

FTC Hearing #1: Competition and Consumer Protection in the 21st Century
September 13, 2018
Segment 1
Transcript

[MUSIC PLAYING]

BILL TREANOR: Well, good morning, everyone. I'm Bill Treanor, the dean of Georgetown Law. And it's my honor and my pleasure to introduce this first set of FTC hearings on competition and consumer protection of the 21st century. And we at Georgetown Law are very pleased to be host to this event.

And I think it's very fitting that we're here. Georgetown Law's connection to antitrust and consumer protection is longstanding and very deep. Dean Robert Pitofsky served as Bureau director, commissioner, and the chair of the FTC over his long, distinguished career.

Numerous agency leaders have been graduates of Georgetown Law, most recently, our current FTC chair Joe Simons, who we'll be hearing from shortly, also commissioner nominee Christine Wilson, former DOJ assistant attorney general Christine Varnum, so Monique Fortenberry is deputy executive director of the FTC. We're very proud of having educated so many of the leaders of the FTC.

And among our current faculty, David Vladeck, who's at the end of our panel today, was director of the Bureau of Consumer Protection. Howard Shelanski was director of the Bureau of Economics. Professor Steve Salant was both a senior official in the FTC's Bureau of Economics and a mentor to Chairman Simon and Christine Wilson.

Actually Chair and I were just talking about how his time at Georgetown Law had really prepared him in every way for the career that you had. So we're just very proud. And it's appropriate-- and it's particularly appropriate, I think, because, in some way, these hearings are intended to follow the path that was set by the FTC's global competition and innovation hearings, which were held in 1995 when Bob Pitofsky was the FTC's chair.

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

JOSEPH SIMONS: Now don't take my thunder, OK?

BILL TREANOR: OK. Let me just kind of-- don't expect too much, until you hear from the chair, who'll bring up your expectations. The FTC will be continuing its hearings at locations across the country. And over the next several months, it will be exploring new ideas and approaches to its historic statutory mission.

And for those of you want to hear more about the antitrust issues of the day, right here at Georgetown Law, our global antitrust symposium which is now in its 12th year, and is one of the

most prominent antitrust conferences outside of the ABA spring meeting, will take place in this room in about two weeks.

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

[APPLAUSE]

BILAL SAYYED: OK. I won't take long except to thank everybody for coming and tell people a little bit about what we'll do today. We'll turn to the chair in just a minute. But I just want to tell everybody this event is being webcast.

The webcast will be posted to the FTC's website shortly after we conclude. The session is being transcribed. And the transcript will be posted quickly.

Tomorrow's planned session-- excuse me. Tomorrow's planned session has been canceled because of concern about the weather, but it will be rescheduled. And we'll make the effort to reschedule it here at Georgetown fairly quickly.

Some of my FTC colleagues will be passing out question cards. If members of the audience have questions that they'd like to put to the panel, they should write them on the card and raise their hand. And we'll come collect them.

We have an open comment process. And so we encourage people to continue to comment. That comment process will be open through probably the end of February. But we encourage people to comment on what they hear today, both what is presented and what is discussed and then all presentations made here will be posted on the website.

And as I noted, the transcript of the session will be posted. So I'd say, with that, I'll turn it over to Chairman, and he'll kick us off to get started.

JOSEPH SIMONS: All right. Thank you so much, Bilal. Good morning, everyone and welcome. On behalf of all of us at the Federal Trade Commission, I want to thank you for coming to the opening of our hearings on competition and consumer protection in the 21st century.

Our goal is to make these hearings as informative, insightful, and consequential as possible, covering some of the most important competition and consumer protection policy and enforcement issues of the day. We believe that we are situated to do just that.

These hearings, as has been discussed already, are modeled on the ones that were held back in 1995 by then Chairman Bob Pitofsky who, in his opening remarks, said at the time, these hearings are designed to restore the tradition of linking law enforcement with a continuing review of economic conditions to ensure that the laws make sense in light of contemporary competitive conditions.

We intend to continue that same tradition with these hearings. We are very fortunate to have a large group of highly respected participants representing a diverse range of views including academics, practitioners, enforcement officials, and representatives from public interest groups.

And I am proud that we are opening the hearings at Georgetown University Law Center where Chairman Pitofsky spent much of his career when he was not otherwise at the FTC and where I received my initial antitrust education, to a significant extent, from Professor Pitofsky.

So today I want to talk about why the commission is holding these hearings. Almost 30 years ago, I came to the FTC the first of my three times at the tail end of the commission's adoption of a significantly revised approach to antitrust enforcement. This change, which began in 1981 and was implemented, to a large extent, by Tim Muris, who is two or three people to my left here-- this change, which began in 1981, reflected new learning that had begun to influence Supreme Court antitrust doctrine.

It was primarily driven by the scholarship of academics, the most prominent, Phil Areeda, Don Turner, Frank Easterbrook, Richard Posner, and Robert Bork, were associated with either Harvard University or the University of Chicago. They applied microeconomic principles to antitrust questions and paid attention to empirical work, which led them to conclude that a lot of the pre-1970s antitrust case law was inconsistent with rational, pro-competitive, an economically beneficial behavior.

By the time I left the agency for the first time in 1989, application of microeconomic principles and economic models was routine and encouraged. Notwithstanding some initial criticism, the Clinton administration's antitrust leadership, including Bob Pitofsky, Anne Bingham, and Joel Klein, largely adhered to these same principles.

So when I returned to the commission as director of the Bureau of Competition in 2001, there was substantial support for, and acceptance of, the antitrust reforms that had been initiated 20 or so years prior. In other words, there was a general consensus on how we ought to think about antitrust enforcement and policy.

But now, at the beginning of my third stint at the commission, things have shifted. The broad antitrust consensus that has existed within the antitrust community in a relatively stable form for about 25 years is being challenged in at least two ways.

First, some recent economic literature concludes that the US economy has grown more concentrated and less competitive over the last 20 to 30 years, which happens to correlate with the timing of the change to a less enforcement oriented antitrust policy beginning in the early 1980s. These concerns merit serious attention and they will be part of today's discussion.

Second, some are debating the very nature of antitrust itself, calling for antitrust enforcers to take account of policy goals beyond consumer welfare. Inequality, labor issues, excessive political power are perhaps the main examples.

We will discuss some of these suggestions during later sessions. These concerns raise a challenge to antitrust agency leadership, the courts, and the legislators to think hard about whether significant adjustments to antitrust doctrine, enforcement decisions, and law would be beneficial to our country in order to accommodate these concerns.

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

We do this with the goal of understanding whether our current enforcement and policies are on the right track or on the wrong track. And if they are on the wrong track, what should we do to improve them?

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

The movement by economists, however, has not always been in the same direction. In the 1950s and '60s, a substantial body of empirical economic work purported to show significant anticompetitive effects at relatively low levels of concentration.

In 1968, the DOJ issued merger guidelines based on these studies. But just about the time the guidelines were issued, the economic studies on which they were based were being substantially discredited. As a result, the agencies over time raised the concentration levels at which mergers were seen as problematic.

A more recent example, where developments in economics increased the level of successful merger enforcement, involves hospitals. In the 1990s, the government lost a large number of hospital merger cases in a row. And the agencies considered whether to give up on hospital merger enforcement. Fortunately, we did not.

Instead, we engaged in empirical economic studies that demonstrated the anticompetitive effects of hospital mergers and we revitalized our hospital merger enforcement program. So the developments in economics can suggest, depending on the circumstances, that our enforcement has either been too aggressive or too lax.

This episode involving hospital merger enforcement really drove this point home for me personally. Use of economics should not be thought of as a one way ratchet only driving down the level of antitrust enforcement. Good economics might point us toward more or less enforcement depending on the facts and the analysis in front of us at the time.

In my view, basing antitrust policy and enforcement decisions on an ideological viewpoint, whether from the left or from the right, is a mistake. Whether or not we expand antitrust beyond

the consumer welfare standard, I would rather make policy and enforcement decisions based on the best evidence and analysis, including, in particular, empirically grounded economic analysis that enables the analysts to weigh the costs and benefits broadly defined to help determine the best approach.

My hope is that these hearings will significantly improve our ability to do so and help to bring about a new and improved consensus among our antitrust stakeholders. But we are not focused solely on competition issues today or throughout the hearings. The strength and direction of the agency's consumer protection mission is also something that we are going to explore at some length at these hearings.

Today our most significant and difficult consumer protection issues often revolve around the use and abuse of technological capabilities not likely imagined during Bob Pitofsky's chairmanship. As a result, we will be having multiple sessions on data security issues. And our upcoming hearings on platforms, big data, and artificial intelligence will address consumer protection issues including privacy as well as competition issues.

Before closing, I want to thank not only the participants in these sessions but the many groups and individuals who have filed comments in response to our initial hearings notice. We have received over 500 nonduplicative comments, many of very substantial length and thoughtfulness. We are reading them and considering them carefully. We expect more comments as we proceed. And I encourage those interested to comment on what you hear today and throughout the hearings.

I also want to thank our co-sponsor and host, the team at Georgetown University Law Center, for helping us pull this initial effort together. I also want to recognize the staff of the FTC for their efforts in both preparing for the substance of this event and undertaking all the logistics to bring this together. I and all the commissioners are grateful for the work of so many people both within the FTC and outside the FTC who are engaged in making this a successful effort. Thank you for attending and I hope you enjoy the hearings.

And I'll turn it over to Bilal.

BILAL SAYYED: OK. So I'll just take a few minutes to introduce the panelists and then try to get out of the way. In no particular order, or maybe some particular order, Jason Furman will speak first. Jason is presently a professor at the Kennedy School at Harvard University and was formerly the chair of the Council of Economic Advisors.

Tim Muris, just to Jason's left, is presently a senior counsel at Sidley and Austin but was also chairman of the FTC from 2001 to 2004 and previously directors of both the Bureau of Competition and the Bureau of Consumer Protection, but not, of course, at the same time. Just to the left of Tim is Alysa Hutnik. She's a partner at Kelley Drye and really an expert in consumer protection law.

Immediately to my left is Jim Rill. Jim is senior counsel at Baker Botts presently but was head of the antitrust division from 1989 to 1992. And then we also have Jan McDavid who was not head

of either agency, but certainly is one who has been considered the head either, maybe even both agencies' head in the past.

Jan is a partner at Hogan Lovells. And finally, but by no means least, professor Vladeck who served as director of the Bureau of Consumer Protection just a few short years ago and, of course, is a professor here at Georgetown. So with that, I'm going to turn it over to Jason and just remind everybody, if they questions, raise your hand, pass your questions over to some of my colleagues who are collecting question cards.

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

I'm a little bit of an interloper on this panel. I think I'm one of the only economists. And anyone that knows any economics would know I'm even more of an interloper than that because my main focus has been on macroeconomic issues, labor market issues, inequality, not on industrial organization and antitrust narrowly defined.

When I was chairing the Council of Economic Advisors, I came to this issue partly out of what I'll now admit was paranoia. There was a crime that had been committed and we were looking for suspects. The crime was low productivity growth and high inequality, something clearly going wrong in the economy, productivity growth being about a percentage point lower over the last decade than it had been previously.

At the same time, high levels of inequality continued to move higher. And those were the two factors that were underlying the slowdown of the growth in income for the typical families. That, I think, is the central challenge for economic policy.

So what can you do to raise productivity growth to reduce inequality? And we're looking around at a lot of different suspects. And just to be clear, there is more than one cause of this set of phenomenon. But one thing we alighted on was this area. And part of what motivated it was a few sub-facts under those two big ones. And let me just list a few of them.

One, a number of economists had documented that throughout the economy there was less churn and dynamism. Fewer businesses being created, fewer older businesses, larger businesses increasingly dominating the economy, fewer people moving from job to job, so a little bit more of a sclerosis than we'd like to think is the case for the US economy. There was, on terms of inequality-- I'm sorry-- reduction in investment, a trend down in investment. Partly that's a shift to intangibles, but not completely, and trying to understand that.

On the inequality side, there was a fall in the reduction-- I'm sorry-- a fall in the share of income going to labor, and finally, an increase in markups and a rise in the rate of return to capital relative to the safe rate of return and an increasingly skewed rate of return to capital with some very successful companies having persistently very high returns, much higher relative to the

median than they had before. So this was a fact pattern about aggregate data that made us look beneath the aggregates in terms of what was going on at the firm and the industry level.

Now one way to look at what's going on in the firm in the industry level is to use aggregate industrial data and to divide up the economy into 10 industries, into 800 industries, and look within each one of those at what's going on in concentration. A number of people did that-- [INAUDIBLE] et al, Autor, et al. We did it at the Council of Economic Advisors, and you saw it in the press as well in places like The Economist.

Now we generally find that in about 75% of industries defined in this way concentration increased. Now as the antitrust community was quick to point out, there's some dispute as to whether it was 35 years ago people realized this was an idiotic procedure or 50 years ago that people realize this was an idiotic procedure but that these aren't antitrust markets.

Now the people that put this forward from the very beginning, including ourselves, understood that. No one would bring an antitrust case based on these types of aggregate data. Everything has pluses and minuses. But we're trying to look at economy wide phenomenon and really needed to use economy wide data, because the type of relevant antitrust market analysis we have for some parts of the economy, and I'll talk about it in a moment, but we don't have it for all of them and can't really aggregate up, synthesize, and add it all together.

When looking at this macro data, I think the question is not ex ante. What do we think about it? Of course, these aren't the relevant markets for antitrust. It's, does it work? Does it help explain some of what we're trying to explain?

And subsequent research by Gutierrez and Philippon, among others, has found actually that, at this aggregate level, increases in concentration are tied to reductions in business investment, are tied to reductions in R&D by business, and also are associated with rising markups in those industries and rising rates of profit in those industries. So you see it-- these different measures seem to. In a broad sense. Work and explain some of what we are interested in.

The next set of measures that one could look at aren't the aggregate macro data but are doing what you would do in an antitrust case, which is looking at a particular relevant market, properly defined, and asking, is the level of concentration high? Has the level of concentration increased?

There have been a range of studies, some done by the FTC, a number done by economists, for a whole lot of markets-- ad services, health insurers, hospitals, refrigerators, airlines, telecommunications, beer-- all of which have consistently found very high levels of concentration and, in many cases, rising levels of concentration well in excess of the levels that would trigger a review if there was a merger under the merger guidelines.

Moreover, a new strand of research, one that is still very new-- I wouldn't necessarily go and make policy on it with certainty tomorrow-- but one that so far is turning out to be empirically more convincing than, frankly, I would have expected, uncommon ownership, finds that when the same few companies own all of the airlines and own all of the banks that that increases concentration above and beyond what you would measure if you thought that American Airlines,

United Airlines, and Delta were three different companies when you realized they're all owned by the same companies. And you see that in a variety of data, including, remarkably, at a route by route level in terms of the pricing. So there's a wealth of micro-economic more traditional antitrust evidence for this.

So the question now is why have we seen this increase in concentration and what are its consequences? I don't think there's any single answer to the why question. In some cases, the increase in concentration may be for good reasons and reflect increases in efficiency, increases in competition that weed out some of the less effective firms, globalization and the like.

This is an explanation that's been stressed by economists including David Autor, et al. That's a story that probably works pretty well in the retail sector where it wasn't that they were a few big mergers, it wasn't that there was some collusive common ownership, but a company, Walmart, figured out how to have better supply chain management and grew, and then Amazon did the same online. And as a result, there's more concentration in that sector. And it reflects that increase in efficiency.

For a lot of the economy though, the story is much less benign than that one. And it has its roots in what Chairman Simons described as a large change in the way we thought about antitrust. [INAUDIBLE] has documented, for example, the FTC's oversight-- challenge looking into mergers. Used to look at 6 to 5. Now we'd never look at something like that. So you have changes in antitrust enforcement.

Some of it may be grounded in other parts of the economy. We should be looking also at things like regulations and rent seeking that allow companies to create rules that benefit themselves at the expense of others, certainly in questions like intellectual property. And I think a lot of these competition issues are about antitrust but they go more broadly. And then if you look at labor markets, you want to look at occupational licensing, something the FTC has been at the forefront of for a long time, land use restrictions and a whole bunch of ways that reduce competition in the economy.

So I think you have this combination of good reasons, bad reasons, and then you have some that are ambiguous. If you look at something like the tech sector, you've seen a lot of innovation, but you also have platforms with network effects that lend themselves to scale that might say that it's efficient to have a single producer at scale. It's also efficient to have a single municipal water company, but that doesn't mean we would want to let it go off and charge whatever it wanted to charge.

I'm not saying that we want to regulate technology the same way we regulate municipal water. It's much more complicated. And it's an issue that I'm currently looking at as head of an expert panel for the UK government reviewing digital competition, but trying to understand the combination of good reasons that you've seen companies grow with innovation and competition.

And want to talk about why we care about this. Traditionally, in economics, this is just about prices. And it's about prices being higher. I think that issue matters. You know, airline prices and cell phone bills are higher in the United States than they are in Europe, because European

competition enforcers have been more vigorous. They have more players in those industries than we do.

So I think the price issue matters. The price issue may be a lot smaller than some of the others I talked about. One is innovation, what this does to the incentives for business investment for R&D, for productivity growth. There's a longstanding debate between a review of Arrow and Schumpeter in economics about the impact of competition on innovation. But there's a number of ways in which it could be deleterious.

And then finally, inequality. And there's been, at the same time that there has been this increased thinking about these types of macro issues in competition, there also has been in labor markets as well. And that's grounded in the observation that every employment relationship has a bit of monopoly power and a bit of rent that's being divided between the two, because there's a cost of finding a new job and shifting a job.

And some market power matters a lot. If you have one hospital in town, it's a lot harder for a nurse to threaten to move to another hospital to get a pay raise. If you have two hospitals in town, it's much easier for the two of them to collude tacitly or even illegally to hold down the pay of nurses. Even in the fast food industry, there's evidence that anti-poaching and non-competes agreements have a deleterious impact on workers' bargaining power, help to hold down wages, and have been part of the reason that the labor share has been reduced.

So in summary, I think this evidence is coming from a variety of different places and a variety of different perspectives. If you're trying to ask a question about the economy as a whole, you're not going to have one definitive data source or one definitive study that's going to answer that question. You have to take a collage of views.

And I think that collage involves looking at the pattern of what we've seen in the data that I've talked about in terms of falling labor share, falling investment, rising markups, looking at the industry level and seeing whether those phenomenon are industry by industry tied to concentration, and they are; looking in a deeper, more careful way where we can, and we can. We've done that in a lot of different industries.

And then no single story comes out of this, but on balance and on average this does seem to add up to a reduction in competition, a reduction in dynamism, and one that I think that we need to be concerned about and think about what ways we need to update our policies to address if we want to have more investment, more dynamism, more productivity growth, less inequality, in addition, of course, to the traditional focus on lower prices for consumers. Thank you.

[APPLAUSE]

BILAL SAYYED: Well, thank you, Jason. And we're going to turn to Tim Muris now. I will note that although Jason is the only economist on this panel, we have, if I count correctly, five economists, 100% of the panel, on our second panel in the afternoon. So we are trying to balance just about everything in these hearings.

TIMOTHY MURIS: Is this still on? Is this thing on?

BILAL SAYYED: Yeah.

TIMOTHY MURIS: Well, thank you, Bilal. I'm honored to be here, once again following in the giant steps that my friend and predecessor Robert Pitofsky. We first met in 1976, but it was 1988 working on the second Kirkpatrick commission that we realized we shared a vision for the FTC. Not that Bob and I always agreed, of course. Minutes after being sworn in as chair, I announced to a somewhat nervous reaction that there was indeed a new majority. I said there was no longer a majority of New York Yankee fans on the commission.

The FTC has enjoyed great success for decades and I address a few topics here. First, what durable success means for an agency like the FTC, then the vision that Bob and I shared that has led to the agency's success. Next I consider recent challenges from two Ps, paternalism and consumer protection and populism and antitrust. Because both of these isms once dominated FTC work, particularly in the 1970s, I discuss history.

I lived through the '70s and the decade was disastrous for the FTC. Nostalgia, expressed explicitly in recent literature, is misplaced. I have no desire to relive those years and neither should you. I'm submitting a longer paper with lots of footnotes, like lawyers do. And I'll make a lot of assertions, for which those footnotes provide support. But starting with success, it has to be built on something more ephemeral than headlines.

A definition that is less ephemeral starts with recognition that an agency needs a clear understanding of, and support for, its core mission among its constituents. Second, this core must derive from a vision clearly shared, not just today, but enduring through electoral cycles. Over time, perhaps decades, stakeholders that judge favorably the core mission of successful agencies.

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

Take antitrust first. Until, recently antitrust reflected bipartisan cooperation. Disagreements existed in close cases, but there was widespread agreement that antitrust should protect consumers, that economic analysis should guide case selection, and that horizontal cases were central to enforcement.

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

Firms also make peace through nonmerger conduct. As with mergers, of course, collaboration is not itself sufficient to assess consumer welfare. Many collaborations are beneficial. And the

peacemaking of most concern lacks offsetting efficiencies, what antitrust lawyers call naked horizontal agreements. The FTC has pioneered development of the law here, especially among professions, generic drugs, and the process to analyze collaboration.

In rare instances, a single firm with market power can exclude competition to harm consumers. The 2001 Microsoft case-- probably the most famous recent example. Those kind of cases are important to any antitrust program. A particularly fruitful category of troubling single firm conduct involves misleading the government. Misuse of courts and government agencies is effective way, this rent seeking, to stifle competition.

Such strategies are not limited to single firms, of course. They're the cheap exclusion, which is a felicitous phrase that the people at the FTC have invented. Two antitrust immunities help protect this rent seeking, Noerr and state action. Some courts have broadly interpreted these immunities.

And for decades, 40 years in fact, the FTC has sought to circumscribe both with three Supreme Court victories in state action. On Noerr, the agency saved consumers billions of dollars at the gas pump in [INAUDIBLE] and provided large benefits for consumers for pharmaceutical consumers in Bristol-Myers Squibb among many other successes. The vision for consumer protection is identical to that in antitrust.

When competition alone cannot defer dishonesty, private legal rights help. There's government developed common law. When the market forces are insufficient and common law is ineffective, there's a role for a public agency. And consumer protection and antitrust naturally complement each other.

Under the FTC's positive agenda, robust competition is the first and most important way to protect consumers. And the FTC's role is crucial, but it's a referee, not the star player. The foundation and core of consumer protection is the systematic attack on fraud begun in 1981.

And the FTC has continued to expand in each administration the fraud program. The commission has long evaluated advertising by legitimate businesses and, in this century, has expanded into privacy with many successes, the National Do Not Call Registry being one of the most popular government initiatives in history.

But yesterday's success has become today's challenge with robocalls clogging our phones. In terms of robocalls, the FTC has been aggressive and ingenious. But ultimately, robocalls are like spam. Spam was ultimately-- the most effective way to deal with spam was when the ISPs developed tools to be able to screen out the majority of spam. And in the same way, robocalls, I think, will be best dealt with when those who deliver phone services and others develop the legal and technical tools to block unwanted calls.

Now I've written with Howard Beales that we criticized the Obama FTC on occasion, but compared to the paternalism of the CFPB to which I turn next, the FTC has been a paragon of virtue. Let me turn to those two Ps and their contrary vision for the FTC.

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

There was an exchange in the 1972 National Commission of Consumer Finance which is illustrative. And I'm not making this up. There was a debate about whether poor and middle class people should borrow money to buy color televisions. With some people saying they shouldn't do it, because they didn't need such luxuries, and other people defending their right to buy on credit color televisions. That, unfortunately, was illustrative.

This paternalism has returned with a vengeance in the CFPB. And by this I mean the Obama CFPB. Whatever one thinks about what's going on, the powers of the CFPB are there. They haven't been touched. When President Warren comes in a few years, if she or someone like her comes in, the incredible power of the CFPB, which is insulated from any effective control, will still be there.

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

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

Now those who defend the CFPB sometimes raise behavioral economics, which is a recent challenge to the benefits of markets. In its extreme version, it's based on the idea that errors, and people obviously sometimes make mistakes, but the idea is that those errors are systematically irrational. Now some people will tell you that normal economics assumes that consumers have perfect knowledge and are economic calculators. Well, I was schooled by those normal economists and I learned about transaction costs and imperfect information from those individuals.

So I think that parody of economics is simply inaccurate. Moreover, there are numerous problems with using behavioral economics. For one thing, the behavioralists don't agree on which biases they talk about are relevant. For another thing, there is not empirical evidence to support what they want to do. For yet another problem is that consumers invest in various ways to improve decision making.

Now I'm not saying there aren't important papers and empirical work here to be done. I cite an example in the paper of the credit card market where people do choose accurately and are learning from their mistakes. There are lots of papers like that in the health care market-- I mean in the credit market.

In the health care market, on the other hand, Fiona Scott Morton has written a very good paper where there are systematic mistakes. Now I believe that health care markets are different, but I would hope these hearings and the FTC pay attention to those empirical issues.

The second P, populism, is reflected in calls, and Chairman Simon mentioned this, on the left and the right to use antitrust to dismantle the highly successful companies, or at least the so-called tech companies, or at least regulate them as public utilities. These are misguided calls.

For one thing, what a tech or digital company is is hard to know. We have new technologies but they're being diffused through the economy. Moreover, these companies have different positions in the market. Some have big market shares. Some don't. Equally important, we've been down the populist road before with disastrous consequences. John Nectarline and I discussed some of this history in a new paper that John will discuss in detail later and let me talk about the highlights.

Before Walmart and Amazon, another company use the same kind of tools to become the largest retailer in the United States for over 40 years. This company was so important-- company was the Great Atlantic and Pacific Tea company-- that the young John Updike used the company as the title and the setting for his iconic short story which every one of my generation had to read in high school.

And what happened was A and P's success triggered a backlash. And the government went after A and P for two decades. First they passed the Robinson-Patman Act, which embarrassed the antitrust world for much longer than two decades and took a long time for the antitrust world from which to recover.

This new legislation was not enough. First the government prosecuted the A and P successfully criminally. They still weren't done. They sued to break the A and P up. Finally, a new administration came in, the Eisenhower administration, and settled for some vertical divestiture. The problem was this long war of attrition caused the leadership of A and P to focus on fighting the government, not on its new competition, and today all that's left of the A and P are the coffees, Eight O'Clock-- I think it's called Eight O'Clock-- and the company itself is gone.

Now it's true that the FTC largely abandoned RP in the '70s, but there are two vestiges of populism that were strong at the FTC in the '70s and the first was predatory pricing. There were three important cases, probably the most prominent of which was the coffee case.

In the mid '70s, Procter and Gamble, then the most feared marketer of consumer goods, had Folgers Coffee. Folgers Coffee expanded into the heartland, into the east into the heartland of Maxwell House. Maxwell House General Foods responded-- massive price war benefiting consumers enormously. How did the FTC respond? It sued General Foods for responding against the best marketer in the world. I'm not making that up either. And there were other such cases.

And a call for a return to predatory pricing is an important plank of the new populist agenda. Another bulwark of the '70s antitrust was reliance on the simple market concentration doctrine.

And the concentration levels were levels that no one today would regard as significant. The prominent example was four firms with 50% share.

This theory was sometimes married to a populous animus toward bigness, which led the commission to seek vertical disintegration of the then very unconcentrated oil industry. And through 1980, the FTC was pursuing deconcentration long after the majority of the economics profession had abandoned extreme versions of the market concentration doctrine. Well, let me conclude.

With the creation of the CFPB, the FTC has another federal agency performing each mission. The original CFPB model, mirroring the 1970s FTC, contrasts to the modern FTC. Perhaps the regulatory world runs in cycles, but one hopes that the FTC will not be in a future Groundhog Day where it awakes each morning to 1975.

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

Luckily, because this advice would have badly misstated antitrust law, lawyers did not give it. Let us pray for the sake of American consumers that such advice never becomes sound. Rather than condemn innovation, whether in the 1930s or today, we should applaud.

Companies like the so-called tech giants have been built from the ground up in the United States rather than in Europe or China largely because the US legal environment is stable, predictable and uniquely hospitable to vigorous paradigm shattering competition by all businesses. That legal environment is a hallmark of American exceptionalism. Long may it continue. Thank you.

[APPLAUSE]

BILAL SAYYED: OK. Thank you, Tim. And we'll turn to Jim Rill now.

JAMES RILL Thank you, Bilal. It's indeed an honor to be here in commemoration of the work that was done by Bob Pitofsky and leadership of the commission in 1995. And a particular honor to me. I go back to relationships with Bob to 1969 when he was basically the author of the first Kirkpatrick report on the Federal Trade Commission.

And we worked together in the ABA. And in 1992 he was a very important and direct consultant on the 1992 horizontal merger guidelines. So it's indeed an honor to be a participant in these programs.

I want to talk today about the developments in the antitrust world that's created by the globalization of antitrust, which I think is one of the most significant developments in the competition world in the last decade since the first Pitofsky hearings.

I think the most important thing we can see is it's been a cascade, a tsunami, of antitrust agencies across the world. In 1995 there was a handful of agencies that had antitrust. And some agencies that had an antitrust law-- Japan, a gift of 1946-- really didn't enforce it.

Now we see something like 130 or more agencies with an antitrust regime. And those agencies that have had an antitrust regime are increasingly engaged in enforcement, often with very controversial results.

So what we need to think about, and what I think needs to be thought about at the Commission and the other antitrust agencies, is what is the response of the antitrust agencies to this global tsunami of antitrust agencies around the world?

And I don't want to suggest that that's a bad thing. I think it's a good thing-- properly-founded, properly-principled, properly-directed. Because I think a sound competition policy is essential to the operation of a market economy. So what have the agencies done, and what is the challenge facing them in the future?

The agencies were responsible-- particularly, the FTC and the Department of Justice-- in the formation of the International Competition Network. In 2001, following on the report of the Department of Justice International Competition Policy Advisory Committee-- the ICPAC-- that was put together in 1997 and reissued its report in 2000.

The International Competition Network was founded when the platform of the Fordham program in 1991 with 12 members. Tim Muris was very instrumental in putting that together. Now we have well over 100 members, 100 agencies, that are members of the International Competition Network.

And the ICN has been extremely important in producing guidance that's based on market economics and due process for its member countries and for other countries around the world. Essentially, soft guidance, but nonetheless effective and responsible guidance.

The ICN has produced merger notification and procedure guidelines. Has put out through its unilateral conduct working group with guidelines on predatory pricing. Guidelines on dominance. Most interestingly, the work that the ICN has done in the area of procedural due process.

The working group on agency effectiveness, which was headed by the Federal Trade Commission. The work of Randy Tritell and Paul O'Brien has been extremely effective in putting out guidelines on due process. Guiding principles, annotated guidance, and similar documents.

These are extremely important contributions that are made towards convergence, if not harmonization, in the antitrust world. Similarly, the OECD, again, under US leadership, has put out a protocol on hard core competition.

Also documents on the merger notification and procedure. Really anticipating ahead of time the ICN's work in that area. The OECD has also issued a very monumental report, under the leadership of then-chairman and then Assistant Attorney General Varney, on due process and procedural fairness.

So most recently in 2017, the Department of Justice and the Federal Trade Commission issued revised guidance for international enforcement. This guidance document broke some new ground. And providing for the government's involvement and advocacy across the globe. That it would attempt to foment adherence to sound principles of not only process, but substance. And would advocate positions as the occasion arose in particular situations.

It extolled the benefit of bilateral agreements, which the United States antitrust agencies have several calling for cooperation in particular cases. It set forth principles of comity and established principle that criticize extraterritorial reach of antitrust enforcement, where that extraterritorial reach was not based on immediate impact. Substantial, reasonably foreseeable, direct, immediate impact on the host nation. Consistent with our legal principles in that particular area.

On the question of its advocacy, what we have is a fairly general statement, however. Not one that gets into the specificity of when and how that advocacy might be best advanced and effective and implemented. And I think that's a challenge as we'll indicate going ahead.

The ICN, the International Competition Network, is continuing its effort towards promoting convergence in substance and procedure through workshops and similar efforts to bring about convergence and harmonization and sound principles. Non-governmental agencies did well since the last time, since the 1995 hearings increased their efforts.

The US Chamber of Commerce has issued a so-called expert report. I say so-called, because I was on it. So, therefore, I got to be modest.

An expert report on due process and the way forward. Somewhat controversial in that it advocated the establishment of a cabinet-level coordinating committee for dealing with international antitrust.

I think one issue that I personally had some-- although I was on the report-- I had some skepticism as to its efficacy. Although there should be more coordination among the agencies of the federal government.

The American Bar Association has sent several task forces, several reports in this area. A due process report and currently a program going forward soon to be finalized on a-- if you will-- not a report card, but an analysis of the implementation of due process. A task force headed by my partner John Taladay and Melanie Aiken.

Also, the ABA has presented-- soon to present-- a paper on the use of public policy issues in antitrust globally. That is, the extent to which non-antitrust factors, flying under the flag of antitrust, tend to adulterate-- that's my pejorative, not theirs, I expect. Tend to adulterate the efficacy and substantial foundation for antitrust enforcement.

The ICC-- International Chamber of Commerce-- has issued a report in this area. That is of significance, and extols, again, the need for global consensus of fair procedures.

So the private sector is active. Is it enough active? No. But increasingly active in this particular area.

So what are the challenges going forward? There are limits to the efficacy of soft guidance, of soft convergence. It's necessary, essential, but is it enough? Is it sufficient?

I answer to that is, you need to go beyond it. There's no structured mechanism right now for establishing, if you will, [INAUDIBLE] for evaluating the extent to which the guidance of the various international organizations and national organizations that I referenced are being actually implemented and followed in the nations around the world. Including sometimes, I might say, the United States.

We see actions in China involving a merger by Coca-Cola, which has questionable economic foundation. The denial of a transaction involving an XP, which had been approved by every other agency in the world on grounds that are difficult to discern any kind of link to sound antitrust.

We see in Korea an expanded reach for extraterritoriality in an area where there may be no effect whatever on consumer welfare in Korea. We see in Taiwan enforcement actions with no printed, published, and maybe not even any practiced, sound standards for due process.

All of these issues are a huge challenge to global antitrust, including the United States, going forward. And sometimes, frankly, the United States has been criticized overseas by its use of CFIUS to, in fact, undermine sound antitrust analysis and engage in national championship work.

I'm not sure I agree. I don't agree with that in many respects, but I know it has been criticized overseas. And, recently, in a speech, former Director General, former Commissioner for Competition of the European Union, Mario Monti, said that Europe has much sounder antitrust leadership foundation correctness than the United States.

We have to be aware of that and be sensitive to it. So what should be the response going forward? And I don't pretend to have any particular wisdom here, but throw out some ideas and actions that I've seen.

First, there is an increasing demand, interest, for the United States agencies to become directly involved in individual enforcement actions overseas, where the effect is on important interests of the United States. Not to protect the US champion, but where there's an important interest to the United States that bears on effective competition policy.

We have in our agreements and in other international principles mechanisms for cooperation, notification, and transparency. These, I suggest, should be implemented. They have been implemented by the United States. In Boeing-McDonnell Douglas, for example, the US was very much involved in attempting to put on the right track. the European Commission's analysis of that transaction.

Even to the point where this guy was an antitrust professor at Arkansas, I think named William Clinton, got involved in the lobbying before the European Commission on that transaction. The actions of the Federal Trade Commission, in certain circumstances, have been salutary. I think in discussing the matter involving Intel in Japan, it was an effective outcome.

Press reports indicate there was an effective outcome involving US involvement with Qualcomm, a principal issue in China. And, of course, the-- I'm not sure how effective, I think it brought about greater convergence and understanding and consultation. The US criticism of the European Commission's action in GE Honeywell.

We must respect foreign agencies' interpretation of their own law. We don't necessarily need to surrender to it in our efforts to converge, to consult. I think the decision by my classmate, Ruth Bader Ginsburg, in the vitamin C case sets a good principle for the question of respect but not total deference to foreign law.

So I think what we need to do going forward, what I would suggest would be an appropriate role for the Federal Trade Commission is to consider the really excellent work it's done. And the recent work that the Department of Justice has done. I think the Federal Trade Commission, under the guidance of Randy Tritell, has made great strides in this area.

But the question is testing the implementation. And I'd like to close with reference to the initiative that's recently been announced and promoted by Assistant Attorney General Makan Delrahim to establish a multilateral framework for procedure in antitrust cases.

He recently spoke at the Fordham conference indicating that there was significant progress in that area. That some 12 or so countries are signing on. We haven't seen what they're signing on to in detail yet, but signing on to the principle.

And I think it's a major first step by a national antitrust agency to attempt to persuade other countries that there needs to be some system, joint system, for assisting in the implementation and review. Not a scorecard. But a review of the extent to which the guidance documents, the so-called soft guidance, is actually adopted and fomented in the international arena.

I think that is the challenge going forward to the FTC, to the Department of Justice. And I think it's a challenge of enormous importance for international antitrust and international competition policy. And so with that, thank you very much.

[APPLAUSE]

BILAL SAYYED: All right, thank you, Jim. Alysa, at your convenience. And I note that I'm very envious of the ICPAC that they had apparently three to four years to do their report.

[LAUGHTER]

ALYSA HUTNIK: So switching gears to consumer protection and privacy. And like most consumer protection lawyers, I have pictures. So I do want to first strongly support the Commission's objectives for these hearings.

I'm a firm believer in that there is value in self-examination and being willing to both solicit and consider constructive feedback from constituents and practitioners, inside and out. And indeed from a similar process, the 1995 hearings positively shaped subsequent FTC policy and approach. And one would expect similar outcomes from these hearings.

So taking the time machine-- let's see if we can get there-- back to the '90s. And while some of us might have had Mariah Carey on the radio. Hopefully nobody's going to raise their hands on that. Here at the FTC the 1995 hearings had technology front and center in the focus.

And there the focus was innovative changes and convergence happening with the online marketplace, television, cyberspace. Even radical new technology issues, such as purchasing compact discs over your telephone. And notably, even then, the FTC was already anticipating issues with the amount and the type of data collected online.

Who is accessing that data? How many people were accessing that data? Cybersecurity issues with the data and the associated other consumer protection considerations.

The resulting Pitofsky report from those hearings provided an effective roadmap for consumer protection, business guidance, and policy for over 20 years. Tim Muris mentioned durability. This policy has been extremely durable.

That report centered on several key tenants. One, consumer sovereignty. This is a point that's been echoed in the 1980 FTC policy on unfairness, and in decades before, and in adjudications and business guidance. The idea that we would give consumers access to material information and allow them to make their own choice without regulatory intervention. To do it conveniently.

Two, the agency would prioritize enforcement to fight fraud and deception and unfair business practices that caused consumers harm. The agency also would support industry self-regulation as a way to make limited agency resources go further. And to provide businesses with greater clarity on compliance expectations.

And finally, the commission would provide consumer education. To empower consumers to navigate through emerging marketplaces. And while some might argue that the application of these concepts has ebbed and flowed over the years, they're viewed by many as the successful foundation to the FTC's approach in consumer protection.

It's an approach that is largely consensus-based. It's not largely political. It's measured. And it intentionally considers competition concerns with those of consumer protection.

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

And while there may be growing pains from time to time, and sometimes criticisms that the FTC does not act fast enough to prevent unlawful business conduct, it is the flexible nature of the FTC Section 5 authority that is such a critical part of our country's economic success.

But like any balanced framework, we should continue to ask tough questions to determine if and what changes may be warranted so that the agency's consumer protection mission can continue to be fulfilled for the next 20 years. And in looking at the comments filed in response to these hearings, they certainly raised several themes.

One of the main themes that Chairman Simons started out with was the concept of technology. Whether the technology marketplace of today and tomorrow requires a change to the FTC's organizational structure and allocation of resources. And just as the 1996 Pitofsky report, following those hearings observed that there would be challenges to the agency's consumer protection mission with the evolving technology marketplace, today cyber threats and technology changes and innovations will absolutely test the FTC's expertise and its resources.

Technology plays an integral part of the consumer experience, whether at work, at home, in educational settings, health care. Facilitates the way we interact with each other and with the world around us. So it's no surprise then that technology should play such a key role in most of the FTC's consumer protection enforcement cases.

And given the technology emphasis of commerce today and tomorrow, does the current FTC's organizational structure and investment of resources and technology expertise reflect the present, foreseeable needs in order to fulfill the consumer protection mission?

One of the second themes, and many might call it a pain point, reflected in the comments is the ever-growing patchwork of consumer protection and privacy laws around the globe and here in the United States. The 1996 Pitofsky report recognized the obstacles that a multitude of conflicting laws would pose for commerce, particularly for small and medium-sized businesses and new entrants.

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

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

And the third thing from the comments underscored a point that this agency has always faced. Where to focus its enforcement efforts? What shall be the priorities given finite and limited resources? And with lots of shiny objects and headlines to choose from, the agency has most advanced its consumer protection mission when it is focused on business practices causing real harm.

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

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

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

History has shown that self-regulation is more nimble and able to move more quickly to address innovation and technology changes. And when the FTC promotes the use of self-regulation and incentivizes companies to embrace such standards, industry responds time and time again. And consumers benefit directly from this carrot, rather than stick, approach, incentivizing rather than purely focusing on punitive deterrence.

So I will keep my comments shorter. Leads me to the concluding remarks that with the rapid changes that were happening and all the discussion around technology, we're largely discussing many of the same types of issues that were discussed in some form at the last set of hearings in 1995.

And as we hear from many voices during these hearings, I can say from my personal experience working with start-ups, working with large companies, new entrants, those that have been around for decades, most companies are motivated to do the right thing while also remaining competitively viable.

Straightforward laws that do not pick winners or losers, clear regulatory guidance, and vigorous support of self-regulation enables companies to achieve those goals without unnecessarily fencing in opportunity or innovation. And for the fraudsters and companies that are bent on causing consumer harm, the FTC has its existing tools to address that. Thank you.

[APPLAUSE]

BILAL SAYYED: OK, well, Alys thank you. And thank you for getting us almost back on schedule. As my friends know, being off-schedule just a few minutes would be a major achievement in my life.

[LAUGHTER]

So anyway, we're going to take about a 10-minute break. So let's come back here just slightly after 10:30. And we'll start up again.

BILAL SAYYED: OK, thank you. I just want to remind everybody that we do have some of my FTC colleagues collecting question cards. So if you have a question for the panel members, just write it on the card. Raise your hand. We'll pick it up. And we will try to get to it.

But before we turn to both a panel Q&A and audience Q&A, we're going to ask, separately, both Jan McDavid and David Vladeck to comment on what they've heard and honestly comment on whatever they'd like to comment on. But I'm sure it'll be germane. So I'll first turn it over to Jan. And then I'll turn it over to David when Jan is complete.

JANET MCDAVID: Thank you, Bilal. I want to applaud the Federal Trade Commission for again using its statutory authority to consider whether changes in our economy require adjustments in the enforcement priorities. Such hearings were part of the FTC's original statutory mandate and have been used very effectively throughout its history, most notably in the Pitofsky hearings that were discussed extensively this morning.

I'm honored to participate again, as I did in Pitofsky hearings, and I'm returning to my antitrust roots here at Georgetown. Because my antitrust career started my final semester in law school at Georgetown when I studied antitrust law with Bob Pitofsky.

Hearings provide the FTC an opportunity to step back and consider broad philosophical issues without the pressure of facts and time deadlines arising out of particular proceedings. That's a real luxury that most agencies don't have, and the FTC does. That kind of introspection allows the FTC to identify opportunities for improvement.

It also offers an opportunity for democratic participation, which is one of the objectives recently outlined by Commissioner Chopra in his paper last week. I speak here as a practitioner who advises clients every day on antitrust issues. And I share the FTC's view that competition produces the best, most innovative, lowest-priced products and services for consumers.

Most antitrust enforcement actually takes place in conference rooms in law firms and boardrooms in corporations where people like me advise our clients on where the lines are. And how they can achieve their business objectives without crossing those lines.

Our ability to do that effectively is significantly enhanced if our clients know that the antitrust cop is on the beat. That was true in the Bush, Clinton, and Obama administrations, because antitrust has always enjoyed bipartisan support. And based on early impressions, it's also true with the current Federal Trade Commission and antitrust division.

I've always viewed the antitrust laws as sufficiently flexible to adapt to changing market conditions, such as those involving the growth of technologies or foreign competitors. It also has been a sufficiently flexible to be applied across a broad range of industries involving defense, health care, consumer goods, or technologies, which don't particularly have anything in common.

The antitrust statutes, as they've been interpreted by the agencies and the courts in recent years-- in the last 30 years or so-- provide a framework that knowledgeable counsel can apply as we consider the unique facts brought to us by our clients. And, of course, we also bring to bear the economic concepts that are so important to underlying antitrust analysis today.

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

In contrast, one of my mentors, former FTC Commissioner Tom Leary, said that during his early career, when they would be defending a merger before the agents, they would say, god forbid it would achieve an efficiencies. Because that was suspect in the '60s and early '70s.

As I was trying to do antitrust research as a young lawyer and as a law student, I had a very hard time discerning any consistent thread through the cases I was reading. And that made it really hard to advise clients. That's not true anymore. Because we have a framework that lawyers and even our clients understand.

During my career, antitrust analysis has been grounded in fundamental principles and focused on consumer welfare. Contrary to the concerns expressed by some, prices are not the only touch point in our analysis. We have handled many matters in which issues like innovation and product quality were much more central than price.

And in my experience, the agencies have done a very good job of identifying those issues and resolving them in the matters. The way they have done so has also made it possible for advisors like me to tell our clients where the antitrust lines are. I'm a progressive Democrat, so you might expect that I would be applauding the development of populist antitrust theories.

But I think that including populist antitrust concepts would make the task that I undertake for my clients much more difficult. Instead of well-established principles grounded in consumer welfare

and sound economic analysis, we would be applying amorphous concept of bigness and fairness. Some of which turned traditional principles on their heads, such as lower prices that don't have the underpinnings of a predatory-pricing analysis. Or penalizing large, successful technology companies simply for being successful, because they created new products and services that consumers genuinely desired.

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

But even that wouldn't be true in a populist system, because ultimately we don't have an administrative system in the United States. We have a system of enforcement. And the agencies and private plaintiffs bear the burden of proof.

In Europe and many other countries, the government can simply say no. Here, they have to go to court. And they do so grounded in facts and economic analysis that supports their case, but with a framework that everyone understands.

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

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

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

[APPLAUSE]

BILAL SAYYED: David. We'll turn to David now.

DAVID VLADECK: OK, thank you. Let me start by thanking Chairman Simons for holding these hearings. I think this is the right way for the Commission-- for a new Commission-- to get its bearings and to figure out what its priorities are going to be and what its agenda should be.

I also think it's right to honor Bob Pitofsky. His legacy still looms large at the FTC. It did when I was there, I'm sure it still does. The influence he's had, not simply on the anti-trust side of the agency, but on the consumer protection side, is enormous. And it's only fitting to do this here at Georgetown Law School.

So I generally agree with Alysa. And I'm going to try not to repeat the points that she made. What I'd like to talk about or what I think are three main challenges the Commission faces going forward. In the first, and this Alysa brought up, is tech, tech, tech.

Virtually everything the agency does today has some connection with emerging technologies. When Chairman Liebowitz and I got to the FTC, we did not have a tech infrastructure. We did not have a single technician on staff. To the extent we needed to engage in forensic analysis, we had to outsource it.

Today, because each of the successive chairs has built upon the tech infrastructure that we started to build, the agency has more technology capacity than ever. But I still wonder whether it's sufficient. The agency needs deep expertise in things like artificial intelligence.

It needs the forensic ability to conduct investigations in data breaches and in other kinds of consumer injuries. We need better forensics. Better tools. And so one challenge I think the agency faces going forward is to make sure that its infrastructure, its resources, match the challenges that the agency faces.

So I think that's one. One of my former colleagues, Professor Krattenmaker, suggested that maybe it was time that the FTC added a new bureau. A bureau of technology. I don't know whether that's the right way to address the technology deficits that the FTC faces, but that's something that ought to be considered.

Second, the challenges of protecting consumers in a digital economy. Now the FTC in 2012 issued a report that tries to set out a framework about how consumer protection matches the FTC mandate. And I think there's a lot of very valuable advice in that report. I would urge the new commissioners to dust it off and take a look.

Because it provides a blueprint, at least, for dealing with some of the difficult questions the Commission's going to face. For example, automated decision-making. I'm not necessarily a foe of artificial intelligence. After all, we all know that human decision-making is not necessarily great.

But it provides all sorts of challenges for regulators. It's a black box system. You can interrogate an algorithm. And it can be a breeding ground for disparate treatment that is based on impermissible factors. And rooting out those kinds of problems is very difficult for the agency.

Data-driven offers in pricing. The marketplace is full of variable pricing and variable offers. There have been challenges about Facebook's ads for housing, and so forth. These are very difficult challenges the agency faces to ensure fairness in the marketplace.

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

It faces enforcement challenges. Yesterday there was a New York Times article about the New Mexico attorney general bringing a COPPA case and criticizing the FTC for not beating his office to the punch. Well, COPPA enforcement has been a thorn on the side of the agency since apps were developed.

The app developer market is highly diffuse. There are thousands of people making apps. Some in their parents' basement. And it's very hard, unless you're going to carpet bomb the industry, to have an enforcement regime that really works well. And now the agency has brought many, many COPPA cases. And has done so against high-profile violators. But that's a problem.

And Alysa talked about the usefulness of self-regulation. This is an area where we've encouraged self-regulation. We actually detailed a lawyer to work out of our San Francisco office to be an outreach person to the app-development community. Or encouraging some kind of self-regulatory body. We didn't succeed. So there are some enforcement challenges that the agency faces, as well, that are magnified by outdated statutes that the agency has to enforce.

Neither [INAUDIBLE] or Gramm-Leach-Bliley nor some of the other statutes that were enacted before anyone could envision a digital economy like this need to be updated. And I would hope that the Commission can work with Congress to do so.

I think the lack of civil penalties in Section 5 cases has been a serious lack for the agency, particular in data breach cases. The Rand Institute has done a number of studies making clear that the economic incentives, particularly for box stores and other kinds of consumer-facing companies, don't push hard enough to ensure robust security defenses. That is, it's economically rational to risk a data breach. Because the cost of strengthening one's defenses may outweigh it.

I think a civil penalty availability in those kinds of cases would add a necessary deterrent and might help stem the tide of rampant ID theft. I think we need to update the unfairness doctrine. It's interesting, because the unfairness doctrine seems to, at least be interpreted by some, to require some form of economic or economic-like harm.

But the statutory mandate of the FTC is to prevent unfair and deceptive practices. Not try to remediate them when they take place. And there are many harms that are just not actually well-remediated by money.

For example, the Ashley Madison data breach. This was a secret dating site. Well, marriages broke up. People committed suicide. These are serious harms that ought to be prevented. There is, at least, an argument that the unfairness statement as it's currently constituted doesn't really take into account some of these reputational injuries that have been made possible by a digital economy.

My last point is the regulation of big data. There's now pervasive data collection. It's ubiquitous. In fact, the last bastion of privacy, our homes, is now yet another side of data collection.

People have always-on always-off devices. The Internet of Things are going to put sensors in people's homes. All of this, they serve useful purposes. But they involve enormous data

collection. And we need to figure out how to protect consumers in this area of ubiquitous data collection. We don't have laws that really deal with this.

The aggregation of data is a real enticement to data thieves. Paul Ohm, who worked at the FTC when John and I were there, wrote a law review article about 10 years ago where he forecast there might become a time where there would be databases of ruin. That is, the data collection would be so ubiquitous that whatever fact that you would be mortified to have revealed to the public or to other people. That those facts will be in a database.

Well, given the ability of data-sharing, data lakes, the ubiquitous movement of data. There really is no answer to those questions now. And those are questions that the FTC has to address. We did when I was at the FTC. We did a 6(b) on data collection by data brokers.

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

So I commend the FTC for holding these hearings. I think this is going to be a challenging, but interesting time. And I urge that the Commission think about these things. Thank you so much.

[APPLAUSE]

BILAL SAYYED: So, thank you, David. What I'd like to do now is, I have a series of questions. And, in frankness, we've shared them with the group in advance.

But, of course, they were prepared before I knew what anybody would say. What I'd like to do is first ask the panelists. Maybe to ask the questions of each other or comment on what others have said.

And because he has to leave at 11:30, and, in fact, squeezed us in to do this panel, I'd like to ask Jason if he's got some thoughts on what he's heard. Particularly, because he comes from this from a different perspective or different background than the rest of us. And that I'll ask folks maybe put some questions to Jason.

JASON FURMAN: Yeah, I guess we've heard too references to populist antitrust. And I'm not sure whether I agree or disagree with those comments. If those comments are saying you should replace the current, disciplined approach with a sort of woolly-headed if you don't like the company, and you want to promote democracy and ground your approach in something big and cosmic like that, then I certainly agree with you.

If what you're saying is that there were certain papers written decades ago, and those papers are still 100% correct. And we should base all of everything on these tablets that were handed down. And any change would be populist and barbarian, then I think I quite disagree with that.

In fact, even some of the assumptions and arguments that people like Bork and Posner and others made, economists in IO have long known that they were quite fragile and based on very specific assumptions that weren't very robust. That the world was much more complicated, as you said, John. That people do take into account a broader set of considerations. But to some degree, economists need to do a better job of understanding this broader set of considerations, too.

So I think this is an evolving area as the chairman said at the very beginning of the remarks. I think that continued evolution is important. I think that if some of the macro evidence, data, and motivations that I said lends more impetus to that, I think that would be a welcome development and an important one.

But I still would then use that to motivate using micro, market-by-market techniques to think about cases, not some of those types of macro data. But I don't think that's irrelevant in motivating us to push further and think harder about in ways that, frankly, enforcement has gotten more lax. And that has had deleterious consequences for the economy.

BILAL SAYYED: Tim, it looks like you want to react.

TIMOTHY MURIS: Sure. Let me address the Chicago point about the sacred texts. Bruce Kobayashi and I published a paper subtitled, "Time to Let Go of the 20th Century."

JASON FURMAN: When did you publish it?

TIMOTHY MURIS: 2014. I think Bilal will send it to you. The way to think about Chicago is the way to think about the American revolutionaries . There was this revolutionary band of brothers. They were opposed to the old order.

And the old order was overthrown. But once it came to running a government, they split, like Adams and Jefferson. If you take a list, and we put this in the paper. Baxter, Bork, Bowman, Posner, and Stigler.

They either hadn't thought of, or they disagreed radically, on how to approach antitrust policy. Mergers, for example, those guys were all over the lot. From the most aggressive-- Posner. To the most restrictive-- Bork.

And the point was they just hadn't thought about it. And when they did, they disagreed. And so this idea, which is ripe in this populist literature, that there is this economic cult from the University of Chicago-- which dominates antitrust thinking-- is simply inaccurate.

BILAL SAYYED: Let's say any other reactions? Or anybody who would like to put questions?

JANET MCDAVID: I agree with Tim, but I also agree, Jason, that this has to be evolutionary. And we don't regard them as the tablets that came down with Moses. Economic theory has evolved.

We've had three iterations of the merger guidelines. And the ones we have in place now actually reflect how the agencies have been analyzing mergers for quite a long time. And they introduced new concepts such as unilateral effects analysis that weren't in the original versions. So we do evolve.

But I am very concerned about the inability to discern the consistent thread that I found when I was a young lawyer. And I'm very worried about how clients are going to have to handle this stuff.

BILAL SAYYED: Well, Jan, since you've touched on merger guidelines, let me ask a question that I have asked people to think about. And this is not meant to reflect on a particular administration or not.

But in 2010, the previous administration revised the horizontal merger guidelines. And changed the safety thresholds, or resumption thresholds, from an HHI of 1800 post-merger. HHI of 1800 being, under some conditions, presumed anti-competitive. To a HHI level of 2,400.

And I will say, also, in fairness, I think Tim Muris and I wrote an article suggesting that some change was appropriate. And we may have landed at around 2,400.

But let me put that out there. Do people think the thresholds in the merger guidelines should be adjusted downward?

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

And in-between, we don't talk about them very much. Because we talk about competitive effects analysis. Where is the real competition that takes place?

And having numbers attached to it and squaring market shares creates a sense of precision about this process that simply doesn't exist in reality or in the way the guidelines are applied. So I don't think it's necessary. I have clients who come to me and say, well, as I run the HHIs, we've got an 1800.

And then I discovered that they've defined the market in a way that the agencies would never agree with. And, therefore, the client has assumed something will be fine. When, in fact, they're going to run into a real buzzsaw.

TIMOTHY MURIS: The guidelines do tell you something significant if you forget the HHIs and think about it. I heard John Baker give a talk on this Friday after our retrospective analysis came out when I was chairman.

Think about it in terms of the number of significant competitors. Bill Baxter-- we argued with him when he when he put the guidelines out in '82-- six to five was his marginal case. And we wanted to make it five to four.

But Bill was a structuralist, much more than modern people are. And he thought that wasn't very many competitors-- six or five. Jim Rill, essentially, when he put out his guidelines, made it much more the focus that Jan was talking about. But when they did the guidelines in 2010, they were relying on data that said four to three was the marginal case.

And, in fact, John Kwoka, among others, had published papers out of the FTC's line of business data that showed the importance of a strong number three to ensuring competition. But it's the marginal case. There are lots of four to three's challenged and occasionally higher.

But it does turn on a lot of factors. But if you want very simple tests-- the number of significant competitors and how consumers react if there are significant business consumers-- answer to those two questions predicts a fair number of the results.

JANET MCDAVID: And on the point of the number of effective competitors, the FTC has done a number of reports looking back at its data about the deals that challenged, the deals that didn't challenge, and what the factors were. And those papers which talk about how many competitors there were in deals that were challenged, whether there were customer complaints, whether there were bad documents, a range of other things. Those are really useful guidance.

And it's terrific work that the FTC has done. I wish the division would join in doing that kind of analysis.

JASON FURMAN: Just briefly on the previous [INAUDIBLE]. I thought, Tim, you were much more modest about the Chicago school in this discussion than you were in your remarks. Your remarks, you actually claimed that they had accomplished quite a lot, in terms of changing the way antitrust was. And I think that's right.

TIMOTHY MURIS: Well, they overthrew the old order.

JASON FURMAN: Right.

TIMOTHY MURIS: That was 40 years ago.

JASON FURMAN: Right. But anyway, I think everyone treats them that way. I don't think one needs to re-litigate that. I think the question is, do we need to make some changes on the HHI? Or do we just do the average of whatever Fiona and John think it should be?

[LAUGHTER]

But I think the argument for raising them also involves focusing. And making sure you were refocusing and being vigorous above them, in terms of a screen and everything else you're taking into account. So I think it's not just the number, but a whole bunch of other things.

And some of that's also, frankly, dependent on the courts. When you're bringing hospital cases-- and you're still losing hospital cases-- even when you have unanimous Commission voting for them. That means there's a set of thinking, some of which was shaped in the past. That needs to probably be modernized and updated to deal with changing research. Including issues like wages, which I think is an important one when thinking about hospitals.

TIMOTHY MURIS: Well, but the FTC is mostly winning, as the Chairman said. Mostly winning hospital mergers. And the problem was, there was this silly belief in the Elzinga-Hogarty test. And I went to Ken. And Ken testified.

He had two very simple propositions. He said, I can't believe anybody would apply that test to hospitals. And second, I can't believe anybody would pay me to say anything so obvious.

And those two propositions, believe it or not, helped carry the day. And two circuit courts very recently blessed the FTC's opinion. But, Jason, you're right in the sense, because these cases are decided out there by individual district court judges, the FTC actually had to overturn some of the district court judges in circuits.

But I think the FTC's way of looking at it is correct. And it mostly wins. But, obviously, in the world of individual judges you could get some hearings.

BILAL SAYYED: I know Jim has some comments.

JAMES RILL: Just real quickly. I think what probably wasn't recognized very much in the change from the '82 guidelines to the '92 guidelines was the treatment of the structural paradigm. If you recall, in the '82 guidelines that the certain concentration level that the guidelines provided, there would be a likelihood to challenge.

In the '92 guideline we said, this is a presumption that's carried on with further analysis. And we went into, then, the other factors including entry and the competitive nature of the marketplace. So I think it was a major change from the '82 to the '92 guidelines.

I think one of the interesting things about the 2010 guidelines-- very creative, revision was probably in order. Is the distinction between the main analytical framework of the guidelines and the analytical framework when the Commission goes to court. The 2010 guidelines are very, very-- not to say critical-- but somewhat, almost dismissive of market definition issues as a proxy for the base for the analysis.

Shortly after those guidelines were [INAUDIBLE] analyzed, the commission went to court. And if you look at its brief in the Polypore case, it doesn't appear that the 2010 guidelines existed. They are very much the traditional analysis-- '82, '92 approach.

So I think there is a distinction that one has to draw between what the agencies do and their analysis, which is, obviously, extremely important if you don't want to go to court. And the practice that the agencies put into their court pleadings, which are more traditional. Because I

think the judges have become comfortable in accepting the analytical framework of the '82 and '92 guideline approach. I think there's a distinction there that we have to be aware of.

TIMOTHY MURIS: Bilal, if I could-- I don't want to forget the other mission. Actually, the FTC is a bigger Consumer Protection Agency in both dollars and people than it is antitrust. And if you ever go out as an official, and we've got some here, and do an interview. Unless there is a big antitrust case in the press, the questions are overwhelmingly going to be about consumer protection.

I think David is 100% right about not strictly non-monetary protection. As a young scholar, I wrote couple of papers about how contract law protects subjective value. But I'm not at all sure you need to revise the unfairness guideline.

I think another speech would be useful because the FTC has protected that non-monetary-- as David mentioned. The first security breach case that we brought-- and it was when I was chairman-- involved Eli Lilly. Where what happened was a non-entrant-- not just poorly trained, an employee who wasn't trained at all-- managed to send out a list to the world of 600 people who were taking Prozac.

And email addresses are very easily identifiable. A lot of people have their names, certainly their last names. And, obviously, we thought that was private information that ought to be protected.

And you could spin a case of monetary loss, but utility functions-- when I talked about those economists who trained me, Gary Becker was one of them. And he was one of the first to put other things in utility functions.

And that's the way the FTC thinks. And David's right that the Commission ought to stress that. I think you can read that in the unfairness statement now, but certainly statements to that effect would be useful.

DAVID VLADECK: Yeah and to Tim's credit, Tim and Howard published an article that's a classic. I think a classic in Mark Twain's sense-- something that everybody talks about, but no one's ever read.

[LAUGHTER]

But I did read it. And in it Tim makes exactly that point, which is that the unfairness statement ought to be construed to cover the kinds of behavior that we would think of as invasion of privacy tort.

But, in fact, often times when a bureau director brings a case like that to the Commission, there's real pushback. And not every commissioner, unfortunately, is quite as enlightened as Tim is on this matter. And so going forward some clarity needs to be injected into the process. Either through a revision of the unfairness statement or some declaration by the Commission writ large that these kinds of norms are subsumed in the unfairness statement.

Because there are some cases that Tim, actually, raises questions about in that article. And the result was you said was hard to reconcile. The order was hard to reconcile with the complaint language. Cases like DesignerWare, [INAUDIBLE]. And that's because there was friction within the Commission.

And so we need some resolution of this issue. Because, increasingly, the harms that are caused through data breach, other forms of revelation of privacy information, are not necessarily economic in nature. And the unfairness statement should simply make that clear. Or the Commission should make it clear in some other way. So I don't disagree.

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

JANET MCDAVID: Or perhaps in these hearings and the report that comes out.

TIMOTHY MURIS: Sure. Good. Another good suggestion.

BILAL SAYYED: Let me ask Alysa, who on this panel counsels clients the most directly on these issues, if she's got some thoughts on this area.

ALYSA HUTNIK: Well, one of the things that we hear from clients a lot are, what's the law, and what's the best practice? And in counseling clients, it's the interpretation of the cases and really focusing on this fundamental policy statements. And so where you have a statement on deception and a statement on unfairness from 1980 and '83, which are very helpful.

And we continually go back to that. I think to David's point, modernizing them even with current examples. Rather than adding the 75th, the 77th document that you need to put in an email to a client on what they need to address. I think with current types of challenges, both in advertising and data practices, et cetera.

BILAL SAYYED: Well, that leads right into a broader question. The Commission takes seriously its obligation to provide clear business guidance and consumer education. So I wonder if folks up here think there are other areas where new or updated policy statements or materials are needed.

Ties in as well to the idea of the self-regulatory model. Put that out maybe to David and Alysa initially. But, of course, that is just as potentially true on the antitrust side.

DAVID VLADECK: Yeah, let me just make a quick comment, which is the agency spends enormous amount of time on guidance documents. When I was there, the endorsement guides came out. The green guides-- 300 pages of narrative.

These are really important documents. We understand why regulated parties need the kind of guidance that the agency can provide. But doing a good guidance document is an enormous undertaking.

And there are areas where the guidance needs to be updated. Native advertising is an issue that the agency is going to have to continue to grapple with. The green guides left a lot of questions unanswered, simply because there was no real consensus about what certain words mean, like renewable.

And so I think one core part of the agency's mission is providing the kind of guidance that Alysa is talking about, that her clients need. It is quite a formidable undertaking. But I do think it's part of the Commission's core mission.

ALYSA HUTNIK: And I would just say that while the reports are well-read by private practitioners, it's the business guides that clients use. The TSR business guidance. The green guides. Every one of those, I have some of those sections memorized, as do some of my clients.

And so I think taking concepts like the 2012 privacy reports, and taking the unfairness statement and really bringing it up to date, that would be relevant for the innovative clients that are thinking of how to use machine learning. And using AI. And using facial recognition.

And having it consolidated in some ways where the topics overlap. So that they can use that and not feel like they are targeted with gotcha enforcement down the line when they are trying to interpret necessarily flexible standards and to do the right thing.

DAVID VLADECK: And this gets back to the 6(b) question, which is, in order to issue some of these guidance documents. For example, the use of biometrics in the marketplace. I think the Commission might do well to commission a study to get a sense of how widespread these practices are. Where companies are going. What the immediate future looks like.

Because this is a topography that the Commission needs to understand. But I don't know whether it has the knowledge base today to issue a guidance document on these issues.

TIMOTHY MURIS: I completely agree about guidance. And the best guidance the Commission gives is in mergers. And an area where it's badly in need of guidance on the consumer side is data security. And there's enough investigations and cases-- there's over 50 cases and probably at least half that many serious investigations-- to do, maybe not a merger guide, but at least a commentary, which the agencies did in the 2006, '07 time frame.

And something that would be important would be to talk about, as examples-- and parties can be disguised-- when the agency didn't act. That's really important information. Because the complaints have tended to be vaguer and vaguer over time. And data security guidance is badly needed.

BILAL SAYYED: OK, well, let me ask if there's any reaction to that. If not, I'd turn to another topic. Well, this ties into a question we got from the audience. So I'll raise it in two ways.

And first, there's a common critique that the US has lost or is losing its leadership role in antitrust policy globally. That what we see developing outside the US is a model predicated on

the framework of the European Union or European countries. And that this is being adopted by some of the newer agencies in newer countries.

I'd make the same point, well maybe slightly different. It's a question. What can we learn from, and is there a divergence, between the US and other agencies on the consumer protection side? So two-part question. Why have we lost our leadership? And then what can we learn from other agencies, both on the competition and consumer protection side.

JAMES RILL: Let me start out with the competition side. Because I don't think I've done much consumer protection work since we put Joe Camel out to stud. There is a challenge here in the global framework of competition agency.

I mentioned in my earlier remarks that a recent speech by Mario Monti, in effect, claiming that the European methods of antitrust, the European foundations for antitrust, were far superior to those in the United States.

The challenge has been there for a long time. I think there is a concern that there is a divergence of enforcement principles and due process principles, procedure and substantive around the world. And one that's increasingly being affected.

I think that the US has not lost its attempt at leadership in the sense of the work it's done within the ICN. It's largely the US pressure, for example, that put out the US initiative to put out the guidance documents on due process for the agency effectiveness working group.

US leadership of the working party on [INAUDIBLE] cooperation and the OECD. It's had a profound effect and produced a major report on due process. So I think we're not winding up the white flag any time soon.

I think it is a responsibility to the US in two areas to preserve leadership not only for-- it's not America first. America first sometimes can be America-not-there. I think it's America trying to present some of the principles that have underlied antitrust enforcement in our country and our jurisprudential base to try and put those across.

I think two areas where this can be done is continuing the guidance through the international organizations. And I think the further attention should be given to the, if you will, the moral suasion. The publicity effort that is underlined in initiatives, such as Assistant Attorney General Delrahim's multilateral framework for antitrust procedure deserve attention.

And I think the increasing use of bilateral agreements on competition policy, bilateral memorandum of understanding is a good way to go about it. And I think, also, that the agencies need to be, perhaps, better attuned more, as they have somewhat in the past, to actually engage in consultation and advocacy.

If you will, in particular instances where the foreign agency seems to be departing from a global accepted principle of procedure or substance. In effect, to engage in consultation is provided for on a number of instruments of cooperation. I think those are important.

I think that the final point that the agencies need to be concerned about, the United States need to be concerned about, is the problem sometimes of an agency action being misused by a foreign agency to say, well, you're doing that, so we can do it. And there's a lot of copycat misuse of US agency.

We need to be conscious of the risk of that copycat. A recent article by Koren Wong-Ervin, Josh Wright, lists a number of areas where that's happened. Following up on some actually some consents being used as an expression of law. Bosch, for example. Google Motorola Mobility, by foreign agencies, as well.

This is an expression of US law. They misuse that and have that as a copycat for the misapplication of antitrust law.

TIMOTHY MURIS: I wanted to take that and ask Jason a question. I know he's doing a lot of work on artificial intelligence. And I assume big data is a part of that. Jason, is what's going on overseas-- is that important for the US? And what should the what should the FTC do about those issues?

JASON FURMAN: I can tell you the answer in six months. But for now, I think a lot of the issues around big data-- the big, empirical question that I don't know the answer to is-- talking about it before. If you think there's diminishing returns to data, then you're a lot less worried about it, then if you think there's some region of increasing returns.

And there's some people do computer science that say with machine learning, when you get past a certain point, you get to this place where you can do the AI in a certain way that you couldn't do before you get to that scale. If you have that, then you think you have to start worrying about data becoming a barrier to entry.

That there'll be some large economy to scale in the machine learning AI space. And that you have to try to look at issues about who owns data, for example. And something consumers may overlook and not fully understand. And have those property rights defined more properly.

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

So I think this question of, is it just a really cheap-- the AlphaGo on reinforcement learning. The latest iteration of it that DeepMind did, isn't that long or complicated a program. Doesn't actually use any data. It just plays itself and generates the data. You know anyone in this room could have done it. Although none of you did, including me.

[LAUGHTER]

So if technology is like that, then I think we don't need to be that worried. Anyone in a garage can do it. If technology is this

increasing returns to data, then I think we do need to be more worried. And I don't know which, so I apologize.

BILAL SAYYED: I'll use that as a plug. We are doing two days on big data at American University's Washington College of Law in early November. And two days on AI, artificial intelligence, and algorithms at Howard University's school of law in the middle of November. So maybe you can come back.

JASON FURMAN: I want to just be clear. Algorithmic collusion is a whole different issue from the--

BILAL SAYYED: Yes, Exactly. Although we are having some difficulty separating out the people who do one or the other. But anyway, we're going to devote a lot of time to it. One of the things the Pitofsky Report did was just to think about things that were going to come up over the next 5, 10, 15, 20 years. And that's part of what we're doing in that space.

Jason, because you have to leave. I hope this doesn't put you on the spot, but I wanted to raise it, since you mentioned that you'll be doing some platform-related work. To go back merger law, and you may have less familiarity with the doctrine, but to get your thoughts on this.

How should we think about acquisitions of new technologies by established players? Sometimes we use the term nascent competition or nascent competitors. But it's something we're going to spend at least an afternoon on. And maybe while you're here, you have some thoughts.

JASON FURMAN: Yeah, absolutely. And you're creating a real incentive to leave panels early. I think you should do it for now on. It's working out really well for me.

I think that's a really important issue. I think there's a longstanding view that everything in technology is evolving so quickly that there's no point enforcing anything. Because by the time you do, it's changed into some new competitor. And MySpace has disappeared or Internet Explorer has been dethroned, or whatever else.

I think there's something to that. I think there's a lot of irreversibility, too, though. It's easier to stop an acquisition now and change your mind five years from now and allow it, then it is to take a company that's already acquired and split it up. The second is basically impossible.

The first the, cost of making an error and not allowing the acquisition, may not be that high if you can change it later. So there's a little bit under-uncertainty a literature in economics is an option value of waiting when you're making irreversible decisions. And allowing a merger is one.

I think you have to figure out how to think not just about market share but about the ecosystem as a whole. And if you are buying up something that could be a competitor later, then I think you're affecting the ecosystem. And something that prices, especially if there are no headline prices, isn't a useful guide to market share.

But it's competition for creating a type of market in an ecosystem. So I think that does require new thinking and probably under that option value of waiting, the uncertainty is an argument for more, not for less in those cases.

BILAL SAYYED: Let me ask if anyone has a reaction to that. We're going to have a whole afternoon of reaction time. Well, not to kick Jason off, but I want to thank Jason for coming.

[APPLAUSE]

Unless the members of the panel want to ask each other some questions, we have a number of questions from the audience. And I don't want to be too selective, because we did ask questions. And I would like to get to them. So if people are ready, we'll do it.

And Jason did leave in just the right time. But maybe others can think about this either narrowly or more broadly. And here's the question. How do we analyze the harm to small businesses who rely on large platforms to reach new customers in ways they never could before? So that may touch on too specific a topic.

TIMOTHY MURIS: Yeah, that sounds like a benefit, not a harm. If they're using these platforms to reach people that they never did before. Obviously, there are a whole set of rules, disclosures, consumer protection rules. It's important that just from a simple contract law standpoint that contracts not be devised unilaterally as they sometimes can be, which is an obvious problem under contract law.

One of the things I'm surprised with is the number of times people bring me antitrust issues that are really contract law issues. I used to teach contract law. I don't think, in the big-picture sense, that the so-called platform issues need to be analyzed any differently. That the tool kit we have is perfectly adequate.

And it goes back decades when the new industries were evolving. We're talking about going back to the 1990s.

BILAL SAYYED: I took a little bit of this question to be focused on the use of antitrust to protect small businesses. And I wonder if other folks have some additional comment on that question. Is that a proper role for antitrust? Or is it just too hard for us to measure that particular factor in our analysis?

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

DAVID VLADECK: Let me just add one thing. Dealing with platforms is an issue that arises on both sides of the building. For example, one of the ironies in the Google investigation were the companies that were complaining about anti-competitive conduct, were the very companies that wouldn't have exist, but for Google.

And that interaction becomes very challenging. Also some of the platforms raise serious consumer protection issues. Because they are essentially bazaars selling multiple products on the same page.

And so questions about deception, who's responsible for the deception, arise with some frequency. So I think one unmet challenge on both sides of the building is what do we do about platforms. There's certain immunities based on content.

But that doesn't really resolve some of the consumer protection problems and some of the anti-trust issues that arose, for example, in the Google investigation.

ALYSA HUTNIK: I would just add on the consumer protection side, we're talking about platforms and responsibilities. And David, I hear you earlier, in terms of talking about the limited resources for enforcement. Some of the things that we've seen is deputizing platforms to be responsible for those that they let into the bazaar.

And that may be all well and good, but there's a lot of interpretation and a lack of guidance on what is reasonable oversight and monitoring. What's scalable? And not doing a gotcha on that.

DAVID VLADECK: All fair questions.

ALYSA HUTNIK: If we go towards that point, what I would strongly encourage thoughtfulness over is, what are the standards to avoid third party monitoring? Whether it's a safe harbor. Whether it's other types of incentivizing, but clarity on those points.

BILAL SAYYED: Any other comments on that? Let me turn to a question that is-- I'll direct it to everybody. It's a similar question.

So the question says that the former Chairman Muris mentioned imperfect information in contrast to behavioral economics. But it's standard economic models, imperfect information, causes transactions not to happen. It does not cause buyers to be fooled. So here's the question. Aren't buyers sometimes simply fooled? And should they be protected from being fooled?

I think that's both a consumer protection and in some ways a competition question, but I'll turn it over to David first.

DAVID VLADECK: I think the answer is yes. The Commission has struggled with what is a reasonable consumer and what percentage of consumers must be deceived by a message. But the mission of the Commission is to prevent deception in the marketplace.

And Tim and I may disagree at the margins about this, but I agree with Tim's fundamental point that the core mission of the agency is to protect against fraud. And the statute doesn't really use the word fraud, it uses deception. And in my view, that's always been the core mission of the agency.

The first cases the agency brought were consumer deception cases. They were the sale of silk, which was really cotton. And it was sold C-I-L-K. And those were those were literally the first enforcement cases the Commission brought. So historically, that's been at the center of the agency's mission.

ALYSA HUTNIK: I would also just add to that we have to reconcile what's a reasonable consumer and a gullible consumer standard. And one of the other parts of the FTC's mission is consumer education. And particularly, as we go through the emerging market places and people are learning even about those marketplaces, consumer education plays a key role in that. That we don't dilute the reasonable person standard.

TIMOTHY MURIS: I agree with both of those points. And let me take the economic modeling part of that. It's almost 60 years since Ronald Coase's famous article. And the applications of that are all about transaction costs.

And shortly thereafter, George Stigler won his Nobel Prize, a significant part for discussing that advertising was an extremely powerful tool for the elimination of ignorance. Well, obviously, if there's ignorance, we're talking about a world with transaction costs. And that's the world in which you need an FTC enforcement as I was talking about.

And so this straw man in the popular press-- that economists talk about these automatons who only react-- consumers who with perfect knowledge who only react to price. That just hasn't been true in any sensible economic application to what the FTC does for decades.

BILAL SAYYED: OK, well thank you. Let me follow up on a point David made, as well, about a bureau of technology in the FTC. I'm going to depart a little bit from the question. But I ask first, what do the other panelists think about that?

Is it something that's relevant on both the antitrust side of the house, as well as the consumer protection side of the house? And what might it look like? And I raise that. Maybe it's a little unfair, because I didn't raise it earlier.

But David was a bureau director. Tim, as well as being chairman, was a bureau director. Now how do you set up these things for success? Really, that's maybe my question.

DAVID VLADECK: I defer to someone who's the chairman. I think that would be the chairman's mission. I think it would be important to retain some of the technology infrastructure in the bureaus.

Much of what the Bureau of Consumer Protection uses technologists for are forensics for investigations. But there is a lot of value to having access to skilled technicians for the policy issues that the agency is going to have to confront moving forward. Biometric identification, things like that. These are difficult technical questions.

TIMOTHY MURIS: The bureaus are complementary. They're not substitutes. As the only person ever to head both of them, they are significantly different. They're different in their personalities. They're different in the career paths.

And they are, in many ways, autonomous. And it's important-- let me give you an anecdote. I wanted the Bureau of Consumer Protection to do more in working with criminal authorities. And I, unfortunately, insulted them and told them that they were too self-satisfied.

Those were not the words I used. I regrouped, and after about a year they decided it was their idea. And they now have a very successful criminal liaison unit, which of course they take complete, 100% credit for, which is fine with me.

And it was a mistake on my part to criticize them in the first place. But it's a wonderful organization. It reminds me of working in OMB in the old days, where you had people who-- it's their career.

And it's not as transitory as the Bureau of Competition. But embedding in the Bureau like David says would be a very sensible way to go.

BILAL SAYYED: Anybody else? OK. I will answer one of the questions. There is a reference in that question to the Office of Technology Research and Investigation, or what we call OTEC, which does sit in BCP. The question is why is this unit insufficient to get the job done now.

Without commenting too much on whether it's insufficient or what job they are focused on, it is a very small group. And more resources would probably be appreciated by the chair and by the commissioners and even by the Bureau directors.

So maybe I'll end with a question that I have. And it's a real question, given the difficulty of managing agencies. Do you think the FTC should have more resources to do its mission? And if you were to allocate those resources, how would you allocate them?

I'd like the private perspective as well as-- folks who have not been at the agency, as well as folks who have been at the agency to maybe give some thoughts on that.

JAMES RILL: I think a question like that to be addressed by me is like asking a Protestant minister what he thought about the latest papal encyclical.

[LAUGHTER]

When I was at the division, one of our major efforts was to enhance the work force at the division, both from the standpoint of law and economics. And it was shorthanded when I got there. And we were able to build it up. And I think increase the efficacy of the agency with more resources.

It's difficult to get those kinds of resources with all the other budgetary demands. And we ran into a number of problems partly solved by either the filing fee issue. But I think the agencies do

need more. Certainly the division needed more resources at that time. Sensibly used and sensibly coordinated. The Commission I leave to the people who work there.

TIMOTHY MURIS: Well, I have a long-run view about this. In '81 when we came in, we were asked to reduce resources. The way to think about it is FTE. We put the agency on a path from 1,800 to 1,200. And that's where it was in the mid-'80s.

When I came back in 2001, I asked for a comparison with the mid-'80s. And Bob had had about 1,000. And it turned out, in professionals a 1,000 and 1,200 were about the same. Very small difference.

And what had happened, there was a lot of outsourcing and a lot of productivity improvements. Technology had had a significant effect. I think the agency is up to 1,150, something like that.

BILAL SAYYED: That's right.

TIMOTHY MURIS: And I don't know how that compares with 2001. I suspect there have been some more productivity improvements, probably not as dramatic as in the '90s. But Bob did a hell of a job with 1,000. I think we're headed for another retrenchment era. So I think it's probably wishful thinking to ask for significantly more resources.

And besides the people, BCP, for example, has a significant infrastructure burden that we managed to satisfy with the money from Do Not Call, which was very helpful for the rest of the agency.

But I think the present rate strikes me as significantly more. We ended up about 1,060, And I thought we did a lot. I thought Bob did a lot. So I don't think more resources are in the cards. And I think they're doing a lot with what they've got.

ALYSA HUTNIK: It's not from an internal perspective, but it's all about the priorities. Where do you want to focus the resources that you have? And some of the themes from today were, we have division of enforcement. And we need more manpower, in terms of business guidance.

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

JANET MCDAVID: Speaking only on the competition side, the lawyers and economists with whom I work regularly at the commission are incredibly dedicated and hardworking. The general populace has a view of government employees that is deprecating. It's not fair. They do yeoman's work. They work weekends. They work nights.

And a lot of the Competition mission is consumed with things they can't predict. What's the merger wait going to be? All of which are time sensitive.

So they have to at least retain the kinds of resources they've got, because you'll burn them out.

DAVID VLADECK: Yeah, I would argue for more resources. I understand Tim's argument. And I realize this is probably swimming against the tide. But since 2001 or 1981, Congress has added considerable workload to the agency. Changes in the marketplace have required the agency to do more work.

The Bureau of Consumer Protection, at its height when I was there, and I don't think we've had any resources to it, had fewer than 450 people. Including most of the people in the regions. People work extremely hard. They're incredibly dedicated. But there are lots of people with fingers in the dikes. And the water is just coming over the transom.

So I would urge the Commission to think about asking for an increase in resources. Of course, most of it should go to BCP, but I think the agency could well use a couple hundred more FTEs.

BILAL SAYYED: OK, well I we'll conclude right there. We were on target for 11:45, and I think that's where we are. Before we conclude, I'd like to thank a bunch of people.

First, I thank the panelists, including Jason, who had to leave. Very much for devoting some time and effort to this. I'd like to thank my colleagues in the office policy planning who have been working very hard what will probably be about 20 days of sessions. And this is only 5% of the way through. Once we're done today

It's just a wonderful crew to work with. And I'm very proud to work with them. And I think I did the best job at the Commission. And, finally, thank, also, the staff of the Executive Director for helping put this thing together. You'll see more of it this afternoon. But I won't be on stage, and I wanted to put that out there.

And then thank everybody for showing up and paying attention. We'll be back here at 1:30. So if you can come here slightly before that would be great. There is a cafeteria across the courtyard if people want to eat law school food.

But it's good. It's better than I remember. So I hope to see you back here slightly before 1:30.

[APPLAUSE]