
16 well. I won't say anything more about those. The law
17 pretty much follows these two things. I inadvertently
18 failed to turn number five yellow instead of green
19 because I don't think it's actually a great screening
20 mechanism, but it's not a terrible screening
21 mechanism.
22 It is possible, of course, to have
23 anticompetitive action that harms competitors and also
24 consumers. Unreasonably exclusionary conduct is
25 harmful to competitors but it also hurts consumers. I

1 think where concerns are raised is when you see a
2 competitor complaining but no consumers are
3 complaining. The competitor may well be complaining
4 of an increase in competition.
5 Now, I would add an additional screen. And
6 this is it. Is there another body of law capable of
7 addressing the anticompetitive harm at issue? It
8 seems to me that a number of recent intellectual
9 property cases involving antitrust probably wouldn't
10 pass muster under this screen.
11 So the agencies have pursued actions saying
12 that antitrust is violated when a holder of a standard
13 essential patent seeks an injunction or an exclusion
14 order. Well, patent law can address that issue in
15 granting an injunction or an exclusion order under the
16 Tariff Act. The court is to take account of the
17 public interest. And one of the things the court will
18 look at is whether there's been anticompetitive
19 holdup, et cetera. I don't think antitrust adds much
20 value here.
21 Another rule that can be discerned from the
22 actions of the agencies is that antitrust is violated
23 when the holder of a standard essential patent seeks
24 to negotiate, renegotiate royalties. And, again, the
25 concern is holdup.

1 Well, we've got entire swaths of contract
2 law that are designed to deal with economic duress
3 resulting from things like holdup. Contract law is
4 fully capable in my opinion of addressing this issue.
5 And most recently, of course, we've got the Qualcomm
6 decision. One of the holdings in the Qualcomm
7 decision -- we'll see if it stands or not, but one of
8 the things that was ruled is that antitrust is
9 violated when the holder of a standard essential
10 patent who has once licensed to a rival stops doing so
11 or refuses to license to other rivals. There's a
12 holding that you have an antitrust duty to deal with
13 your rivals.
14 Again, this issue I believe could be handled
15 by contract and has been handled by contract.
16 Standard essential patent holders are entering into
17 contracts with standard-setting organizations. Those
18 contracts can be enforced by third-party
19 beneficiaries.
20 And so, again, I think this is an area where
21 contract law could step in and solve the problem and
22 adding antitrust with its potential for treble damages
23 in private actions is likely to screw up the system to
24 create greater error costs -- to create particularly
25 great error costs.

1 I am out of time there, so I'm going to
2 skip.
3 MR. SAYYED: No, keep going. You can keep
4 going.
5 MR. THORNE: Oh, all right. Quickly. I’m
6 going to set my friend here up to swat me down.
7 One last point. Alan, in his very excellent
8 article, has said, you know, maybe agency should be
9 subject to a lower evidentiary burden. And he says
10 that when you’ve got a public enforcement action,
11 things are different than when you have private
12 antitrust litigation. So on the one hand the public
13 enforcers have better incentives. They’re pursuing
14 the public interest, not private gain, which may
15 involve a reduction in competition or it may be a
16 strike suit by a plaintiff’s lawyer.
17 They also tend to have superior expertise
18 than private litigants. And so if the agency is
19 saying this is anticompetitive, courts should maybe
20 defer a little bit more to those judgments. I'm a
21 little bit nervous about stacking the deck in favor of
22 the agencies for a couple reasons. And I generally
23 agree with those points, but I've got a couple of
24 concerns.
25 One concern is that this expertise that I

1 believe the agencies really do have can sometimes
2 breed overconfidence or -- I hate to use the word, but
3 maybe hubris. This is a very elegant formula.
4 This is the formula for MHHI-Delta, which is a metric
5 that’s designed to figure out whether common ownership
6 by institutional investors has the effect of softening
7 competition in the market. It's beautiful. It’s
8 really elegant. I like it a lot.
9 A number of prominent antitrust theorists
10 are proposing a rule that we should basically use this
11 formula to restructure the mutual fund industry and
12 effectively adopt a rule that says institutional
13 investors can invest in only one firm per concentrated
14 industry.
15 Well, that would radically revamp the mutual
16 fund industry. It would effectively end index
17 investing. Do these, you know, planners who have come
18 up with this very elegant formula really know that the
19 world would be a better place if we revamp the entire
20 industry in that way? I don't think they do.
21 I think they need to be reminded of Hayek’s
22 insight that, you know, the knowledge to order an
23 economy is not really given to anyone in its totality.
24 And what is his classic saying, “The curious task of
25 economics is to demonstrate to men how little they

1 really know about what they imagine they can design."
2 So that's one concern, that expertise can actually
3 lead to excessive aggression.
4 Another concern here is just a basic public
5 choice concern. So these two economists, this is
6 James Buchanan and Gordon Tullock, two of the fathers
7 of public choice economics. And I just put a picture
8 up there because I like the scotch glass.
9 But, you know, an insight of public choice
10 is that government officials, everybody operating the
11 public space, we're all rational self-interest
12 maximizers. And I believe that many times enforcers
13 and the academics who berate them have personal
14 incentives that may favor overly aggressive antitrust
15 enforcement.
16 So antitrust officials stand to benefit from
17 a big antitrust. Your job is more important if you're
18 overseeing a big antitrust enterprise. When you leave
19 the agency, your skill set is going to be more
20 valuable if antitrust is really big.
21 Officials also sort of want to do something.
22 You know, there's a lot of popular sentiment now that
23 something must be done about the rise of the tech
24 platforms, et cetera. And so we run the risk of that
25 interventionist syllogism, you know, something must be

1 done; this is something; therefore this must be done.
2 And then finally, you know, academics are --
3 all of the sudden antitrust academics are superstars.
4 You know, people are getting written up in fawning
5 reports in "The New Republic" and the "New York
6 Times." But you don't get your profile in "The New
7 Republic" for cautioning or suggesting a cautious
8 approach.
9 If you want to make a name for yourself as
10 an antitrust academic, be aggressive. And so I think
11 there's a lot of forces that are pushing toward an
12 aggressive, big antitrust. And for that reason, I
13 would be reluctant to stack the deck in favor of the
14 antitrust enforcement agencies.
15 Thank you.
16 MR. DEVLIN: Thank you, Thom, for the kind
17 words and fascinating remarks. And, Bilal, thank you
18 for inviting me to this panel. And it's a particular
19 honor to speak with such a distinguished group here
20 and especially on so important a topic.
21 Before I kick off, as you won't be surprised
22 to hear, I'd implore that all of you treat my remarks
23 as personal and in no way to be imputed to my
24 colleagues at Latham & Watkins or to any of our
25 clients. I speak only for myself.

1 So you might be thinking at first blush that
2 antitrust error decision theory, it sounds awfully
3 technical. And, of course, it is, but it's also
4 profound and goes right to the heart of competition
5 policy.
6 So if we're going to have a serious
7 conversation about the future of antitrust, its
8 various successes and possible deficiencies over the
9 past few decades, and perhaps most importantly its
10 capacity for successfully determining and resolving
11 contemporary issues that are substantiated, well,
12 then, we have to talk about antitrust error.
13 So one interesting thing we spend some time
14 with our strange world of competition law is that one
15 encounters almost an illusion of mathematical
16 precision. We do have a technical field of objective
17 economics brought to bear on problems, but I think
18 it's worth reiterating that antitrust lies on a
19 foundation that involves value determinations that are
20 in many respects contestable.
21 And so the fact we're actually seeing a
22 resurge in political view today is, to my mind, not
23 the least bit surprising. The only surprising part is
24 that it's taken so long to reemerge. And it's
25 healthy. It forces us to confront the uncomfortable

1 truths if they exist and to look closely at premises
2 underlying our position. So this is all a healthy
3 thing, and I commend the FTC for holding the hearings
4 to explore all of these foundational questions anew.
5 So when we talk about antitrust error, I
6 think I'd like to start off with something provocative
7 and then I'll heavily qualify. So I'm going to say
8 that antitrust is political. Competition lawyers
9 bristle at that suggestion because it impugns the
10 integrity of their beloved practice, and it is, of
11 course, through that modern antitrust -- at least in
12 the United States -- involves the application of a
13 robust theory and framework from the industrial
14 organization literature pursuant to an objective
15 standard.
16 And by "political" in no way am I referring
17 to some kind of executive interference or a melding of
18 overriding and incommensurate objectives such as, for
19 example, employment or other issues that might bring
20 to bear.
21 So in that respect, the way people react
22 negatively to the suggestion of political content of
23 antitrust is both understandable and correct.
24 Nevertheless, the fact of antitrust itself implies the
25 antecedent resolution of some core societal questions

1 about how we organize economic activity. And as a
2 field of policy, it requires valued determinations.
3 Those value determinations, as I mentioned, are
4 contestable, and therein I believe lies the root of
5 much of the capacity for error and disagreements at
6 the margin that characterize much of our fields and
7 the ongoing debate today.
8 So we talk about the existence of antitrust
9 law. What does that even imply? Well, just as a
10 threshold matter, it implies the fact that we've
11 chosen to use a capitalistic market system. If you
12 end up embracing communism or socialism -- and by
13 socialism I mean state ownership of the means of
14 production, there you could crowd out any role for
15 markets and there's no or little role for competition
16 and hence no need for antitrust.
17 So the fact that we have antitrust means
18 we've already made some determinations about the
19 utility of markets to deliver superior outcomes.
20 However, by the same token, the fact that we have
21 antitrust laws also demonstrates the fallibility of
22 markets because if they self-corrected perfectly and
23 quickly we would have no need or occasion for
24 antitrust law itself.
25 So I think it's worth just before getting

1 into the specifics of a decision theory and error to
2 just explore these background themes just a little
3 bit. And I think there's a spectrum of political
4 views and priors that inform decision-making. And if
5 we were to start at one end of the spectrum, there are
6 those, of course, of a particular political persuasion
7 who take issue or distrust markets. Distrust is
8 probably the better way to put it. They may be
9 suspicious about profit maximization incentives. They
10 may question the neoclassical proxy between utility
11 and ability and willingness to pay. They may doubt
12 the efficacy of the market and its ability to self-
13 correct.
14 So there are, of course, a wide variety of
15 views of -- you know, people accept some of these
16 views, all of them, and some a lot and some little.
17 I'm not talking about any one particular person. What
18 I am suggesting, however, for someone who looks at
19 markets that way one is immediately attracted to a
20 competition policy that differs from the Chicago
21 School brigade, for example.
22 So one, in interpreting and informing
23 antitrust under that view, might immediately start
24 thinking about, well, if we don't trust market
25 processes perhaps we don’t trust market outcomes. We

1 won't treat them as sacrosanct. So one starts to
2 think about regulating prices or prohibiting
3 excessively high prices, something that overseas
4 jurisdictions often do but the United States does not.
5 And they may seek not simply to preserve
6 existing competition but to intervene to increase it
7 or even maximize it. One phenomenon -- one
8 application of that principle involves, for example,
9 calls to break up large companies regardless of
10 whether there was an elimination of competition but
11 simply to preserve a market structure that's
12 competitive. Right? So we see that.
13 And finally one might see a view that
14 antitrust should intervene to protect against
15 accumulations of economic power regardless of whether
16 they flow from l0st competition. So think of the
17 banking crisis '08, too big to fail, was that an
18 antitrust failure or not?
19 And, of course, for free marketeers and
20 the Chicago School brigade, they couldn't look at
21 the world more differently. Markets solve
22 information problems that stymie effective
23 government intervention, profit maximization,
24 incentives, direct capital and investment towards
25 productive applications that the state could never

1 hope to identify and recreate. And the competition is
2 the magic sauce that brings it all together.
3 So we have, as I said, this wide spectrum.
4 The problem is that differences of opinion as to the
5 efficacy and reliability of markets invade every
6 aspect of antitrust analysis from the existence,
7 durability, or susceptibility of market power to
8 erosion, to the relationship between industry
9 structure and incentives to innovate, to entry
10 barriers, to capital market efficiency, and the
11 relationship between static and dynamic efficiencies.
12 These are all tremendously important. We
13 don't have very good answers to them. By that I mean
14 as a matter of broad prescription over an entire
15 economy, the economic literature, just under my
16 understanding is not there yet. We do know quite a
17 lot about specific markets but for broad
18 prescriptions, widespread disagreement.
19 So how do we deal with this universe of the
20 unknown that characterizes much of antitrust? Well,
21 therein lies decision theory, and that's why this
22 panel is so important. I'm looking forward to hearing
23 the thoughts of my copanelists on this.
24 Decision theory has to do -- and I want to
25 clarify -- with uncertainty, not probabilities. By

1 uncertainty, I mean we simply don't know. For an
2 antitrust enforcer peering into the void of the
3 unknown, you immediately encounter a quandary. What
4 are you supposed to do?
5 Well, you might start by thinking the first
6 rule of medicine is do no harm. And so an antitrust
7 enforcer facing uncertainty may decide simply not to
8 act. And the result of that inaction, of course, is
9 the elimination of Type I errors or false convictions,
10 but it invites a great many of surely unacceptable
11 number of Type II errors, thus eliminating the
12 function of antitrust.
13 Alternatively, one might say we’ll prohibit
14 every practice -- we’ll prohibit every practice unless
15 it's shown to us to be affirmatively procompetitive in
16 a demonstrative way and we’ll flip the error costs
17 accordingly. Neither is particularly satisfying or
18 or satisfactory.
19 So what to do? Frank Easterbrook gave us a
20 terrific way to think about this in 1985. And what he
21 said is we should eliminate -- excuse me, not
22 eliminate. We wish we could eliminate. We should
23 minimize the sum of error costs Type I, Type II, plus
24 enforcement costs.
25 And critical to his prescription was the

1 proposition that Type I errors are worse than Type II
2 as Type I errors, a legal rule that mistakenly
3 condemns procompetitive behavior is apt to be
4 perpetual and it's not subject to erosion by market
5 pressures.
6 Conversely, markets susceptible to and left
7 with anticompetitive restraints will over time break
8 down as super-competitive rents drawing entry. So
9 that was his account. And the fact that we're having
10 this panel speaks to its impact. It certainly has --
11 and its controversial nature, too, because much of
12 that thesis, I think, informs criticisms we're getting
13 today about how antitrust hasn't done enough. So this
14 topic couldn't be more timely. And as I said, I think
15 it's a nice capstone to all the good hearings you've
16 held to date.
17 So the Supreme Court, just to spend a minute
18 at the following observation really just to talk about
19 how significant Easterbrook's article was, look at the
20 1986 decision in Matsushita. The Supreme Court
21 observed that intervening, you know, to prevent
22 potentially low-cost behavior involved errors that
23 were prohibitively expensive and couldn't be -- or
24 they counseled heavily against the introduction of
25 liability. And those themes have developed over time.

1 In 2004, the late Justice Scalia observed
2 that the potential for false positives weighs against
3 an undue expansion Section 2 liability. Twombly, the
4 pleading standard case, is all about error, having to
5 pay costs for something you shouldn't have to face.
6 And we saw a variety of decisions actually the same
7 year in Credit Suisse and in Weyerhaeuser, again,
8 where the role of error loomed large.
9 So obviously the Section 2 report that the
10 DOJ came out with under Bush II maybe was a high point
11 or low point depending on one's perspective on all of
12 this for the role of error under Easterbrook's thesis.
13 So that brings me to Easterbrook's famous
14 article. And if we were here to simply say he had it
15 perfect, truly nothing would have changed. I do
16 think, useful as it was, it was incomplete. And I want
17 to spend just a few minutes talking about some of the
18 ways in which the application decision theory can be
19 revisited and refined.
20 First of all, as a threshold matter, it
21 doesn't matter if one Type I error is more socially
22 costly than one Type II error. We need to consider
23 the total sum of all error costs. So if your chosen
24 intervention policy reduces 10 Type II costs or errors
25 for every Type I error, you presumably have a problem.

1 And that observation also pulls in the
2 following point, which is we might -- when we think in
3 a nuanced way about error observed that the propensity
4 and significance of error change depending on whether
5 you're talking about an intervention decision and
6 idiosyncratic facts that are unlikely to be repeated
7 certainly en masse on the one hand versus a rule of
8 broad application that was likely to affect a wide
9 swath of behavior. So that's a significant point. So
10 that's first.
11 Second, there's a suggestion running
12 throughout the decision of antitrust error literature
13 that a Type I error, the false conviction, results in
14 the total loss of social value associated with the
15 erroneously condemned procompetitive behavior. That
16 overstates the significance of the Type I error
17 problem, and that's a thought that I think will recur
18 here that a single-minded focus in minimizing Type I
19 errors is uncritical in my opinion.
20 So the actual truth of the matter is the
21 social cost for an erroneously condemned restraint is
22 the difference between the condemned restraints and
23 the next best alternative available to firms. The
24 difference between those two can be small in some
25 circumstances, even negative, as you can imagine that

1 a firm denied a preferred restraint or acquisition
2 may, as Easterbrook said, through natural
3 experimentation find something better. So that's
4 something to bear in mind.
5 Now, a bigger issue -- and this looms large
6 in Judge Easterbrook's analysis -- is that Type I
7 errors are unlikely to self-correct. Well, that's an
8 interesting observation and we can debate it, but I
9 think that's far less obvious than Judge Easterbrook
10 presented to us.
11 If you look at bad precedence -- and there
12 have been many of them. They've been reserved left
13 and right, not always quickly but en masse. I mean,
14 we look at Legion in 2007 overruling Dr. Miles. We
15 had State Oil versus Khan 10 years before. We stayed
16 away 10 years before overruling Albrecht. We saw the
17 Supreme Court in BMI limit the role of the per se
18 rule. We saw, of course, Arnold, Schwinn overruled,
19 and the famous GTE Sylvania case in the '70s. And so
20 those are just a variety of examples.
21 Now, you might say that those reversals came
22 far too late and not quickly enough. But just bear in
23 mind that some are the most egregious errors one could
24 say were quickly limited. If you look at the Dr.
25 Miles decision itself in 1911, it was effectively

1 eliminated in 1919 by the Supreme Court's Colgate
2 decision. The per se rule against product time today
3 exists on paper because of Jefferson Parish, 1984. It
4 effectively defined the per se rule.
5 And then most importantly, I think this gets
6 lost. The fact that you end up with a bad precedent
7 doesn't mean that the agencies themselves have to
8 prioritize enforcing them. If we look at the 1960
9 Supreme Court merger law, which still holds as binding
10 law of the land, it looks like a different alien world
11 compared to the 2010 merger guidelines.
12 If you look at the Robinson-Patman Act, I
13 doubt you'll find many prominent advocates for renewed
14 enforcement of that particular statute at the
15 agencies. And the Supreme Court, I think it was in
16 1972, and Sperry Hutchinson observed that the FTC's
17 standalone Section 5 authority goes way beyond the
18 Sherman Act. It said, in fact, it can condemn
19 behavior that violates neither the letter nor the
20 spirit of the antitrust laws. Nevertheless, over time
21 as a general matter, the FTC has been quite
22 circumspect about employing that authority, and when
23 it has employed it, it's been quite controversial.
24 So for all those reasons, I find the Type I
25 error focus has been overweighted in this calculus and

1 that we may want to revisit this somewhat more
2 critically.
3 Rounding out this critique, I want to make
4 one particular observation, which is that the whole
5 conversation on Type I errors is that are they worse
6 than Type II, is in some respects getting the tradeoff
7 wrong. We care about both. It really does matter. A
8 Type II error means that antitrust has failed to do
9 its job. And, you know, effective exclusionary
10 practices that are allowed to endure are truly
11 problematic.
12 And by the same token, a Type I error that
13 condemns a procompetitive practice turns antitrust on
14 its head. So to really talk about which one is worse
15 in my view is not the right way to think about the
16 question. What we should really be thinking about is
17 institutionally how to tackle particular practices.
18 And if you look at the actual substantive
19 rules of antitrust liability, they reflect this
20 tradeoff, as I think is suggested and should be
21 conduct-specific. But if you look at the per se rule,
22 the whole premise of the per se rule is that courts
23 and agencies are better at fixing anticompetitive
24 problems than markets are. And I think that's
25 uncontroversial for those particular examples.

1 Even cartels take time to break down.
2 If you look at the quick look, same premise.
3 Right? We're going to look at facially
4 anticompetitive behavior, but we'll limit the
5 propensity for error by allowing the defendant to
6 articulate a plausible procompetitive rationale that
7 will trigger the full root of reason. And if we think
8 about the root of reason, what does that actually say?
9 That's a full legal recognition that the markets may
10 be able to figure this out more reliably than we can.
11 That's why if you even acknowledge that
12 there's been a particular practice such as product
13 tying, in the absence of market power you think that
14 the market will self-correct or eliminate any
15 propensity for harm before it fully takes root.
16 So what I'd call for in summation is to get
17 away from this proposition that decision theory means
18 that we should bring no cases at all because we care
19 about Type I or lots of cases because let's worry more
20 about Type II. I'd call for a more nuanced and
21 discerning and discriminating inquiry under this. And
22 I've got some other observations we can discuss later
23 about how the agencies might think about acting or not
24 acting in particular circumstances to discern more
25 information.

1 And just on one final note because I believe
2 I’m out of time, I very much appreciate the
3 opportunity to talk with you further about the
4 interesting question of whether the agency should
5 enjoy some measure of deference.
6 Let me just say first of all I find it a
7 hugely important feature of the U.S. system that the
8 agencies must prove up their cases from scratch in
9 court because it brings a disciplinary effect that’s
10 absent elsewhere and it’s obvious in the practice of
11 law.
12 So in no way am I suggesting that the
13 agencies should be relieved of their obligation to
14 prove up a case. Rather, I'm thinking of something --
15 at least I was thinking of something a little bit more
16 nuanced, which was if you think of the well
17 established law that consumers have referred antitrust
18 plaintiffs and were more skeptical about competitor
19 lawsuits, well, maybe we want to think the same way
20 about agencies. And agencies to some degree already
21 do enjoy a major of deference. And that's
22 particularly true of administrative proceedings at the
23 FTC under Part 3 where the standard employed by the
24 appellate court is on factual and economic matters
25 quite deferential. So thank you very much, and I’ll

1 pass it on to John.

2 MR. THORNE: I’ll take the clicker. And one
3 of the buttons makes it go. There we go. Bilal, FTC,
4 Creighton, thank you so much for inviting me here.
5 It's an honor to be on this panel. And this is
6 something that is personal to me.

7 In the nature of disclaimer, some people who
8 read my resume think, well, he's the pro-monopoly guy
9 on the panel. It is true that I worked for a long
10 time for one of the broken-up pieces of th Bell system
11 trying to put it back together and succeeded in part.
12 It's true that I have done pro-defendant cases --
13 Discon, Trinko, Twombly -- but it's also true that
14 I’ve worked on a lot of plaintiff stuff. I just want
15 to mention that.

16 My firm, for example, has still the U.S.
17 record for the largest antitrust plaintiffs jury
18 award, $1.3 billion actually paid in Conwood versus
19 U.S. Tobacco. We were on the winning side -- my firm
20 was on the winning side of Ohio against American
21 Express for the defendant, and also Pepper against
22 Apple for the plaintiff. We're working with the
23 California Attorney General on the Sutter Health case.

24 So, disclaimer, everything I say is my own.
25 It’s not -- please don't think any client agrees with

1 me or anybody else from my firm because they probably
2 don’t. Special shout out thank you to the state AG
3 enforcers in the audience. I won't call you out by
4 name except for Nebraska, but eight of you supported
5 the petitioner in Trinko. Thank you. Thirteen states
6 and D.C. and Puerto Rico supported the respondent. So
7 the states were split on Trinko. But, anyway, the --
8 thanks again for having me here.
9 I'm not going to say too much about Frank
10 Easterbrook's article because much was said before,
11 except I think it's pretty cool how he dissects the
12 rule of reason analysis. He calls it empty. And
13 there’s a great quote that you can use in many other
14 places besides antitrust about when everything is
15 relevant, nothing is dispositive.
16 So he proposes -- and a couple of the
17 panelists have talked about this -- five particular
18 filters. If I were coloring these in like Thom did,
19 I'd color the first one, market power, green. The
20 defendant or defendants should possess market power.
21 That's very important. It's a one-directional filter
22 for excluding challenges. Having market power is
23 necessary; it's not sufficient. Having it could well
24 be the result of conduct that everybody wants more of:
25 investment, new products, good service, low prices.

1 So you don't condemn those behaviors if they result in
2 market power. And it’s been said, most often market
3 power is temporary, not durable. A profitable
4 business will attract new entry.
5 I would also color green the concept that
6 the profits should depend on monopoly and not be --
7 the conduct not be naturally self-effacing or
8 self-disciplining over time. I won't elaborate that
9 very much, but the concept that some kinds of problems
10 are flashes in the pan, not durable.
11 If you've got, for example, a manufacturer
12 that puts restraints on distribution, the manufacturer
13 actually is incented to make as much money as it can
14 and it wants distribution to be efficient. And
15 restraints on distribution presumably are making the
16 manufacturer more money, and often it's true that the
17 manufacturer is aligned with the ultimate customer in
18 wanting some accommodation of price and better
19 service. And, you know, often if that's not right,
20 somebody will come in with a better model and you
21 don’t have to worry about it.
22 So I think Easterbrook's second filter about
23 whether something is going to be competed away or
24 depending on monopoly, that's still correct as a
25 principle.

1 Thom had said that the third filter,
2 widespread -- the option of identical practices. And
3 the way I read Judge Frank Easterbrook on this point
4 is if you see something happening in competitive
5 markets all over the place, and now a monopolist is
6 doing it, too, you presume that the widespread
7 adoption of that practice is probably a good thing or
8 otherwise the competitive firm subject to full
9 competitive discipline wouldn't be doing it.
10 I think that's a very green principle for
11 distinguishing good from bad. A clever thing in Frank
12 Easterbrook's article at this point is he talks about
13 exceptions. You know, often you see a practice out
14 there and it can harm competition or competitors or
15 consumers, but he says we don't live by existence
16 theorems. It’s an echo to Justice Holmes’ idea that
17 the 14th Amendment didn't enact Mr. Spencer's social
18 status, or in the common law where Holmes says the
19 life of the law has not been logic; it's been
20 experience.
21 Existence theorems, the possibility of harm
22 shouldn't make you disregard the fact that if
23 something's widely in use by competitor firms it's
24 probably a good thing, and to deny a monopoly the
25 opportunity to do the same thing is likely going to

1 impose extra costs on the monopoly that will be flowed
2 through to the customer.
3 His fourth filter, in addition to looking at
4 price effects, look at output. If something doesn't
5 decrease output then that's a surrogate for is
6 something harmful? And that's a logically good thing
7 to do. It turns out to be really hard in practice to
8 look at relative output.
9 I was at an ABA antitrust spring meeting
10 many years ago and I saw a panel that turned out to be
11 very fun. There was the general counsel at Qualcomm.
12 He had no idea what was about to happen. And Fiona
13 Scott Morton -- and they were sitting side by side --
14 and the general counsel of Qualcomm made the perfectly
15 sound point that, you know, thanks to my chips and my
16 inventions, look at how the cell phone market has
17 exploded in output. And you can take the fact that
18 output has gone up as a result of my invention as
19 proof I've done something procompetitive.
20 Fiona Scott Morton looked at him sideways
21 and said, well, what is the but-for world? Would it
22 have grown even more? Anyway, a hard question to ask
23 sometimes looking at it from the output lens.
24 And then the last of Easterbrook's filters,
25 the identity of the plaintiff. I actually think you

1 should be skeptical of everybody. But you have to
2 find truth and good ideas where you can. The Old
3 Testament says, “follow the prophets but don't follow
4 the false prophets.” So which is which and when are
5 they true prophets? It's hard to discern, and I think
6 that's in some ways not a useful filter.
7 So what I take away from Frank Easterbrook's
8 article, as his conclusion, and then I’m going to talk
9 about how it's been implemented, it's a radical idea.
10 It’s we should have rules of per se legality, which
11 what most examples of a practice are procompetitive or
12 neutral, the rules should have the same structure
13 although the opposite bent as those that apply when
14 almost all examples were anticompetitive. So you’ve
15 got things that are per se illegal because almost
16 always they’re bad, they’re equally important. Find
17 some things that are per se lawful as Easterbrook
18 explains. If you have a strong presumption of
19 legality that makes it possible for counsel to state
20 that some things don’t create risks of liability. So
21 that’s an idea that’s been implemented over time and
22 with some success.
23 I’ve worked on three examples of that. I
24 mentioned Discon, Trinko, and Twombly. Discon, for
25 those of you who don't remember that case, NYNEX

1 against Discon, NYNEX was the petitioner. A nine-to-
2 zero decision written by Justice Breyer said it was
3 okay for NYNEX to switch suppliers. They had gone
4 from supplier -- I forget -- Discon to Supplier B,
5 whoever B was. But they switched suppliers. And they
6 did it in a way that was alleged to violate a state
7 rule limiting the market power of NYNEX. So state law
8 existed to keep NYNEX's monopoly in check.
9 And NYNEX was alleged to have violated
10 the state law holding its monopoly in check by
11 switching suppliers. And Justice Breyer said, no, no,
12 no. As a matter of antitrust, you can switch
13 suppliers and we don’t care whether you broke a rule.
14 Nine to zero.
15 And it was at the motion-to-dismiss stage.
16 It didn't depend on the particular parties, NYNEX or
17 Discon. It was categorical. Any state of facts that
18 fit the pattern, you want to switch suppliers, you can
19 do that, per se legal.
20 Trinko you know well. You don’t have to
21 share something you’ve built with rivals in general.
22 We’ll come back to exceptions and limits of that.
23 The Twombly case was an antitrust case about
24 the Baby Bell companies not entering into one
25 another’s markets. You've got to plead enough to say

1 that's sufficiently suspicious to justify the cost.
2 So I've seen this idea. Some things are per se legal.
3 There are going to be some limits to those.
4 So as a descriptive matter, not necessarily
5 normative, how might this idea of per se legality be
6 implemented? I would summarize ways it could and in
7 part has been implemented as five freedoms. There's a
8 basic freedom to cut price. Brooke Group
9 categorically says at least out of some measure of
10 incremental costs, firms, even monopolies, can cut
11 price.
12 Now, why would that be a good thing? Why is
13 it good for a monopolist? Let me try to defend this
14 freedom of why is it good for a monopolist to be
15 allowed to cut prices? Well, because you want -- more
16 people benefit by definition if it's a monopoly and
17 there's less market discipline to bring the price
18 down. So if a monopolist offers you a price cut, say
19 yes, we welcome it.
20 Similar to that but much less well adopted
21 in the courts, a freedom to package products at a
22 discount. I think this follows from Frank
23 Easterbrook's insight that if you see a practice
24 widely adopted by competitor firms, it must have some
25 benefit out there. And then if you condemn that same

1 practice here, the idea of putting together a
2 discounted package, you condemn that behavior when
3 it's a monopolist. You're going to lose something
4 because you would lose something if the competitor
5 firms were prohibited from that.
6 I have seen in my life that a lot of
7 innovation proceeds from combinations of products.
8 You take chicken nuggets, add a carton of milk and a
9 toy; you have a happy meal.
10 In the LePage's/3M case decided first in the
11 District Court in the Third Circuit, cert not granted
12 because the government didn't help. But in the 3M
13 case, I understand as an outsider that 3M's discounts
14 on the package were actually a management tool to try
15 to overcome silos within its conglomerate business and
16 to promote internal cross-selling from one business to
17 another. So if you want to offer your customer a
18 discount on this product, you hade to sell the -- you
19 had to help the other guy sell the other products.
20 Freedom to innovate. Does that actually
21 need a defense? Greg Sidak, one of Judge Posner's
22 first law clerks -- first year Posner was on the Court
23 -- wrote an article about predatory innovation. I
24 won't say any more that that.
25 Freedom to increase efficiency. There are

1 many new examples where you might be seeking a freedom
2 to increase efficiency, say, in the sharing economy or
3 some of the tech platforms. Older examples of this,
4 kind of a neat, stark example, Honeywell/GE merger.
5 In the U.S., that was seen as creating efficiencies.
6 It got cleared.
7 In Europe, the same efficiency was viewed as
8 harm to competitors. How are competitors going to
9 deal with this more efficient animal, and it was
10 condemned. Discon, switching suppliers is a kind of
11 categorical efficiency.
12 And then finally the freedom to make
13 investments to build stuff without being forced to
14 share it with rivals. Defense of that, I could go on
15 at length since I was one of the counsel of record for
16 Trinko in that case.
17 But the two main ones are because you want
18 to promote people building stuff. I'm saying it in a
19 colloquial way, but if you -- if you force the
20 incumbent to share facilities, you deter them from
21 building or keeping those facilities up. But you also
22 deter the best kind of rival that is going to build
23 its own competing facilities. Because some -- in
24 telephone they were called CLECs, itty-bitty telephone
25 companies trying to build pipes sort of from place to

1 place to compete with the incumbents.
2 If you tell them you got an option, you can
3 sync expensive fiber under the streets of New York or
4 you can piggyback on somebody else's stuff. But
5 piggybacking is always less risky and it's hard for
6 the facility's building rival to make a living. And,
7 of course, as many people will note, judges and at one
8 time lay juries are not very good at setting price in
9 terms of forced dealing.
10 So I don't want to leave this on a, well,
11 here are all the cool things a monopoly should be
12 allowed to do. I think there's a strong case that the
13 same economic freedoms to be promoted with
14 Easterbrook's ideas also require energetic law
15 enforcement.
16 And so the prior panel talked -- quoted Gary
17 Becker, an important price theorist. I want to quote
18 the price theorist from South Africa, Desmond Tutu,
19 who said, "The price of freedom is eternal vigilance.
20 Economic freedom does not sustain itself; it must be
21 actively promoted and defended."
22 So a test case for how much energy you want
23 to put into defending economic freedoms -- and I
24 thought of this before Makan Delrahim last week put
25 these out for public comment because Randy Picker has

1 a good article on the subject, but the ASCAP/BMI
2 consent decrees. Everybody knows what that is. These
3 are the music publishing companies that most of a
4 century ago put together all their licenses into a
5 package, and if you wanted to play the music, you had
6 to deal with ASCAP or BMI. And if you wanted to get
7 your music licensed, you're a music songwriter, you
8 had to deal with ASCAP and BMI.
9 And this was a hard case. It is a hard
10 case. This has two judges in the Southern District of
11 New York with rate courts setting the price,
12 periodically adjusting the price and the terms under
13 these consent decrees.
14 My friend, Randy Picker, said this is a --
15 this is a way to look at how much do you care; how
16 much energy are you willing to put into disciplining
17 something that’s probably good, but -- and any time
18 you get competitors joining together to set package
19 prices, it's problematic. So do you care enough to
20 put the energy in?
21 And I was pleased that last week Makan
22 Delrahim put these out for public comment. So it is a
23 timely thing. But Makan’s personal hero, he said in
24 several speeches, is a former assistant attorney
25 general, then solicitor general, then attorney

1 general, then Justice Robert H. Jackson.
2 And Makan almost has a meme of “so what
3 would Robert Jackson do?” And I thought, well, what
4 did Robert Jackson do? Surprise, he was there for
5 ASCAP/BMI and he wrestled with the problem presented
6 by aggregations of competing license holders for
7 blanket license. He wrestled with this, what to do.
8 And his deputies at the time were Thurman Arnold and
9 -- I’ve got a lot of notes on this, I’m not going to
10 read them all to you, though. Andrew W. Bennett was
11 Jackson's special assistant.
12 And there was a case that lingered in limbo.
13 And initially Jackson said if you can settle it, fine,
14 but I don't want to actually bring a case. Jackson's
15 fear in the era when these decrees were put into place
16 is that the antitrust laws represent an effort to
17 avoid detailed government regulation by keeping
18 competition, not regulators, in control of price.
19 He was very concerned about using antitrust
20 aggressively but to avoid something that looked
21 regulatory. So he stewed on this. And I sent a young
22 lawyer to the National Archives and we dug out all the
23 papers. And it turns out there is a typewritten
24 manuscript of Jackson's entire career. And he’s got a
25 chapter on ASCAP/BMI typewritten with his hand

1 corrections to whoever the typist must have been
2 transcribing it.
3 He worried about whether this was a good
4 idea or not. But in the end he came down with, yeah,
5 yeah, we should bring -- and he brought a criminal
6 case. He brought a criminal case. And he brought
7 ASCAP and BMI to the table and they signed these
8 decrees. So that's -- that’s an outer limit of what
9 can be achieved but with energy put in to effect a
10 regime that at least Jackson thought was a good place.
11 So one last major idea here, which is some
12 people think the Trinco case stopped Section 2
13 enforcement. And haven't seen that and I think it’s
14 wrong. And I want to give three examples.
15 Example one is Trinco is not an obstacle to
16 Section 2 cases where the monopolist is affirmatively
17 disrupting a rival's distribution. And one example is
18 I mentioned the Conwood case where U.S. Tobacco had,
19 through contract or through practices apart from
20 contract, gone into retail locations and targeted the
21 shelf space needed by the rival smokeless tobacco.
22 U.S. Tobacco had the cool monopoly brands, and the
23 rival, Conwood, needed shelf space. And there was a
24 lot of shelf space available. I mean, not that much.
25 It was convenience stores. But there's gum and

1 there's lottery tickets and there's the sodas, many
2 different places.
3 If U.S. Tobacco had needed more shelf space
4 for its products, it could have just gotten whatever
5 shelf space -- you know, lots of good shelf space.
6 That's not what they wanted. They wanted the shelf
7 space used by the small rival and basically -- maybe
8 it’s a bad pun, snuffed out the rival.
9 I had a case about a month ago decided at
10 the motion-to-dismiss stage in Chicago. I won't bore
11 you with details. But there the district judge said
12 that antitrust claims against a monopolist for
13 depriving distribution of a rival, that’s a good
14 Section 2 claim that goes forward.
15 I'll note that Justice Neil Gorsuch has a
16 decision from when he was a judge in the 10th Circuit
17 that also says exclusive dealing arrangements,
18 arrangements that interfere with distribution, state
19 valid Section 2 claims; a case called Novell. He was
20 also on the trial team that won the Conwood verdict.
21 A second example is Trinco is not an
22 obstacle to enforcement against antirival
23 discrimination. So, for example, Trinco would not
24 have been an obstacle to the Bell breakup case nor to
25 Otter Tail, a similar case. Both of those cases

1 involved discrimination in dealing, not forced dealing
2 under new terms. Voluntary terms offered to some but
3 denied to rivals.
4 Einer Elhauge has a very good Stanford Law
5 Review Article that goes through all of the prior
6 Supreme Court decisions on this and describes that
7 antirival discrimination existed in all of the Supreme
8 Court's decisions that affirmed antitrust liability
9 for refusal to deal.
10 Third example is that Trinco is not the last
11 word. Trinco does not bar common law development of
12 the Sherman Act. The Sherman Act is not a nose of
13 wax. It's subject to constraints of stare decisis
14 necessary to protecting investment-backed
15 expectations. It's subject to the need for stability
16 in the law. But it is adjustable in light of
17 experience.
18 And so if you reread Trinco, reread Justice
19 Scalia's decision for the Court, the first thing to
20 notice is the repeated use of the word "recognize."
21 Our decisions have not recognized a duty to deal in
22 these circumstances. He talks about the essential
23 facilities doctrine that have been adopted by some of
24 the lower courts. He says the essential facilities
25 doctrine is not a recognized doctrine of this Court.

1 But he doesn't stop there. He doesn't say,
2 well, Trinko's complaint doesn't succeed so he didn’t
3 stop there. There's a whole second section that
4 follows that where he asks the question, should we in
5 this case recognize a greater duty to deal? And he
6 concludes, nope, not never, no how. He doesn't say
7 that. He says the Court finds no need to recognize a
8 broader duty in this circumstance, and then he gives
9 reasons for it. But the possibility of expansion or
10 contraction is plain on the decision.
11 So one last -- one last thought about Trinco
12 because I just like it. It turned out the Trinco
13 plaintiffs’ facts were all wrong. There was a little
14 non-antitrust piece in the case. We went back to
15 District Court, we did discovery. If the plaintiffs
16 had known, they would have picked a different
17 plaintiff. The wrong class rep. Their facts were
18 backwards and wrong.
19 And so I asked for my attorney's fees. I
20 said, you know, we went to the Supreme Court and back;
21 we need -- you know, we’ve got to get paid for this.
22 And the district judge seemed kind of interested in
23 the attorney's fees idea, and the plaintiff said, no,
24 we will not give a nickel to your client; we'll write
25 a check to charity.

1 And so I went -- Bill Barr was general
2 counsel of Verizon at the time. I went back to Barr
3 and said so we got this check for charity; that's what
4 Trinco gave us. And at Barr's inspiration, part of
5 the check went to support an inner city education
6 charity that he was familiar with. The rest of this
7 check, blank check, and there was a little tiny school
8 being started up in Southeast Washington, D.C. to
9 serve kids that would have no real opportunity. And
10 we started the school with that. So a happy ending --
11 two happy endings to Trinco, 9-0, and then we started
12 the school with the proceeds of the losing party.
13 MR. LITAN: Wow. All the thanks to
14 everybody inviting me. I have learned an incredible
15 amount from my fellow panelists, and I'm sure I'll
16 learn a lot more from Steve. Standard disclaimer, I'm
17 with a plaintiffs' law firm in St. Louis and Chicago,
18 Korein Tillery. The remarks are my own.
19 The other thing is that I submitted some
20 long -- unconscionably long written testimony to the
21 FTC, which I'll revise and I guess will be part of the
22 public record. These PowerPoints are based on that.
23 That testimony was based in turn on a longer paper
24 that I did for the Progressive Policy Institute called
25 "A Scalpel, Not an Axe," which sort of summarizes my

1 approach to life; which is if you see a problem and
2 you can solve it by a targeted intervention, do that
3 rather than swing an axe. You only swing an axe if
4 it's absolutely necessary and the target intervention
5 will not work. And I think that's true here, and I'll
6 point out a couple of problems that I think are
7 targets.
8 The final introductory point is that I'm
9 going to talk about not only things that the FTC can
10 or should do, but also some legislative tweaks that I
11 think would help the situation for the problems that
12 I'm going to identify. And I am going the use the
13 Easterbrook framework but we're going to skip through
14 a lot of slides here because we know what the
15 Easterbrook framework was. That slide summarizes it
16 in a slightly different way.
17 The focus of my remarks are going to be on
18 key changes since he wrote it, very briefly on the
19 change in the law since he wrote it, and then much
20 more emphasis -- because I'm also an economist in
21 addition to being a lawyer -- I'm going to focus on
22 some economic changes which are in three bags, to use
23 Thom's metaphor. Some are bad, some are good, and
24 others are mixed. And I'm going to talk about what
25 those changes imply for Easterbrook's framework.

1 So let's begin with the legal change. The
2 most important is that Easterbrook and the Chicago
3 School largely won since he wrote the article. Now,
4 the reason I say largely is that the way I actually
5 read the law under the Sherman Act -- and I'm heavily
6 influenced by the Microsoft decision that came down en
7 banc, I think it was 9-0 by the D.C. Circuit. And
8 they used what I call a structured rule of reason.
9 And this has been repeated in a number of
10 cases; in fact, most recently in the Qualcomm case,
11 Lucy Koh, Judge, used the same three-part thing.
12 There was a case against the NCAA for fixing financial
13 aid packages that I followed heavily. And that was a
14 Section 1 case, not a Section 2. But, again, the
15 judge there, Judge Wilken, used the same three-part
16 analysis which I'll get to in a minute. And so that's
17 the first thing that's changed.
18 The second is that judges and economists are
19 better at implementing the structured rule of reason
20 than I think Easterbrook feared that they could.
21 And, finally, this is just a note, since he
22 wrote, basically vertical and conglomerate mergers
23 have been pretty much always approved.
24 So let's go to the first economic change.
25 Is this working?

1 MR. SAYYED: I think the green button.
2 MR. LITAN: Green button? Oh, yeah, okay.
3 Okay. So the bad news from the economy point of view
4 is that we've had a dramatic drop in what economists
5 call the secular rate of productivity growth. So in
6 the good old days from '48 to '73, productivity, which
7 is basically the growth in output per unit of labor
8 input, that grew at about 3 percent a year and wages
9 grew at about 3 percent a year in real terms.
10 In the last decade or probably a little
11 more, we're down to about 1 percent. Now, there's
12 been a brief uptick in the last quarter or two, but
13 there's been no real sea change in the secular growth
14 of productivity.
15 Now, why is this bad? It's that on average
16 productivity growth determines average wage growth.
17 And there's been increased income inequality, which is
18 not good, but on the average the decline in
19 productivity is not good.
20 And that -- when I say business dynamism, I
21 also include -- I included in things like that, the
22 drop in the startup rate. There used to be about
23 600,000 startups a year. There are now about 400,000
24 since the Great Recession.
25 Now, what's the good news? The good news

1 that I have highlighted in my paper are all the
2 upsides of the internet. And I won't go through all
3 of them because they have been written about all over.
4 And of course we've had a lot of great medical
5 advancements since 1984.
6 The mixed news is globalization. And what
7 we have learned, of course, is that there are winners
8 and losers. I'm a free trader and an unabashed free
9 trader. I realize that I'm out of step with both
10 political parties right now, which have backed away
11 from globalization and free trade. I'll talk about
12 the implications of that for antitrust, which people
13 have not recognized. And then, of course, there are
14 all the dark sides of the internet.
15 So the question is, has less competition
16 contributed to any of these changes? Now, there is a
17 narrative out there that the economy has become a lot
18 more concentrated at the national level. If you look
19 at all these industries, broadly defined, a lot of
20 critics of what's going on say the economy is less
21 dynamic because there's been a lot of concentration or
22 increase in concentration.
23 The second point here is really important.
24 Defining broad industries, as what's called the
25 two-digit level of the standard codes that are used to

1 define industries. They're not the same as relevant
2 antitrust markets. This is really important. Carl
3 Shapiro, who used to be a chief economist with the
4 Antitrust Division, wrote a really important paper a
5 year and a half ago where he goes through proxies for
6 antitrust markets. And what he points out is, number
7 one, a lot of the antitrust markets are local; they're
8 not national.
9 So if you think about banking, a lot of
10 financial services, in fact most services, doctor
11 services, things like that, retail, wholesale, a lot
12 of it, the competition if you're going to have an
13 antitrust case, is at the local level. It is not at
14 the national level.
15 And when he looks at the local level, he
16 finds no increase in concentration. That's really
17 important. You can't overgeneralize. And then the
18 second thing he finds when he breaks down the
19 industries is that there has been a minor increase in
20 concentration in some industries at the national
21 level, but they were already unconcentrated to begin
22 with so that the delta is not that great.
23 So I think you really need to -- when you
24 look at this populist narrative that's out there, you
25 have to dissect it in antitrust terms. And even

1 though you may say we're a bunch of nerds and a bunch
2 of wonks, that’s the way the law is structured. It’s
3 to look at these markets where competition actually
4 takes place and the economy is not as out of control
5 as a lot of the narratives suggest.
6 Moreover, even if you look at the national
7 level, you find that in concentrated industries
8 productivity has increased faster in concentrated than
9 unconcentrated industries. So concentration is not
10 necessarily so bad even at the national level, which
11 is not an antitrust market.
12 And in my own research that I have done with
13 Ian Hathaway of Brookings, we’ve looked at the startup
14 decline, which is another measure, as I told you, of
15 business dynamics, and we found that it's not industry
16 concentration that is driving it. It's the age of the
17 firm, in other words, if you're a new firm competing
18 against a really older firm you’ll have a much tougher
19 time generally competing.
20 And, secondly, we’ve had a slowdown in the
21 growth of the labor force. And we did a cross-
22 sectional analysis and it turns out the cities that
23 are growing most rapidly, startups are doing
24 relatively okay. Cities that are not growing rapidly,
25 startups have basically fallen through the floor.

1 And so this largely explains the startup
2 decline, not the so-called increasing national
3 concentration. In fact, the CEA in 2016 under
4 President Obama, not under President Trump, basically
5 said that there were government barriers to entry, not
6 private ones, and that the -- a lot of these other
7 causes of the startup decline have not been well
8 explained. But they did not single out concentration.
9 And if you look at the public narrative, they say it's
10 concentration that's driving the startup decline.
11 That is simply not true.
12 Now, there is a part of the public narrative
13 that is true. And that is if you looked at corporate
14 profits, there is a cause for concern. Number one is
15 the share of profits and the share of GDP has gone up
16 on a secular basis from roughly 8 percent to a roughly
17 12 percent of GDP. There's been an increase in
18 inequality in profits, so the firms that are doing
19 really, really well are doing great. And there are a
20 lot of people -- a lot of firms down there at the
21 bottom that aren't doing so well. That parallels
22 what's going on with workers as well.
23 So the question is what's causing this
24 increase in inequality? And I'm just going to single
25 out three things. It's not been as well studied as

1 personal inequality, income inequality. But I think
2 one is the rise of big tech. They're making a lot of
3 money because of network effects. Number two, there's
4 been rising profits to intellectual property. Look at
5 big pharma, all right? We have patent protection that
6 basically is protecting a lot of monopoly profit.
7 And, third -- and this has not been well
8 commented on -- is that there are a lot of collusive
9 profits out there. I mean, one of the biggest
10 surprises to me personally when I came to the
11 Antitrust Division was how many conspiracies there
12 were. And as an economist, I just sort of believed
13 that, you know, General Electric being convicted for
14 price fixing in 1958, it wasn't going on anymore. And
15 then I come to the division and I find that there's a
16 lot of price fixing.
17 And one of the reasons we found out is that
18 my boss then, Ann Begeman, who was Assistant Attorney
19 General, introduced a new leniency policy in 1984
20 which basically said that if you were the first person
21 in a cartel to come in and confess, you got off scot-
22 free. But if you're the second one, we threw you in
23 jail. All right?
24 Well, guess what that did? That induced a
25 lot more people to come in and confess to the Justice

1 Department. And it turns out if you look at the data,
2 there has been roughly between 40 and 60 price-fixing
3 conspiracies that have been uncovered and prosecuted
4 in the last decade or so. And a lot of that, I would
5 argue, is due to the change in the leniency policy.
6 So that’s a very important thing.
7 The other thing I want to highlight about
8 profits and sort of what's going on in economies is
9 the so-called kill zone around the tech platforms.
10 Now, in my PPI paper, I did not give this as much
11 attention as I now appreciate. I think there is
12 something to this story that you don't see as much BC
13 and startup activity around the big tech companies
14 because they're afraid of getting killed. And I think
15 that’s something to worry about. So I’m going to talk
16 about how to fix that in a minute.
17 So the implications for antitrust
18 enforcement. The first thing is -- I'm not going to
19 spend a lot of --time, but for Section 1, which is
20 basically price fixing and so forth, technology can
21 facilitate collusion. And if you look at a lot of the
22 business that our firm does and other firms do in
23 terms of litigation against big banks, it's all been
24 facilitated by chat rooms, which is basically
25 innovation of technology. And people have stupidly

1 participated in these things and said a lot of bad
2 things that have gotten them in trouble.
3 Now, Bill Kovacic, who used to be a
4 Commissioner at the FTC, has just written an article
5 which basically urges the Commission that when you
6 look at a merger and if either of the parties has been
7 engaged in cartel activity in the past, that ought to
8 count against them. Whatever you do, that ought to be
9 a negative. And I actually think that's a very good
10 idea because that means that there's proclivities to
11 engage or convert tacit collusion into overt
12 conclusion.
13 Now, what's the implication for Section 2?
14 Even if the probabilities of the errors have not
15 changed, I would argue the costs of being wrong have
16 risen. So those two cats in your story, in that
17 picture, Thom, I think the lion looks worse. The lion
18 looks worse for instances where you don't do anything.
19 All right? And a perfect example I'm going to give is
20 the AT&T breakup. And I learned a lot of this when I
21 was at the Justice Department. You may have known it
22 when you were already there.
23 This story has really stuck with me. We had
24 a big supplier of fiber optic cable come and talk to
25 us and they basically said, look, AT&T and Bell Labs

1 had invented fiber optic cable but they didn't lay it
2 because they already had the copper in the ground;
3 they had no incentive to put it down.
4 You broke up AT&T and now you have Sprint
5 and you had MCI competing against them. They're huge
6 customers of fiber optics. The supplier then starts
7 selling a ton of fiber optics. We then basically get
8 the backbone of the internet because AT&T followed
9 after the breakup. They put in fiber optics.
10 And I would argue that because of the AT&T
11 break up, we got the internet a lot faster than we
12 would have otherwise. And, therefore, a lot of the
13 digital platforms that we're talking about today, they
14 came a lot faster than would have been true otherwise.
15 That is a huge benefit to innovation from the AT&T
16 breakup that a lot of people have not recognized.
17 And so when we look at the dominant
18 platforms today, which are due to network effects and
19 scale economies, we have to think about -- we have to
20 think about that if there are abuses, they can do bad
21 things because AT&T did bad things. And if we hadn't
22 broken them up we wouldn't have gotten a lot of the
23 good things from them.
24 Here’s another point I want to leave you
25 with: Go back to that free trade point that I talked

1 about, which is the backlash to globalization. People
2 have not thought this through. If it's going to be a
3 lot harder for imports to come in and it's going to be
4 a lot harder for foreign firms to invest in the United
5 States, that means there's going to be less
6 competitive pressure in America. Other things being
7 equal, that means we’re going to have to emphasize a
8 lot more aggressive antitrust enforcement because we
9 can't count on the foreigners to discipline us as much
10 as used to be the case. So I think in combination of
11 those things argue for tipping the balance, if you
12 will, to worry more about Section 2 abuses.
13 In my paper, I say that largely the current
14 law is okay. The Microsoft case, the Qualcomm case,
15 are okay. The FTC has done a lot of work in pay-for-
16 delay cases in the pharma situations. But the one
17 change that I do suggest -- and I have had enough
18 experience with it -- is that the one thing I would do
19 if I were God, I would say that exclusive dealing,
20 which was the core of the Microsoft case, both the
21 first one and the second one, first one was ended in a
22 consent decree, it was the core of what was going on
23 in Qualcomm, I would say that there is no
24 justification for exclusive dealing if you're a
25 monopolist. I would make it a per se offense. I

1 think we have enough experience to know that. And I
2 would try to get that in court. If you can't do it,
3 let's change the law.
4 I'm going to -- what else would I do? I'm
5 not going to go through all the alternatives for
6 addressing the threats to innovation, the kill zone.
7 But I very much like an idea that Hal Singer has
8 proposed, which is to go outside of the antitrust
9 courts, which can take a long time to prosecute
10 Section 2 cases.
11 Why not set up an administrative process
12 that basically does this: It says if you're a tech
13 platform and if you discriminate, which is one of your
14 categories, John, if you -- you know, you're talking
15 about the Trinko cases. If you discriminate and
16 you're a platform and you discriminate against a rival
17 and the effects of that are material, that ought to be
18 stopped. And we shouldn't wait for a Section 2 case
19 which could take seven years to fix and the poor rival
20 is out of business. We ought to be able to stop that
21 at the ALJ stage and get it stopped right away.
22 And you could have ALJs at the FTC
23 administer this. So this is a change in the law that
24 could speed up things and stop abuses before they
25 cause a lot of damage.

1 Now, I have a lot of other slides. I’m not
2 -- I’ve run out of time. I’m not going to talk about
3 those. I do want to end with a couple of points.
4 There are people that have adhered to this narrative,
5 the populist narrative that we ought to therefore
6 fundamentally change antitrust law, throw out consumer
7 welfare standard and go back to the original purpose
8 of the antitrust laws, which Louis Brandeis talked
9 about, which was to protect small business, protect
10 democracy from excessive concentration and so forth.
11 Bork and the Chicago School basically
12 revolted against that and they said that even though
13 that stuff may be in the legislative history, although
14 Bork didn't even concede that, it is in the
15 legislative history. But even if it were in the
16 legislative history, the Chicago School says there's
17 no way to administer it. There's no way to balance
18 the economics versus the politics, what metrics were
19 used and so forth. And I am very persuaded by that
20 argument.
21 If we go back to reintroducing effects on
22 small business and throw in effects of politics and so
23 forth, we’re going to get ad hoc decisions made by
24 judges. There’s going to be no guidance for business.
25 I think it's a very bad direction to move. So I am

1 not a neo-Brandeisian for that reason because it's
2 basically unadministerable.
3 And I will close by saying don't forget the
4 attorney generals out there, the state attorney
5 generals. They uncover things that sometimes the feds
6 do not. It was brought up earlier today. They found
7 generic price fixing in the drug industry. They found
8 the no-poaching agreements; good for them. They
9 should stay in business.
10 And, finally, I know this is self-promoting,
11 but we shouldn't forget private antitrust enforcement.
12 All right? Congress provided treble damages for a
13 reason. They wanted an additional layer of deterrence
14 and also compensation. Attorney generals will not get
15 all -- always get all your money back for you. You
16 need private plaintiff lawsuits, especially class
17 actions, because that is a practical way -- is going
18 to be the way you're going to get your money back.
19 There’s a new study out by the American Antitrust
20 Institute which points out that just in this past
21 decade alone $18 billion was recovered by private
22 plaintiffs’ attorneys for consumers, and that's
23 something that we should not forget. I'm done and
24 I'll pass the baton.
25 MR. CERNAK: All right. Let me add my

1 thanks to everyone else's here, to Bilal and the FTC
2 for inviting me here and actually for holding all of
3 these hearings. I think this was a great idea. And
4 in particular, I think it was a great idea to get out
5 of Washington and come visit us in the Midwest here.
6 So, thanks for that.
7 Like the others, I'll also offer the usual
8 disclaimer that my presentation here will be my
9 thoughts, not necessarily the thoughts of any past,
10 current or future employer or clients.
11 So for this panel we've been asked to
12 revisit now Judge Frank Easterbrook's seminal 1984
13 article, "Limits of Antitrust." Is it still an
14 appropriate guide to antitrust enforcement both for
15 the FTC and U.S. courts? Or like many of the rest of
16 us 35 years later, is it a little creeky and perhaps
17 ready to be thanked for its fine service and then
18 retired for something else shiny and new?
19 In my view, the underlying motivating factor
20 for Easterbrook's limits remains at least as true
21 today as back in 1984. And I think something at least
22 like its focus on the cost of action and information
23 should continue to drive antitrust enforcement and
24 litigation. Perhaps there can be a more nuanced view
25 of the Type I and Type II errors for particular

1 situations given the development of our learning, such
2 as Alan has discussed here today and in an earlier
3 paper.
4 But the underlying rationale for these
5 heuristics, the antitrust enforcers and courts, should
6 show some humility about why, when, and how often they
7 intrude into the market and take steps to first do no
8 harm, I think is just as true and important today as
9 it was 35 years ago.
10 So let's take a closer look at limits of
11 antitrust to try and make explicit the underlying
12 admonition that antitrust courts and enforcers should
13 be humble about the good that they can accomplish. In
14 the first sentence of the paper, Easterbrook says that
15 antitrust’s goal is to perfect the operation of
16 competitive markets. The problem he says is that in
17 the real world competition is messy. It's not like
18 the atomistic competition of an econ textbook.
19 There’s plenty of cooperation in various forms, much
20 of which nobody would call anticompetitive, such as
21 all the cooperation that goes on within a single firm.
22 I would also add all the examples of joint
23 ventures that have gone on and continue in an industry
24 where I'm still active; that is the automotive
25 industry. But if cooperation within a firm seems

1 benign at worst, and agreement on future prices is
2 definitely bad, what about all the combinations of
3 cooperation and competition in between?
4 As Easterbrook describes it, are 10-year
5 exclusive dealing contracts between oil companies and
6 service stations too long? Too short? Just right?
7 Does it matter whether there are two oil companies or
8 20, 200 stations or 20,000?
9 And to make matters worse for the poor judge
10 or enforcer, although perhaps providing some comfort
11 that others are equally confused, it's not like the
12 actions of each market participant are always well
13 thought out or straight out of an MBA business
14 strategy class. As Easterbrook puts it, firms try
15 dozens of practices. Most of them are flops and the
16 firms must try something else or disappear.
17 I can distinctly remember early in my career
18 sitting in a meeting where the division that I was
19 working for decided it needed more revenue this
20 quarter and so needed to raise prices. I expected to
21 see the elasticity estimate on the next PowerPoint
22 slide. But instead the assumption was that the market
23 was perfectly inelastic at least over this time range
24 and no sales would be lost and the entire price
25 increase would be paid by the customers.

1 When I asked how this could be, the manager
2 acknowledged the probability that some sales would be
3 lost. But he had no idea how many, no time to figure
4 it out, and so this estimate was the best that he
5 could do with the limited information that he had
6 available, and limited time that he had available.
7 So if the competitive process and the
8 antitrust judge or enforcer -- the competitive process
9 that the antitrust judge or enforcer is meant to
10 perfect is complex, and if even market participants
11 can't always figure it out, then what's a poor judge
12 or enforcer to do?
13 As Easterbrook points out in the context of
14 antitrust litigation, the judge knows even less about
15 the business than the lawyers hired by the companies
16 and yet has to make a decision. So Easterbrook
17 implicitly suggests that the judge or enforcement
18 leader should have the humility to admit that she
19 might not be able to divine the perfectly correct
20 answer and instead "employ some presumption and
21 filters that will help separate pro and
22 anticompetitive explanations," and reduce the cost of
23 the decision process and of any mistakes.
24 Now, when I speak of the humility that
25 underlies Easterbrook' limits, I think there are at

1 least three strains or varieties of humility to keep
2 in mind. The first two have been covered extensively
3 elsewhere, including by some great thinkers of the
4 last few hundred years. So I intend to focus more on
5 the third.
6 But first, there is the humility to accept
7 that it can be impossible to gather all the knowledge
8 necessary to fully understand the complex markets
9 involved in any antitrust question as well as to
10 confidently predict all the primary, secondary, and
11 some important tertiary effects, whether intended or
12 unintended, of any intervention into that market.
13 Easterbrook makes this clear in "Limits" the
14 judge knows even less about the business than the
15 lawyers, and others like Hayek in his 1974 "Pretense
16 of Knowledge" speech, upon winning the Nobel Prize in
17 economics, have covered this ground extensively.
18 I will just note that Hayek also provides
19 helpful advice to governments that sounds remarkably
20 similar to Easterbrook's, when near the end of the
21 speech he says, "If man is not to do more harm than
22 good in his efforts to improve the social order, he
23 will have to learn that in this, as in all other
24 fields where essential complexity of an organized kind
25 prevails, he cannot acquire the full knowledge which

1 would make mastery of the events possible. He will
2 therefore have to use what knowledge he can achieve,
3 not to shape the results as a craftsman shapes his
4 handiwork, but rather to cultivate a growth by
5 providing the appropriate environment, in the manner
6 in which a gardener does this for his plants."
7 Second, there's the humility to recognize
8 that any judge or enforcer, like any other human
9 being, is subject to her own biases and predilections
10 whether based on experience or the institutional
11 framework within which she works.
12 Yes, markets and their participants might
13 not always act in ways that we like, but enforcers are
14 not perfect, either. Again, this idea is not new.
15 Sorry, I didn't realize that was going to be a
16 controversial point. It's not new. It dates back to
17 at least Madison's remark in Federalist 51, "If men
18 are angels, no government would be necessary. If
19 angels were to govern men, neither external nor
20 internal controls on government would be necessary."
21 And it goes all the way up through Bill Kovacic's
22 application to antitrust agencies in a 2016 article.
23 Agency leaders are not angels. Sorry, Bilal.
24 A new article from Thibault Schrepel,
25 "Antitrust Without Romance," more than ably covers

1 this concept and the application of public choice
2 thinking of James Buchanan and others to antitrust
3 enforcement.
4 So I want to spend a little more time on
5 what I call the third type of humility, the
6 recognition that we are not the first ones to face
7 some of these questions and, in fact, though the
8 particulars might be a little different, we might be
9 able to learn something from those who came before us.
10 I think this humility is at least implicit
11 in “Limits” when you see the presumptions, filters,
12 and focus on error costs as simply distillations of
13 learning from past experiences.
14 Now, I often see this failure to appreciate
15 history in my clients. Like those manufacturers who
16 are convinced that this issue of poor customer service
17 and other brand-destroying actions by distributors --
18 yeah, and low resale prices, too -- all began with the
19 internet. I'm sure the heads of the Dr. Miles Company
20 would have had something to say about that.
21 But I think we can also see this failure,
22 this lack of humility, in some, but not all, of the
23 reactions to the currently wildly successful companies
24 that have built up huge market shares and seem to be
25 indestructible. Is the right action a breakup of a

1 successful company? Drastic changes to how investors
2 invest in companies in the same industry? Or might
3 better action with fewer negative unintended
4 consequences be to ensure that competitors of these
5 behemoths are able to compete to better serve
6 customers and try to wrest away any market power?
7 I was reminded of this lesson just last
8 week as I drove past a Baby's “R” Us store. I didn’t
9 drive past too closely because the parking lot was
10 walled off while the bankrupt former category killer
11 Toys "R" Us sells off all the land and buildings.
12 Now, a favorite historic example in response
13 to current fears of unbeatable alleged monopolists is
14 A&P, or the Great Atlantic & Pacific Tea Company. It
15 was the original supermarket, huge market share,
16 vertically integrated, “sapping the civic life of
17 local communities.” That’s a quote from
18 representative Wright Patman, who was inspired to
19 draft the Robinson-Patman Act. They went from 16,000
20 stores in 1930 to a quarter of that number 20 years
21 later; to competitive irrelevance shortly thereafter,
22 and then later out of business. I won't go into any
23 great detail. This is detailed elsewhere, especially
24 in a paper by former FTC Chairman Tim Muris.
25 But given my background, I want to relate a

1 couple other examples. First, consider this quote
2 from a U.S. senator: "It is evident that businesses
3 grown to such an extent, mergers have been taking
4 place with such rapidity and economic powers being
5 concentrated in fewer and fewer hands to such a degree
6 that the legislative and executive power of this
7 nation should come quickly to an understanding as to a
8 formula for clarifying the antitrust laws by which we
9 can stabilize our economy."
10 Now, is this is a quote from somebody
11 running for or supporting a candidate for President in
12 2020? No, that's Senator Joseph O. Mahoney, Democrat
13 from Wyoming, on November 8, 1955, as he's kicking off
14 18 days of hearings into the antitrust issues raised
15 by the operations of General Motors Corporation.
16 So, GM, that vertically integrated company
17 with over 50 percent of the light duty vehicle market
18 at the time; GM with a dominant share of the
19 refrigerator business through its Frigidaire
20 subsidiary; GM, with its Electro-Motive division
21 subsidiary having sold more than 60 percent of the
22 locomotives operating at that time; GM, the company
23 which hasn't made a refrigerator or locomotive in
24 decades and declared bankruptcy in 2009.
25 Now, there was plenty of talk at these

1 hearings back in 1955 from both senators and experts
2 alike about GM's dominance and ability to head off
3 meaningful entry. One expert predicted that it may
4 turn out that Chrysler Corporation's entry in 1923 is
5 the last successful one. Almost two years to the day
6 later, a small foreign entrant established a small
7 U.S. sales subsidiary in California; you may have
8 heard of Toyota. Just as an aside, keep in mind these
9 predictions from the 1955 hearings as different
10 hearings get underway.
11 Just one more example from the automotive
12 industry but one very appropriate for an FTC hearing
13 like this looking into actions from 35 years ago. At
14 the beginning of my talk, I mentioned joint ventures
15 in the automotive industry. One of the biggest JVs
16 started business 35 years ago. In 1984, New United
17 Motor Manufacturing, Inc., started production of small
18 cars in Fremont, California. NUMMI was a production
19 joint venture of General Motors and Toyota designed to
20 produce small cars, help GM learn the mysteries of
21 Toyota's high quality, low-cost production methods,
22 and convince Toyota that such methods could be
23 implemented by U.S. workers.
24 It almost didn't happen. The FTC barely
25 approved the joint venture the prior year with one of

1 the dissenting Commissioners asking if this joint
2 venture between the first and third largest automobile
3 companies does not violate the antitrust laws, what
4 does the Commission think will?
5 But approve it the FTC did, although with
6 some conditions, including an ongoing requirement to
7 annually share with the Commission compliance staff
8 certain documents regarding the interaction amongst
9 the companies. I know. I collected and shared those
10 documents with the FTC staff, who always seemed to
11 spend less time with me in suburban Detroit than he
12 did with Toyota and NUMMI staff in Northern
13 California.
14 Now, in many ways NUMMI was a great success.
15 GM did learn much about the Toyota production system.
16 Those efficiencies have now spread throughout the
17 company and really the industry. Toyota was convinced
18 that its methods could work in the U.S. and now makes
19 over a million vehicles here.
20 But in other ways, NUMMI was a failure. It
21 never made much money, if any, in any given year for
22 its parents. The vehicles that it produced for GM
23 were never great sellers by industry standards.
24 But perhaps most pertinent for antitrust
25 purposes is what didn't happen. The cooperation of

1 the two companies did not bring about decreased
2 output, increased prices or any other negative effect
3 on competition.
4 As Kathy Fenton said in a 2005 antitrust law
5 journal article, “A whole new generation of antitrust
6 lawyers by that time could ask what was the big deal?”
7 Now, all of this talk about history and
8 humility doesn't mean that the FTC or a hypothetical
9 judge should be frightened into inaction. After all,
10 even “The Limits of Antitrust” recognizes legitimate
11 antitrust actions. Nor do I think the exact rules
12 described in “Limits” cannot be adjusted. I mean, it
13 was published in the Texas Law Review, not inscribed
14 on stone tablets.
15 And while I think much can and should be
16 learned from history, I don't think it's sufficient
17 for me to say, “But, but, but, A&P,” and consider that
18 the argument is done. As Jonathan Baker has pointed
19 out, the high market shares of such past giants as GM,
20 RCA, and Xerox did persist for quite some time.
21 Antitrust law should consider if it knows
22 whether the persistence of such high shares shows the
23 willingness and ability of these successful
24 competitors to continue to meet the desires of
25 consumers, or instead the blocking of the rise of

1 effective new competitors.
2 In doing so, antitrust scholars should rely
3 not just on theories of potential anticompetitive
4 conduct but on empirical work like the early Chicago
5 School did to give us the confidence to implement the
6 theories.
7 So in the end, I think the right approach to
8 both adjustments to a “Limits” approach, and to
9 antitrust enforcement itself, is to echo Former Acting
10 FTC Chairman Maureen Ohlhausen, “A respectful
11 regulatory humility to what we know and can improve by
12 intervention in a market.”
13 If antitrust law is meant to ensure that the
14 market aspects of democratic capitalism persist, a
15 system that some have said has lengthened the life
16 span, made the elimination of poverty and famine
17 thinkable, and enlarged the range of human choice,
18 then we should be confident that we have learned
19 something in the intervening 35 years before we make
20 any changes.
21 So what do we know now that Easterbrook
22 didn't know then about the complex interactions of
23 customers, suppliers, and competitors; about human
24 beings, whether actual or potential buyers, sellers,
25 investors, or enforcers and how they react to various

1 incentives; about technology diffusion or when R&D is
2 successful?
3 I think the enduring legacy of "The Limits
4 of Antitrust" should not be its answers to questions
5 like these but ensuring that we, practitioners, judges
6 and enforcement agencies, ask those questions anew to
7 see if we can now come up with better answers.
8 Thanks.
9 MR. SAYYED: All right. Thank you all. I
10 want to do two things. I want to give hopefully
11 everybody a chance to maybe comment on what they've
12 heard. And then I have one question from the
13 audience, so I want to ask that. And then we're going
14 to go overtime but that may be all we have time for.
15 So, Thom, I'll start with you if you want to
16 comment on anything you've heard, take your time.
17 MR. LAMBERT: Actually, I think I'll just
18 pass.
19 MR. SAYYED: Okay, okay.
20 MR. DEVLIN: I think it speaks to the
21 extent of the problem and the magnitude of the
22 difficulties involved that I haven't heard a crisp
23 answer throughout this discussion about whether the
24 core focus in favor of minimizing Type I, accepting
25 Type II, should be revisited, let alone rejected.

1 I haven't heard people be particularly
2 specific about that or comfortable with it. I think
3 in error cost as with antitrust application more
4 generally, the devil is in the details. And what I'd
5 like and I think hopefully we all can agree on, is as
6 the industrial organization literature becomes
7 increasingly refined over time and as investigations
8 are -- if they're not already there, optimized, the
9 sphere of uncertainty should shrink and reducing this
10 problem we have to grapple with.
11 But as I said and referred to earlier, I do
12 think that there's an opportunity for the Commission
13 to think thoughtfully about error in some marginal
14 decisions, and just if you give me 30 seconds I'll run
15 through this one point and then pass the baton back
16 along.
17 But in certain circumstances you can imagine
18 not intervening to challenge, for example, a merger in
19 the presence of uncertainty and taking advantage of
20 retrospective studies much as the Commission did in
21 the early 2000s with hospital mergers to more
22 specifically understand the nature of competitive
23 effects.
24 And on the other hand, you could also
25 imagine circumstances, again, subject to error in

1 which parties claim changing industry conditions
2 require a combination. And if you don't have the
3 requisite certainty that that competition is going to
4 be displaced naturally, in theory the Commission could
5 wait to see what happens in the industry and then
6 revisit the determination in the future.
7 So there are ways to be thoughtful about how
8 to reduce uncertainty through intervention decisions.
9 Pass it along.
10 MR. THORNE: Again, I very much appreciate
11 the chance to be here. I thought of lots more things
12 to say but I'm going to pass it down the other way and
13 wait for the exciting question.
14 MR. SAYYED: And as for you two?
15 MR. LITAN: Well, I'll say something
16 exciting I didn't get a chance to in my opening
17 remarks, which is really a piggyback off a point that
18 Alan said. He suggested we ought to go back
19 retrospectively and, you know, see what happened in
20 various things, mergers and so forth.
21 One of the things I have in my written
22 testimony is that I urge the FTC -- and this is a
23 headline that I buried -- I urge the FTC to reexamine
24 the Facebook-Instagram merger. And -- not just
25 through ex-post analysis, although you could because I

1 cite in my testimony the GM-DuPont case in 1957 when
2 the Supreme Court looked at an acquisition by DuPont,
3 a 23 percent share of the votes of GM. They acquired
4 that stock in 1917 and 1919. Yet in 1956, the Supreme
5 Court ordered the divestiture of those shares. And it
6 did it on an antitrust theory.
7 And I point out in my written testimony how
8 that precedent is not necessarily on all four squares
9 with revisiting an entire merger. It's not the same
10 as buying 23 percent interest. It's true that we had
11 an entire merger between Facebook and Instagram.
12 Nonetheless, that case does stand for the proposition
13 you can go back and look at something again. And I
14 would argue that even at the time back in 2012 there
15 was reason to believe that Instagram could have been a
16 rival social network to Facebook. It was already way
17 ahead on a mobile platform; Facebook was not there.
18 And so I urge that -- I'm not saying that they should
19 be undone. But I'm saying that at least it ought to
20 be looked at.
21 MR. SAYYED: Okay.
22 MR. CERNAK: Nothing further here, Bilal.
23 MR. SAYYED: So let me -- I’m going to ask
24 the one question. I may return to Bob’s point because
25 I want to ask about Facebook-Instagram. But here’s

1 the question, and it goes to John's point, although
2 everyone, I think, can answer. And this is with
3 respect to the five freedoms.
4 Is the freedom to increase efficiency
5 absolute? That is, does it outweigh potential
6 anticompetitive harms that may be the result of the
7 efficiency? If not, if it's not an absolute freedom,
8 then what is the appropriate balance?
9 MR. THORNE: Big question. Every freedom
10 that I can think of, the freedom to speak and publish
11 and assemble and vote, is qualified in different ways.
12 The right to cut price is limited to -- down to your
13 -- some measure of incremental cost.
14 I think there could be -- there could be
15 situations where efficiency is bad. I can't think of
16 any right now. And the normal suspicion of
17 efficiencies, like A&P, a supermarket, or Walmart
18 comes into a neighborhood with more products, lower
19 price. Usually efficiency is such a good thing that
20 the Easterbrook idea, even if there is an existence
21 theorem that says there could be some durable harm to
22 competition by letting this additional efficiency in,
23 that's so rare that I would follow the Easterbrook-
24 Holmes idea, you know, don't worry about the logic.
25 Your experiences of efficiency is good.

1 If you condemn it a little bit, you're going
2 to condemn it a lot because Bob's firm will sue you
3 for being efficient. Not that that's bad to sue
4 people, but --
5 MR. LITAN: No, we won’t because we won't
6 make any money doing it.
7 MR. THORNE: But it's hard to think what the
8 limits are, but in general I think every freedom has
9 necessary limits. And then details matter a lot. It
10 may depend what somebody thinks is an efficiency.
11 In merger cases, for example, people are
12 properly skeptical of efficiencies, but super
13 aggressive -- Joel Klein, when he ran the antitrust
14 division, brought the Microsoft case with you, Bob, he
15 let go of the Bell Atlantic/NYNEX merger because we
16 established there were going to be serious
17 efficiencies, which actually we achieved after.
18 MR. DEVLIN: And just add, I agree with all
19 of that. But, you know, to condemn a company, even a
20 monopolist, for achieving superior efficiencies and
21 bringing greater price pressure to bear on its rivals,
22 though within theoretical construct could be
23 consistent with some effective exclusion, in
24 practicality, I mean, how does one implement that
25 rule?

1 And I think the Supreme Court has spoken
2 about that several times now in various iterations of
3 the same problem. In Weyerhaeuser, the Supreme Court,
4 for example, said the ability of trying to look at
5 above costs, how to treat pricing or buying, said it's
6 just beyond the ability of the judicial court to
7 control.
8 So how do you actually implement that? So I
9 think it's a nice example of this decision theory
10 because the dangers of getting around are so high.
11 MR. THORNE: My friend, Dennis Carlton, who
12 was for a while the head of the antitrust division
13 economics group, taught me that even a perfect
14 monopolist will pass through some of its variable cost
15 savings because it sells more; it makes more profit.
16 If it passes through some of its cost savings, so to
17 tell a monopolist, no, you're efficient enough, don't
18 achieve any more cost savings, means consumers are
19 going to be denied a price cut.
20 MR. LAMBERT: I think maybe implicit in that
21 question, something about the goals of the antitrust.
22 And I think the question is sort of asking what about
23 the small dealers and worthy men who are driven out by
24 efficient practices?
25 You know, there seems to be some value lost

1 in that and is that something that antitrust should
2 take account of? And my response to that is I think
3 the same as Bob's, which is to say that if antitrust
4 has these incommensurate goals, protect consumer
5 welfare and protect small dealers and worthy men, it
6 becomes really indeterminate and it becomes, you know,
7 when Bork started his antitrust paradox book by saying
8 that antitrust, when it was pursuing all these
9 multiple goals, was in the nature of an old west
10 sheriff who didn't sift evidence but just walked down
11 the street and every so often pistol-whipped people.
12 And it sort of becomes like that because the
13 enforcers then can say, well, we're going to bring
14 this enforcement action because we're concerned about
15 small dealers and worthy men. And we're going to
16 bring this one because we're concerned about consumer
17 welfare. And to me that's just an excessive amount of
18 discretionary power.
19 And so I would answer the question that
20 efficiency should trump.
21 MR. LITAN: Can I just add one thing that
22 makes it highly relevant to a policy discussion?
23 There is a proposal out there that was offered in
24 2017, although I haven't seen much reference to it
25 since, which is to change Section 7 standards for

1 mergers. And that's to add all these other factors
2 to, you know, the criteria for whether or not a merger
3 lessens competition. There’s a proposal, well, you
4 should add, well, effects on unemployment, effects on
5 wages.
6 By the way, you can account effects on wages
7 under existing rubric, under the existing law. They
8 will add employment. And that’s a critical one. And
9 if you're going to have to balance the employment
10 effects against the effect on consumers, that means
11 almost by definition you're going to have to deny a
12 merger that could lead to job cuts, which are
13 unfortunately an efficiency and which means you would
14 you basically prohibit efficiencies from being
15 realized.
16 And I actually think that's very bad policy.
17 And I don't know how you devise a rule to balance, you
18 know, employment versus consumers. I don’t see how
19 any judges would be consistent on that. And so
20 therefore I am not in favor of legislatively doing
21 that. But there are some very well known people out
22 there who are urging this.
23 MR. THORNE: There is one other
24 countervailing factor that happens. This is a more
25 general point about buyer discipline. Sometimes in

1 mergers you look, well, will the buyers support number
2 2, number 3, to make sure that the new larger firm
3 isn't locking them in in some way.
4 It's a sad thing when anybody goes out of
5 business to a more efficient firm. But often in local
6 markets in particular people will pay more because
7 they just want to support the local business. I shop
8 at a bookstore that would charge me more than Amazon
9 to keep -- I want to prop it up. It’s a good place.
10 I like the people. Bakeries, other kinds of small
11 businesses. That's not a universal fix but it’s a
12 countervailing fact that buyers will often come to the
13 rescue.
14 MR. SAYYED: Steven?
15 MR. CERNAK: No. I agree with Alan. I
16 guess we could imagine some theoretical case where
17 that would be true. But I don’t know that we have the
18 ability to actually find it in the real world.
19 MR. SAYYED: So let me follow up on
20 something Bob said, although it’s not -- it’s an
21 extension. One thing that, you know, occurs to me
22 when we talk about balancing or taking into account
23 different factors such as employment concerns,
24 accepting all the comments, one thing that I haven't
25 seen discussed much, although maybe it's implicit in

1 granting courts or agencies discretion to balance
2 multiple factors, is, you know, what does the agency
3 do when we tell a party that, look, we're going to
4 challenge your merger because it's anticompetitive; we
5 think prices will rise or innovation will slow.
6 And parties say to us or maybe to the
7 courts, well, you know, we'll commit to hiring an
8 extra thousand people for a certain period of time.
9 You know, how do we respond to that? And should we
10 respond? How do we make that tradeoff? And that --
11 you know, you see that outside of the antitrust
12 agencies in some form in other regulatory agencies,
13 whether it's at the state level or the federal level,
14 where, you know, parties ask the agency to balance
15 multiple factors. And you get results that probably
16 have longer term anticompetitive effects and, you
17 know, maybe some short-term positive effects but are
18 not really sustainable.
19 But let me ask a little bit about the
20 Facebook-Instagram example or transactions like that.
21 It's sort of a question I have is when people ask us
22 to relook at a consummated merger five or more years
23 after the fact, what is it they're asking us to do?
24 Are they asking us -- or what should they be asking us
25 to do or what should we do? Should we go back and

1 say, look, to use a rough example, in 2010, we got it
2 wrong based on the evidence we had in 2010. Or, well,
3 now it’s roughly 2020, let's take the market as it is
4 and let's say, well, geez, Instagram, for example, has
5 done very well. It would be nice to have two firms
6 instead of one.
7 You know, there's been, I assume, changes in
8 the running of a merged firm that would not have
9 occurred sort of separately or if the firms were
10 operating separately. So what are we -- what should
11 we be looking at or how do we make those tradeoffs?
12 MR. LITAN: Okay. I’ll start off. I’ve
13 thought a lot about that. So let's take your example.
14 Should we look at 2010 or 2020? Right? So if you
15 look at 2020 and you take basically a retrospective
16 look, the great risk using the Easterbrook error cost
17 phenomenon is that are you then going to send a
18 message to firms that when they acquire somebody they
19 shouldn't invest in the acquired firm for fear of
20 building them up into a big deal because then they
21 will be snatched away? All right? That's not a good
22 signal to send. Although acquiring firms can prevent
23 that by integrating the acquired firm and make the
24 omelet so that you can’t unscramble the egg. That's a
25 way around that.

1 But nonetheless, having retrospective look
2 in 2020 runs that danger especially if you keep them
3 separate, which is what Facebook did with Instagram.
4 And many people speculated that they did that because
5 they wanted a safety net in case Facebook somehow
6 didn't do well. At least they could then ride the
7 Instagram horse, and that's why they kept them
8 separate.
9 GM, by the way, that law, that GM-DuPont
10 case, stands for the proposition that you can do the
11 retrospective analysis, all right, because they
12 actually looked at what happened in the 1940s and
13 1950s shockingly. I wouldn't do that. I would say
14 that if you're going to relook at something, you go
15 back and you go back to that particular point in time
16 and say, you know, essentially did we make a mistake?
17 And I actually do think that the critics who
18 say that Instagram was a rival, potential rival, of
19 Facebook are right because the standard critique of
20 the -- or the Facebook defenders will say, look,
21 Instagram at the time only had eight employees; they
22 had no revenues. All right?
23 MR. SAYYED: Mm-hmm.
24 MR. LITAN: So they're a nothing company.
25 How can they be a threat? The problem is that

1 Facebook paid a billion dollars for those eight
2 people, all right? And Instagram was all over the
3 mobile phone system, all right? And Facebook was not.
4 Now, what I urge in my paper is that if you
5 don't go back and you challenge Facebook, which you
6 may not for -- I can understand for some reasons. I
7 think you should because I think the billion dollars
8 is still a lot of money. All right. Even though
9 Everett Dirksen is not alive, a billion dollars is
10 still a lot of money.
11 And at a minimum in the future in other
12 mergers you ought to think a little bit more
13 imaginatively about if the acquired firm really could
14 be a competitor, all right? And if you use a little
15 bit more imagination, it didn't take that much in the
16 case of Instagram. In the future, you wouldn't allow
17 such mergers.
18 MR. DEVLIN: Just to add to that, two
19 thoughts, actually. First, on your preliminary or
20 first remark about how to deal with merging parties
21 throughout the noncompetition related virtue as part
22 of the deal to get the challenge put to bed. I would
23 say soliciting or accepting those kinds of
24 contributions to satisfy a competition issue poisons
25 the integrity of the antitrust enterprise. And I

1 categorically have an issue with that. I think that's
2 something to value what we have here.
3 And I think modern antitrust under both
4 agencies has -- both federal agencies has a strong
5 tradition in that respect and has done much to help
6 convince other agencies around the world to, if not
7 fall in line, at least to hear us out on that.
8 Second, I’m not going to talk about any
9 specific consummated merger for reasons you can
10 probably understand given where I work. But what I
11 would say is that there's an odd ambiguity in the law
12 in that the DuPont decision you're referring to, I
13 believe the language you used was whether there's a
14 reasonable prospect, “at the time of suit.”
15 MR. LITAN: Right.
16 MR. DEVLIN: A proposition that if you took
17 literally means that we could trace back to
18 acquisitions centuries ago or decades ago and, through
19 an elaborate spider web exercise, show a problem
20 today. And you don't have to be, I think, an
21 economist to figure out that there could be dangers of
22 pursuing that line.
23 But putting all that aside, I mean, remember
24 the Evanston FTC matter where they concluded there
25 was, in fact, a Section 7 violation based on

1 post-acquisition evidence but they couldn't unscramble
2 the eggs. There was still great value to that
3 decision in figuring out the antitrust economics
4 brought to bear to help you to try to, you know,
5 decide matters more precisely in the future.
6 So value in and of that in itself, and plus
7 realistically 10 years later, in fast-moving markets,
8 so difficult to recreate in the but-for world. So
9 I’ll stop there.
10 MR. SAYYED: Anybody else?
11 (No response.)
12 MR. SAYYED: I’ll make one point. When we
13 concluded, there was often talk about the hospital
14 merger retrospectives that were done -- initiated by
15 Muris when he was chair, and Joe was bureau director.
16 They were done as enforcement matters, not -- you
17 know, not studies. And there were, you know, four to
18 six -- four or six transactions looked at. One we
19 challenged. One the Commission issued a closing --
20 sort of a closing statement on or a statement that
21 explained why they didn't proceed. And then there
22 were at least, I think, two, maybe more, where, you
23 know, the evidence was -- or the data, let's say, was
24 not only inconclusive but difficult to work with.
25 And, you know, antitrust is generally a

1 predictive and probabilistic effort. It shouldn't
2 surprise people that we -- that the agencies get
3 decisions wrong. But people should recognize, I
4 think, that those wrong decisions go both ways.
5 And there -- we -- as a matter of course, we
6 don't look at transactions we challenged and ask
7 whether we should have challenged them and then say
8 well, geez, maybe not. And that's something as we try
9 to put greater formal structure around the merger,
10 retrospective work we do, is to sort of think about
11 what we're learning from that. Right? Because it is
12 somewhat biased if we're only looking at transactions
13 that were challenged or that we consider should have
14 been challenged.
15 So with that, I'll close the panel. I have
16 a few minutes of closing remarks, but maybe I'll just
17 take a minute to let people get out of the hot lights
18 and then I'll stand up and do it. And I say thank
19 you. It was, I thought, a great discussion and
20 obviously could have used four more hours.
21 (Applause.)
22
23
24
25

1 **CLOSING REMARKS**

2 MR. SAYYED: There’s more light here so I’m
3 going to do this here. I may or may not go over the
4 15 minutes. It depends if I say everything I wrote
5 down or scribbled down.
6 First, Howard Shelanski gave great closing
7 remarks on the first day of our hearing sessions.
8 And, you know, they're worth sort of listening to
9 again. And I'm going to try not to make the points he
10 made. I'm really going to do two things. I really
11 want to thank lots of people and I want to do it by
12 name.
13 Now, that's a reason for people to turn off,
14 so I'm going to say -- and I'm also going to try to
15 discuss some of the things worth thinking about in
16 terms of output from these sessions as I talk about at
17 least the folks in OPP.
18 So, first, you know, thank you to all the
19 participants. We’ve had -- I think the count is 393
20 unique, non-FTC participants in these sessions. We
21 honestly did not target that. When I heard we were at
22 393, I said, man, if I can get like two more hours I
23 could get us to 400. But 393 is pretty good and we
24 thank them. A lot of people put a lot of work into
25 it. And, you know, we're going to take everybody's

1 comments at the sessions seriously.
2 I want to thank the law schools that we went
3 out to. You know, the staff at those law schools
4 helped us a lot. It is difficult to leave our own
5 building, and all the law schools made it relatively
6 easy.
7 There was a question I saw in somebody's
8 Twitter feed as to why we went out to law schools and
9 also why the sessions were cosponsored with law
10 schools. We went out to law schools because we wanted
11 to involve or make interaction between panelists and
12 students more likely and easier to do. We just wanted
13 to show to students, at least the potential to show to
14 students who are not especially interested in
15 antitrust or focused on antitrust and consumer
16 protection, that there are a lot of interesting
17 issues, and, you know, maybe introduce people to
18 something they wouldn't otherwise think about.
19 They were cosponsored with the schools
20 because the schools put a lot of effort into what we
21 did. We drew on their faculty, we drew on the staff,
22 and so we just felt it should be considered cobranded
23 and cosponsored.
24 I want to say thank you to the people
25 outside the FTC who came to all these sessions. I

1 mean -- or, you know, helped us with these sessions,
2 the AV team, Yorktel, the court reporters, right? All
3 of that made it easy for us to get these sessions out,
4 make them available to people who could not be here,
5 who could not travel, who could look at it at their
6 leisure.

7 Of course I want to thank FTC personnel, of
8 course, outside of OPP. The bureau directors, heads
9 of the different offices. So in particular Andrew
10 Smith, Bruce Hoffman, Bruce Kobayashi, Alden Abbott
11 and Randy Tritell, who made their staff available to
12 us to participate in these sessions to make them
13 better.

14 The point of these sessions, these hearings,
15 is -- this is not really a policy discussion or it’s
16 not intended to be a policy discussion. It is
17 intended to influence the enforcement mission of the
18 Commission. And so we are not going to do anything
19 without the involvement of the relevant bureaus and
20 other people, right? We are in a sense -- and I'll
21 talk a little bit about the output. We're not going
22 to describe the issues in our output. We are -- we
23 are doing this to improve the enforcement mission of
24 the agency. That's something OPP should be involved
25 in. And we’ve got -- we’ve got a lot of smart people

1 who can do that.

2 Of course, the biggest thanks should go to
3 the personnel of the Office of the Executive Director,
4 Dave Robbins, who's the head, who, you know, provided
5 a lot of sound and good useful advice when we hit
6 rough spots. He was especially good at clarifying
7 some -- what appeared to be difficult decisions in
8 very simple ways.

9 Pat Bak and Monique Fortenberry, his
10 deputies, and Gretchen Kohl, who are with us all the
11 way through; you know, the OPP staff originally said,
12 you know, how can we do this on the pace you want to
13 do it?

14 I think people may have forgotten that
15 between September 15 and roughly November 15th, we did
16 a substantial amount of hearings and then had sort of
17 the same effort in the March/April months when we
18 returned from the forced vacation.

19 Kathy -- oh, I should not forget Alex
20 Iglesias, also in the OED office, who was often with
21 us and helped tremendously. Of course, many other
22 people helped but I like to call out some people by
23 name. Catherine MacFarlane and Peter Kaplan in the
24 press office, OPA’s team helping us get the word out
25 on these sessions. Mitch Katz came today because he

1 couldn't travel with us. April Tabor in the
2 Secretary’s Office and the Records Office, for
3 handling comments we received and making them
4 accessible to the public.
5 I’ll remind everyone that the comment period
6 closes 11:59 p.m. on June 30. We really want the
7 comments. We’ve gotten a lot of good comments and,
8 you know, we'll take more. We're reading all of them.
9 Bruce Jennings, who’s really run sort of the
10 video feed, some of the IT efforts we’ve done, you
11 know, making last-minute changes. We thought we
12 couldn't -- well, today we made some changes, you
13 know, five minutes before the sessions began. And,
14 you know, these things take time or raise the
15 potential for things to go badly wrong. But Bruce and
16 his team was able to make those changes to accommodate
17 everyone without any issues.
18 All the Commissioners and their offices for
19 supporting this effort, and I think conveying the
20 importance of it in their public remarks when they
21 spoke to other groups. I'll talk a little about the
22 Chairman later.
23 Of course the staff of the Commission, most
24 involved in these sessions and the substance. In the
25 Bureau of Economics, Dan Hosken and Dave Schmidt ran,

1 prepared the content for the merger retrospective
2 hearing. The Chairman considers that the most
3 important hearing because of the questions about
4 whether we're getting merger enforcement and merger
5 policy correct.
6 You know, we've collectively been asked to
7 think about a couple of things, but basically how
8 would we continue to evaluate and implement a merger
9 retrospective program that, you know, just becomes not
10 only a core part of the Commission's mission because
11 the Bureau of Economics staff does them continuously,
12 but, you know, what kind of resources should be
13 devoted to it to answer these questions about are we
14 getting merger policy and merger enforcement decisions
15 correct.
16 In the Office of International Affairs,
17 Molly Askin and Deon Woods Bell, they took the lead in
18 running the -- what I'll call the international
19 sessions we held in late march, bringing in a lot of
20 non-U.S. colleagues to think about how the FTC could
21 work more effectively to identify, investigate and
22 prohibit anticompetitive conduct and deceptive acts
23 and practices with our non-U.S. colleagues.
24 Since I'm talking about OEA, I'd also call
25 out Maria Coppola for helping us bring in folks from

1 outside the U.S. to comment and participate in our
2 substantive sessions with respect to issues they were
3 facing outside the U.S. but that we were also
4 considering in the U.S.
5 In the Bureau of Consumer Protection, we
6 worked especially closely with Jim Trilling, Elisa
7 Jillson and Jared Ho, and Maneesha Mithal from DPIP on
8 the privacy and data security sessions. I mean, they
9 conceived the substantive content there. They ran
10 them with an assist from OPP, the Bureau of Economics,
11 and their colleague, James Cooper. You know, those
12 are two important topics. We couldn't have done it
13 without them, and they ran with those after we sort of
14 proposed the idea of doing sessions on those.
15 I skipped but -- so now I want to do now
16 the Office of Congressional Relations, you know, who
17 provided a lot of outreach to Congress to explain why
18 we were doing these things and the importance of these
19 things and why they were relevant to that work.
20 Also within BCP, since I mentioned DPIP just
21 a moment ago, Mary Engle and Kristin Williams
22 developed the substantive portion of our broadband
23 hearing that focused on deceptive conduct in broadband
24 markets. That’s something that we needed their help
25 to do and they stepped up.

1 So now I'm going to turn to OPP. First I
2 want to thank some previous directors who were
3 supportive of this effort and provided advice on this
4 effort and how to do it. Most important, Susan
5 DeSanti, Maureen Ohlhausen, who directed OPP some time
6 ago, and Andy Gavil, and also two-time Acting Director
7 Tara Koslov. They all had positive reaction to this
8 and helped guide our both process or planning and
9 substance.
10 I want to call especially -- I want to call
11 attention especially to Susan DeSanti. You know, way
12 back in '95 she took Bob's Pitofsky's vision of
13 reestablishing and reinvigorating the Commission's use
14 of hearings, workshops, and conferences to evaluate
15 and address topical and long-term issues in both
16 antitrust and consumer protection and made it work.
17 She did it for Pitofsky. She then did it for Chairman
18 Muris with the healthcare hearings and IP hearings.
19 And she did it later for Chairman Leibowitz.
20 I did not have a full appreciation for the
21 value of her unique value in these things until I sat
22 down and had to think about both how I would think
23 about using my time as director of OPP and also
24 specifically with these sessions.
25 I'd also say, you know, she had a

1 significant and important role in the 2007 report of
2 the Antitrust Modernization Commission. You know,
3 these things should not be overlooked. And that
4 report in particular as well is an important report
5 and it shouldn't gather dust on people's bookshelves.
6 I think AAG Delrahim was a member of that Commission
7 and I think has tried to implement or advocate for
8 some of its reforms. But I think more can be done
9 with it. And I think, you know, the business and
10 public interest community should think about that and
11 look back at that and potentially propose some more
12 focus on some of those things.
13 Now, within OPP, this was an all-office
14 project. Everyone within OPP worked on this matter
15 and had at least one substantive hearing to develop
16 content on and devise a framework, notwithstanding
17 that they also had other work to do, both work that
18 was in the pipeline and work that we do in the
19 ordinary course.
20 Now, you might ask to what point did we do
21 this? And I'm going to come to that in a minute. So
22 I’m going to take this alphabetically, I’m going to
23 give you a few words about each person. Katie Ambrogi
24 helped finalize the hearing session on privacy, big
25 data, and competition. And then she immediately

1 turned to developing -- helping develop next week's
2 workshop on Certificates of Public Advantage. And,
3 you know, again, great contribution on both of those
4 things. We’ve asked her as the work on the COPA
5 workshop maybe winds down to think about whether
6 there's a reason to revisit issues either discussed or
7 that were -- or to identify new issues in the
8 healthcare area, whether we should revisit and redo
9 something like the 2002-2003 healthcare hearings and
10 the 2004 report.
11 OPP has done a few smaller healthcare
12 workshops since then, most recently 2014-2015. But
13 healthcare is so important and there are new issues
14 both with the changes made in response to the
15 Affordable Care Act in particular and changes in
16 response to some changes in that it may be worth just
17 thinking about returning to some old issues and
18 thinking about new issues.
19 Bill Adkinson, he took the lead within OPP
20 on the sessions on vertical mergers, common ownership,
21 and monopsony; had a strong role on the platform
22 topic. These are all topics on which additional
23 guidance of the public may be helpful and clarity on
24 the FTC's enforcement position might be useful. And
25 Bill is taking the lead again within OPP in our effort

1 to see if we can provide that guidance.
2 Bill, along with Derek Moore, is a go-to
3 person on their sharing economy stuff. And you know,
4 we still continue to look at advocacy opportunities in
5 that area, or even enforcement opportunities in that
6 area. So I'd encourage people to, you know, come in
7 and talk to us if they see something in that space
8 that they think will be of interest to us.
9 I want to note that the sharing economy work
10 builds on the work of the E-commerce Task Force
11 initiated by then OPP director and now Senator Ted
12 Cruz. We're thinking of taking a look at how some of
13 those markets have developed since our initial look
14 at them -- initial look at the 8 or so -- 8 to 10
15 markets we looked at back in 2002. So if people have
16 continued interest in those specific markets, we'd be
17 interested in hearing how those markets have
18 developed.
19 Ellen Connelly along with Karen Goldman were
20 tasked with developing the substantive content for our
21 sessions on algorithms, artificial intelligence, and
22 predictive analytics.
23 Now, I think this is the most important
24 topic that we are thinking about because of its
25 long-term impact on business and maybe consumer even

1 decision-making. And we're at a very early stage in
2 thinking about how and whether, you know, antitrust or
3 consumer protection law or practice needs to sort of
4 change.
5 So Ellen, you know, with Karen, has been
6 asked to really return to some very basic questions
7 really, right? Does the use of these techniques
8 require the FTC to rethink the application of its core
9 Section 5 statements with respect to unfair methods of
10 competition, which is a fairly new statement,
11 deception and unfairness.
12 Now, Section 5 is perceived to be quite
13 broad and flexible. I think many people have made
14 that point in our hearings. But, in fact, those --
15 particularly the last two statements but now maybe
16 even moreso the section -- the statement on unfair
17 methods of competition, those really define the scope
18 of how we apply Section 5 in the vast majority of what
19 we do. And we ought to think carefully about whether
20 AI, machine learning, big data, and the way they
21 impact decision-making -- business decision-making,
22 marketing, we ought to think really hard about whether
23 we need to do -- maybe let's say a fundamental
24 rethinking of how we apply those statements.
25 Now, we may not need to. But we ought to

1 think about it because there’s been a lot of sort of
2 casual, I think, references to using Section 5 to do
3 all sorts of things. But that's an area where there's
4 some long-term -- maybe some long-term implications to
5 how the Commission looks at decisions and markets.
6 Karen Goldman, working with Ellen, as I
7 mentioned, developed the content for those hearings.
8 Karen is a Ph.D. in neuroscience, and so we’ve asked
9 her to take a very deep dive into the science -- I
10 think that’s the right word -- of AI and machine
11 learning, machine decision-making. And so as we -- as
12 a Commission, as a staff, you know, just know more
13 about, you know, what is it that we need to know as we
14 make our investigation and enforcement choices, right?
15 If we don't understand the technology or the science,
16 maybe even the art of AI, we just may incorrectly
17 either handicap or overextend our enforcement efforts.
18 So, you know, there's two -- I’ve read two
19 types of literature in this space. One is very
20 high-level surface analysis that says AI is very
21 interesting, has benefits and problems, and then, you
22 know, very technical textbook-oriented discussions
23 that maybe only someone in the field can understand
24 and use.
25 We need to develop something, again, in

1 conjunction with the staff that gives the staff an
2 understanding of what matters and what doesn't matter
3 with these -- with this science, with these
4 techniques, to our investigation or enforcement
5 efforts, and also develop sort of a common language so
6 when people come in to see us we know what they're
7 talking about or maybe they know what we're talking
8 about.
9 Just as an aside, Karen has probably the
10 best paper on telehealth that I have ever read and we
11 have put it aside for a little bit while we're
12 finalizing our work product in this effort. But it's
13 something we're going to get out because telehealth,
14 the promise of telehealth, is large, and impediments
15 to its growth may be significant and problematic,
16 particularly -- and particularly harmful to consumers
17 in rural areas or less populated areas where access to
18 medical care is much, much harder. So that's an area
19 of real interest to us.
20 Again, so if people are -- have advocacy
21 opportunities, they ought to bring them to us if they
22 have any matters that may suggest enforcement look is
23 appropriate, we ask people to bring them us to.
24 Elizabeth Gillen, who while devoted
25 full-time to the Qualcomm case, helped develop with

1 Suzanne Munck and our former colleague John Dubiansky
2 the IP hearings -- the IP component of these hearings.
3 As John mentioned to me at lunch earlier, we’ve done -
4 - the Commission has done a lot of work in IP over the
5 last 17 years. But we don't want that work or our
6 interest to go stale. So we are thinking about other
7 areas where there's an IP competition overlap where we
8 can bring -- you know, sort of competition framework
9 to tough issues.
10 One of the issues some of us are
11 particularly interested in because it relates to the
12 platform issues we have been asked to think about is
13 copyright and antitrust issues. It's not an area the
14 Commission has been especially active in. But in
15 October -- in our October two-day session on IP, we
16 spent a little time on copyright issues. So it's an
17 area we're thinking about how to develop.
18 Elizabeth is also working on -- with some
19 others, but right now sort of maybe the primary,
20 thinking about how to further develop our
21 Noerr-Pennington efforts. The Commission has brought
22 -- has recently, let’s say, focused on Noerr-
23 Pennington issues associated with IP rights.
24 Elizabeth, with her background, is, you
25 know, well-suited to help advance that thinking. But

1 we're thinking more broadly. One of the things we're
2 especially interested in -- when I say we, I often
3 mean me, but -- or, you know, at least a group of us
4 in OPP. I should have said I'm not speaking for the
5 Commission with respect to these things, but these are
6 things we're developing for presentation to the Chair
7 and Commissioners.
8 One of the things we're really interested in
9 is further developing the law with respect to sham
10 and/or serial petitioning. You know, if you know of
11 efforts to use government process, particularly
12 repeated attempts to use government process to exclude
13 competition, we want to know about it because those
14 may be opportunities for us to even make amicus
15 filings or consider whether our colleagues in the
16 anticompetitive practices division, or shop of BC,
17 would be interested in further review.
18 Now, you know, First Amendment rights to
19 petition are important. But, again, speaking for
20 myself, they should not be read so -- they should not
21 be so broadly deferential to anticompetitive conduct
22 by firms and competitors. I might say we don't -- as
23 an antitrust agency we don't need to fetishize the
24 First Amendment. We ought to think hard about where
25 it is being used inappropriately to exclude firms.

1 Now, since I mentioned IP, I want to mention
2 John Dubiansky. John left the Commission -- left OPP
3 in October to go back into private practice in-house.
4 But he had an important role in identifying new issues
5 where there was an IP antitrust innovation overlap
6 that, you know, we're thinking hard about how we might
7 develop, you know, I'd say most of the policy
8 positions. But that might be of interest to other
9 agencies in the Federal Government and also third
10 parties.
11 Of course, Suzanne Munck, who is both a
12 deputy in OPP and the Commission's chief IP counsel,
13 took the lead role in developing the IP content that
14 you saw in those two days and additional IP content
15 that you didn't see that we sort of put on hold
16 because of the forced vacation.
17 She also took the lead in the broadband
18 hearing session. So, you know, between Suzanne,
19 Elizabeth and maybe someone to be named later, we're
20 going to further develop these IP topics into a
21 forward-looking IP agenda that doesn't discard what
22 the Commission has done in the past. I don't --
23 neither I nor other relevant people at the Commission,
24 don't believe it needs to be discarded or changed.
25 But we want to build on it and we want to look for new

1 areas. So Suzanne, Elizabeth -- Suzanne, Elizabeth,
2 and as I said, hopefully somebody else are sort of in
3 charge of doing that. So we welcome, again,
4 submissions on, you know, what are new areas we should
5 be thinking about.
6 I mentioned the copyright antitrust issue.
7 It’s something we -- you know, we’d like to spend some
8 time thinking about.
9 Dan Gilman took the lead in developing the
10 content and substance of the privacy, big data and
11 competition hearing. This is a tough task. You know,
12 it was initially conceived as intended to focus on
13 basically the fact that there are tradeoffs between
14 greater or lesser privacy rights and lesser or greater
15 competition or innovation in specific markets, or even
16 more generally in the economy, current markets or in
17 future markets.
18 We're going to do that. But, you know, as
19 we thought about this more, we thought, well, we
20 really need to focus on how we will identify and
21 measure and make those tradeoffs in both our policy
22 and really importantly maybe in our enforcement
23 efforts.
24 You know, our enforcement decisions in
25 mergers or conduct occurring in the tech industry or

1 industries where data is an important asset, I think
2 it is going to require us to at least think about how
3 we identify harms related to privacy concerns or
4 security concerns. And even in the absence of
5 legislative direction, we just need to think about how
6 we make these tradeoffs. You know, privacy is
7 equality in a sense. So we've got to think about how
8 we make these tradeoffs, how we implement them, how we
9 measure them, how we identify them.
10 It's a tough task but I think we need to do
11 it rather than sort of ignore it, and we need to give
12 guidance and we need to say something that, you know,
13 people can react to and tell us where we got it wrong
14 or where we got it right.
15 Part of this effort just has to include a
16 better understanding and explication of harms
17 associated with privacy values and preferences, both
18 expressed and revealed preferences. I mean, how do we
19 take account, particularly in the predictive antitrust
20 work we do of potential harms in those space. And
21 maybe we'll conclude we don't or we can't or it's not
22 the right tool, but I think we've got to think hard
23 about it.
24 And the same with, you know, how do we
25 evaluate efficiencies that relate to those topics?

1 How do we define markets where those values may be
2 important. I'll give you an example that I think is
3 relevant. You know, two -- and, you know, this is a
4 hypothetical.
5 I use two very different companies for two
6 very different things. One has data on my purchases,
7 one has data on my friends, family and relationships
8 that I interact with. Well, if those two companies
9 propose to merge, you know, should I be concerned?
10 Should the agency be concerned that one efficiency
11 justification for that transaction is to better market
12 what I like to friends of mine?
13 Well, I can think of lots of situations
14 where me or other people might be concerned about
15 that. And I think we ought to think hard about how do
16 we think about that in the merger context. Again, we
17 might conclude that I'm wrong or that it's not
18 something we would use, but, you know, people -- you
19 know, protection of personal information probably
20 matters to a lot of people. And so if transactions
21 are going to affect that, or the -- it seems like
22 something we've got to wrap our arms around.
23 Elizabeth Jex with Stephanie Wilkinson
24 developed the content and substance of our sessions on
25 nascent competition. Now, this is an area where

1 there’s significant interest and attention. We had, I
2 think, two important questions going into the session
3 that we wanted public comment on. We wanted to see if
4 we were thinking about it right. First, is there a
5 sufficient and appropriate legal framework to
6 effectively challenge and identify, challenge and
7 prevent acquisitions or conduct that would result in
8 the anticompetitive elimination of a nascent
9 competitor or competitor in a nascent market? And
10 does that take account of the procompetitive effects
11 of the combination of what may be complementary
12 strengths of an established and nascent competitor?
13 All right. And then the second question we
14 went into was, you know -- to this was do we have the
15 tools -- the resources, the tools, the knowledge, to
16 identify and remedy conduct or transactions that are
17 at least potentially -- may potentially have a
18 material anticompetitive effect or a positive
19 competitive effect? Right? How do we measure -- do
20 we -- can we identify situations where nascent
21 competition -- or the elimination of nascent
22 competition would be an anticompetitive problem or
23 would lead to positive effects.
24 And, of course, we do it all the time, but
25 there’s a real question of whether we're doing it

1 correctly, and I think this is the reason people are
2 saying the agency needs to have, you know, more
3 technologists, right? Well, we have a pretty good
4 understanding of many markets that we deal with, but,
5 you know, I think we're thinking about whether we need
6 other resources.
7 So Elizabeth, you know, brings along
8 experience with the pharmaceutical mergers to this
9 issue. And I think what I took from the discussions,
10 again speaking only for myself, is that there is a
11 clear legal framework within Section 7 and Section 2
12 of the Sherman Act to challenge those transactions or
13 conduct where we can, you know, marshal sufficient
14 evidence to show there might be an effect. But you
15 know, we'd like comment on that. I could be wrong and
16 there may need to be improvements.
17 Now, we ought to be able to -- we ought to
18 consider carefully whether the courts are or would
19 analyze these questions with a clear understanding of
20 how Section 2 or Section 7 would apply. And that's
21 something I think we are -- well, we're both
22 considering it and whether specific guidance from us
23 would be valuable for the development of the law in
24 this area.
25 Now, the second question is harder, right?

1 Predicting the potential effects of conduct on mergers
2 is tough all the time. And so some of the issues that
3 might dog us with respect to nascent markets or
4 nascent competitors are just the same types of things
5 that affect all -- or come up in all our
6 investigations. But, you know, we're thinking about
7 whether different resources, more knowledge, is
8 needed.
9 You know, as an example of the different
10 considerations that are relevant -- the factual
11 considerations, you know, I direct people to former
12 Chairman Muris' statement in the Genzyme/Novazyme
13 transaction. It's about 16 years old and it's in the
14 pharmaceutical industry. But I think, you know, what
15 the Chairman -- what the then Chairman tried to
16 explain there is still relevant and should be -- you
17 know, should be used as we think about these other --
18 these newer tech issues.
19 Stephanie Wilkinson also worked on the
20 nascent competition topic, putting aside for a short
21 time sort of almost the sole responsibility for
22 carrying out and developing the upcoming workshop on
23 Certificates of Public Advantage.
24 You know, that effort, which we drew on
25 other people in OPP and particularly as we got closer

1 to it, BE and also BC, it is important -- and, you
2 know, we didn’t want to let it slide while we did this
3 sort of new thing. That effort -- that COPA project
4 was announced in November of 2017, and, you know,
5 honestly it was delayed a little bit by these -- by
6 the resources we devoted to this hearing session. But
7 Stephanie, you know, carried the ball a long way on
8 her own.
9 And as you might know, next week, June 18,
10 we're doing a full day on COPA with economists and
11 state enforcement officials, folks who have been
12 involved with either monitoring, or I'll call it sort
13 of evaluating the operation of hospitals after they
14 were in this case granted immunity or protected by
15 state action immunity from a challenge because of the
16 Certificate of Public Advantage.
17 So Katie Ambrogi helped when she was able to
18 get -- when we finished the big data privacy
19 competition session. And Stephanie deserves a lot of
20 credit for really continuing that work so that when we
21 were done today we didn't look out and say, all right,
22 where's the other work, right?
23 Okay. Ruth Yodaiken joined OPP about six
24 months ago from DPIP and she’s taken a leadership role
25 in our broadband hearings; helped develop those, and

1 more importantly is helping us develop a strong basis
2 to advance our involvement in privacy and data
3 security questions.
4 We have two computer science Ph.D. students
5 with us over the summer, and she's working with them
6 to think about a lot of these technology issues that
7 folks suggest we, you know, should be thinking about
8 or don't know enough about. And that's going to be
9 important. We're going to continue with that at least
10 as long as I'm director. We're going to try to have
11 computer scientists either under contract or on a
12 fellowship with us, or maybe even working on sort of
13 some of their Ph.D. work, you know, that's applicable
14 to what we do.
15 I know very little about technology, but I
16 want to at least respect the idea that computer
17 scientists and others can help us in our case
18 selection and enforcement efforts. And, you know,
19 we've started that within OPP; certainly other parts
20 of the agency have been doing it a long time.
21 Sarah Mackey joined us from the General
22 Counsel's Office last summer to fill the big loss of
23 Tara Koslov going up to the Chair's office. She was
24 originally slated to help run these hearings. I'm no
25 administrator. You know, so keep the hearings and the

1 work product moving forward and on track while I
2 kibitzed with everybody. But she has taken, you know,
3 a real role in the substance, particularly on the AG
4 -- the hearings this morning.
5 She has also taken the lead or been given
6 sort of the responsibility to restructure and
7 reinvigorate the Economic Liberty Task Force that then
8 acting Chairman Ohlhausen announced. We're going to
9 pick right up with that again and, you know, those
10 issues will get some play in the future, particularly
11 as they relate to state action issues and barriers to,
12 you know, employment.
13 Derek Moore, he's really been a linchpin in
14 our hearings effort over the past year. He's been a
15 valuable resource to everybody within OPP and has, you
16 know, had a leadership role in developing the content
17 with respect to all our merger-related sessions, our
18 labor-related sessions, and most importantly our
19 platform sessions.
20 He's got on his plate primary responsibility
21 within OPP, but we're -- and we're working on this
22 with BC, BE, folks in the General Counsel's Office, on
23 how to evaluate conduct of platforms under Section 2,
24 Section 7, and of course maybe even Section 1.
25 We're working closely with the Technology

1 Task Force on this. There are a lot of theories out
2 there about how conduct by -- conduct by and the
3 business decisions of large platform companies may
4 affect actual or future competitors. It's important
5 for us to consider whether those theories are relevant
6 to thinking about how -- whether competition is
7 affected; whether consumers are harmed. And, you
8 know, Derek is taking the lead on that.
9 You know, we've heard a lot of theories sort
10 of in the abstract without a lot of evidence. We're
11 not duplicating the work of the Technology Task Force,
12 which is going to be looking at enforcement
13 opportunities. But we think some real guidance on the
14 application of Section 1, Section 2, Section 7, maybe
15 some others, on conduct or acquisitions by, you know,
16 large platform firms is necessary.
17 There's a lot of proposals about how to --
18 how to or whether to regulate, break up, develop
19 different standards for relatively small number of
20 platform companies, whether new agencies need to be
21 created to evaluate their conduct or the effects of
22 their conduct, the transactions.
23 You know, we think -- and by we, I mean me,
24 a handful of others, think, you know, somebody has
25 just got to put pen to paper and say here's how that

1 conduct would be evaluated under the laws; here's how
2 -- you know, here's what a good case would look like;
3 here's what we need to bring a good case, and then see
4 if there really are these limitations either in
5 existing law or in agency design that would require
6 these changes that people have proposed.
7 You know, it's just we, I think, you know,
8 should make sure when people come to us and say, do
9 you support this legislation or this idea or this kind
10 of case, that we both have a good response to that and
11 also that we give guidance to parties, either the
12 firms themselves or their suppliers or their customers
13 as to what -- you know, what the antitrust laws can
14 and can't do.
15 Personally, I'm skeptical that the laws
16 cannot reach the conduct that's problematic, but we've
17 got lots of people who say something different. And,
18 you know, we're going to -- and of course what I think
19 doesn't really matter. But we're going to think hard
20 about that and we're going to try to make a case one
21 way or the other for either the laws as they exist or
22 the laws as they should develop.
23 And one thing, you know, this will do is
24 maybe help us identify areas where our amicus program
25 should be directed, right? Where and how should we

1 seek to influence the development of the law?
2 I think the last person besides Joe that
3 I'll thank, Jacob Hamburger. He's the newest -- he’s
4 the youngest attorney in OPP and he joined us last
5 year, just shy of a year ago. He's been invaluable in
6 our efforts to pull the substance of these hearings
7 together and to make sure they ran smoothly and were
8 accessible to everybody. Look, everyone within OPP
9 was necessary to pull this together, but I think it
10 would have been impossible to do without Jacob's help.
11 So let me see. In discussing each of these
12 individuals I tried to give some guidance on what our
13 output might be; also on what other things we're
14 thinking about. But there's a lot of interest in
15 that. And, you know, we’ve not really talked much
16 about it.
17 So I wanted to take this opportunity. I
18 want to -- I mean, I'm grateful for the interest and I
19 wanted to be, you know, somewhat responsive to the
20 questions. I think there's a couple other ways to
21 think about what we're going to do -- I mean, what
22 we're aiming to do, right?
23 Our output is going to be forward-looking.
24 We're not in a position to evaluate whether, you know,
25 the past administration or the past five

1 administrations got antitrust enforcement or consumer
2 protection enforcement decisions correct. We don't
3 have those resources, and honestly I don't think it's
4 a strong use of our time.
5 What we are doing is intended to be
6 forward-looking. How will it influence the
7 enforcement mission of the Commission going forward,
8 or development of law in the courts?
9 Now, in just about every -- prior to just
10 about every hearing session we sought comment on a
11 few, sometimes a lot of questions. You know, we chose
12 those questions or prepared those questions because we
13 thought they were especially relevant to the topic.
14 We're going to try to provide a response to those
15 questions. In some areas this is going to be very
16 difficult because it's a developing area. But, you
17 know, we put those questions out for comment for a
18 reason. And I think rather than ignore them we need
19 to try to answer them.
20 And so that -- you know, if you wonder what
21 the content is going to look like, look at those
22 questions and we're going to try to answer them. You
23 know, timing, some are in a sense more important than
24 others, and so we may not get to all of them as
25 quickly as might be necessary given, you know, the

1 fact that issues confront -- you know, come to us
2 without regard to our work schedule. But we're going
3 to -- if you want to know what we're going to do and
4 what we're focused on, just look at those questions.
5 I mean, I considered just putting the burden on the
6 commenters, but that doesn't sound too right. So
7 we're going to try to answer them.
8 I want to touch on a few things that I did
9 not -- that did not make it into the hearings but
10 which we remain interested in. I mentioned earlier we
11 are moving forward with, you know, consideration of
12 how to further advance the Commission's long-term
13 interest in -- well, my interest, hopefully the
14 Commission's interest, in narrowing the
15 Noerr-Pennington exception to Section 1 or Section 2.
16 You know, I was part of that effort when I
17 worked for Tim Muris. The Chairman was part of that
18 effort. I think the -- as much as I like the folks
19 who finalized the Noerr-Pennington report in 2006, I
20 think it was a lost opportunity. We want to do for
21 Noerr-Pennington what the Commission's actions over
22 the past 15 years have done for the state action
23 doctrine, right? Provided real -- more clarity to
24 when immunity applies. And that was a long-term
25 effort, but the trigger for the most recent

1 decade-plus efforts was the state action task force
2 that Tim Muris and Ted Cruz set up. We want to do the
3 same -- have the same effect on the Noerr-Pennington
4 side
5 In addition, notwithstanding all these good
6 results, the Commission has had on state action, and
7 the division has also been part of that, there are a
8 number of other areas with respect to state action
9 that we want to explore where the courts, would like
10 more clarification. And hopefully at least, again, in
11 my view, we can narrow the use of state authority to
12 limit competition or exclude competitors -- I mean the
13 use of state authority, whether direct or granted to
14 market participants to disadvantage competitors,
15 particularly new entrants, is, I think, a serious
16 problem. I think Bob referred to it in his slides.
17 CEA referred to it a few years ago. It's a serious
18 problem in the U.S. economy. And we are interested in
19 narrowing the use of state or government authority to
20 limit competition.
21 And I'd say small cases, you know, cases
22 built on even what appear to be relatively stupid
23 regulations that limit competition, sometimes make
24 good law. So if you have -- if you are an entity that
25 is disadvantaged by the actions of a state board,

1 particularly a state board made up of market
2 participants, we want to know about it. You know, we
3 -- it's a significant area of concern that outside of
4 the antitrust community doesn't get enough attention
5 as affecting the economy and the economic
6 opportunities available to -- I'll say individuals.
7 So I want to say one more thing before I say
8 a few words about the Chairman. Fifty years ago the
9 Nader Report and Kirkpatrick Report heavily criticized
10 the FTC as an institution. Both reports criticized
11 the FTC as an institution focused on trivial matters.
12 Now, in response to those criticisms, a year
13 later, then FTC Chairman Caspar Weinberger created the
14 current structure of the FTC, collapsing multiple
15 divisions and bureaus into the Bureau of Competition
16 and the Bureau of Consumer Protection. The Bureau of
17 Economics was not substantially restructured.
18 Well, one of the important questions we did
19 not discuss during these hearings was whether the
20 current structure of the Commission is the best
21 structure given current issues, right? We’ve probably
22 all seen, you know, suggestions that we substantially
23 increase our use of technologists and create a Bureau
24 of Technology; that what is now a division of privacy
25 become a Bureau of Privacy or even be spun out of the

1 Commission to a separate agency.
2 Well, with the 50th anniversary of
3 Weinberger’s restructuring approaching this topic, I
4 think worth considering, you know, the structure of
5 the agency, is it the right structure? Does it allow
6 for -- I think what a couple of Commissioners have
7 said we need to do, which is make sure the BC side and
8 BCP side are talking to each other on specific cases.
9 Now, I can tell you in the big cases in
10 matters that, you know, do raise issues on both sides,
11 they often do and -- going back some time now, you
12 know, the Commission's investigation into search
13 investigation of Google, you know, raised -- did draw
14 on resources of both bureaus. That's not a unique
15 situation but it's one that at least for the
16 investigation and the outcome is public.
17 So it's not a new issue. The bureaus do
18 talk to each other. But it is worth thinking about
19 whether there's enough interaction there to deal with
20 new issues and whether the current structure either
21 supports that or doesn't. I mean, these are, again,
22 my views, things I think are worth thinking about.
23 Okay. So, finally, you know, we couldn't
24 have done this undertaking without Joe’s support; we
25 can't finish it without the Chairman's support. Oh, I

1 should mention two other people. You know, these
2 things were -- the idea of this came up really in
3 conversations between myself, Joe, Joe's former
4 professor, and also our former colleague at the FTC,
5 Tom Krattenmaker, and I think one of John's now
6 current colleagues, Jeff Long.
7 So, you know, credit for lots of folks. But
8 Joe, you know, deserves the real credit for moving
9 forward with this and in this way, right? Now, Joe,
10 I'm sure undoubtedly does not agree with all the
11 policies or policy preferences of past chairmen or
12 past Commissioners or decisions of past Commissions,
13 right? I mean, that should not be a surprise.
14 It's not meant to signal anything, right?
15 And he undoubtedly has views on many of the questions
16 Congress is considering or that interest groups or
17 other interested parties propose to us, propose to
18 Congress.
19 But rather than implement his own policy
20 preferences as chair, because he's the chair, he chose
21 a much harder and much -- but longer lasting approach,
22 right, to, you know, recognizing that there were real
23 questions about antitrust and consumer protection
24 enforcement, particularly with respect to privacy and
25 data security issues, and that the consensus that

1 existed maybe for a quarter century, plus or minus,
2 bipartisan approach to antitrust, had broken down. He
3 thought it important to think long-term and really try
4 to identify and develop response to these questions,
5 response to the fraying of this consensus.
6 He wanted to do it based on empirical
7 evidence, on an open process. And he said -- you
8 know, he's given us sort of -- the OPP the opportunity
9 to sort of do it. It’s a much different approach than
10 he could have taken. And it's, I think, consistent
11 with what most affected parties want, an open, fair,
12 transparent and explainable process, and one that
13 hopefully will lead to consistency in application of
14 the law over time, right?
15 I mean, he should be recognized, I think,
16 really for pursuing this path rather than what I’d
17 call the somewhat head-spinning and whipsaw approach
18 adopted by other agency or executive branch department
19 heads in -- you know, in any administration. It is --
20 what he's asked us to do, chosen to do, is much more
21 likely to have long-term beneficial effects on
22 competition, on innovation and economic growth than,
23 you know, this just rapid, unsubstantiated changes in
24 policies across, you know, different -- that occurs in
25 some agencies.

1 So, you know, we were going to call these
2 hearings the Pitofsky Hearings II because of Joe's
3 both affection for Robert Pitofsky and to recognize
4 that these really were in the mold of what he did, but
5 of course we settled on the much less personal title.
6 But I hope if the FTC does this again,
7 hopefully we do it well enough that people will
8 consider doing it again, you know, that somebody
9 thinks to call those second sessions the Simons
10 Hearings II because he's devoted a lot of time to
11 this, given a lot of support to it when he could have,
12 you know, done something different that would have
13 been easier.
14 So with that, I'll say we're done with the
15 hearings and we're going to turn our full attention to
16 our output. And we welcome continued comments from
17 everybody. The only reason we’ve set a deadline on
18 them is, you know, we want them to come in so we can
19 rely on them. All right. So I'm sorry I went on very
20 long. But thank you.
21 (Applause.)
22 (Hearing concluded at 6:04 p.m.)
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25

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