

1 UNITED STATES OF AMERICA  
2 FEDERAL TRADE COMMISSION

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4  
5 FTC AT 100: INTO OUR SECOND CENTURY  
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7  
8 Thursday, September 25, 2008

9 9:15 a.m. to 5:00 p.m.  
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13 Northwestern University School of Law

14 Searle Center

15 340 East Superior Street

16 Chicago, Illinois

17 Matter No. P081205  
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24 Reported and transcribed by:

25 Maryann Cherry, CSR, RPR

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1 REPORT OF PROCEEDINGS

2 SEPTEMBER 25, 2008

1 the FTC. It's not supposed to be like, oh, aren't we  
2 great? It's really supposed be to a careful  
3 self-assessment of what we do so that six years from now  
4 when we do turn 100, we are the best agency that -- that  
5 we can possibly be, fulfilling our mission in the way  
6 Congress foresaw us filling it when we were created --  
7 well, now, 94 years ago -- but then it will be 100 years  
8 ago.

9           So what we're trying to do through this  
10 process, which will involve internal consul- -- internal  
11 deliberations and numerous external consultations, is  
12 really identify approaches for how we can improve as an  
13 agency. So -- so we're asking people -- we started out  
14 in D.C. with a two-day roundtable there. We talked to a  
15 lot of former FTC officials. It was very helpful. But  
16 one of the things that Chairman Kovacic really wanted us  
17 to do is to reach out beyond the usual D.C. community, to  
18 ask people who are in other areas -- he liked to call  
19 them other centers of excellence around the world -- what  
20 their views are, not simply on what the FTC does, which  
21 is very helpful to the extent people can give information  
22 and their views on that, that's useful, but also for  
23 agencies and organizations with similar missions, how  
24 they carry out their work, what they think is important,  
25 how they do all the different jobs that an agency like

1 the FTC has to undertake.

2 So we have a mix of people participating in  
3 this debate. We have agency officials, state officials,  
4 academics, practitioners, consumer groups, just a lot of  
5 really interesting, careful observers, and we'll hear  
6 from a number of those people today.

7 I wanted to mention a few -- having already  
8 done one of these in D.C., a few interesting highlights  
9 that came out of that, sort of the pushes and pulls that  
10 an agency like the Federal Trade Commission is subject  
11 to.

12 For example, on one of our panels at the D.C.  
13 workshop, we had Jodie Bernstein, very, very successful,  
14 very well-respected, head of Bureau of Competition. We  
15 had Tim Muris, former chairman of the FTC and -- I'm

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1 real positive.

2 And Tim on the other hand, also cautioned that  
3 having such a broad statute, it's hard to have -- you  
4 know, that can be too broad, you can take it too far so  
5 you really need to provide some rigorous guidance on how  
6 you're going to exercise that kind of broad authority.

7 We also had interesting viewpoints on the need  
8 to use all the tools that an agency like the FTC has, to  
9 use our enforcement, our research, our advocacy, and our

10 10 8 ~~very important~~ So that was very important.

1 balancing that an agency like the Federal Trade  
2 Commission has to undertake.

3           So today we are going to be hearing from a very  
4 distinguished -- three very distinguished panels;  
5 consumer protection issues, and competition issues, and  
economics.

1 Steve Baker. Thank you.

1



1 THE FTC'S CONSUMER PROTECTION MISSION:

2 RESOURCE DEPLOYMENT AND EFFECTIVENESS

3 MR. BAKER: Well, it's good to see everybody  
4 today. And I think a hand should go out to Greg and  
5 Maureen for putting this together because I know it's  
6 been a big challenge for them.

7 We do have a big -- a really good panel today.  
8 And Teresa Schwartz will be joining us very briefly so we  
9 will certainly roll her into the discussion.

10 I'm Steve Baker. I've been with the FTC about  
11 26 years now, spent my first 6 years at the FTC in  
12 Washington and I've been fortunate to head up the Chicago  
13 office for just over 20 years now. During that time,  
14 we've done probably pretty much everything the FTC does  
15 from antitrust to all the various nooks and crannies of  
16 consumer protection.

17 One of the things that's always interesting  
18 about the FTC is it's kind of like two agencies housed  
19 under the same roof in some ways. We've got the  
20 antitrust and consumer protection side. And they really  
21 inform each other really well. And I think what the FTC  
22 used to think or we used to hear sometimes is why don't  
23 you just take this antitrust jurisdiction and give it all  
24 to the Justice Department? You guys can be a consumer  
25 protection agency and why do you need to have both of

1       them under the same roof.

2               And I think what we've discovered really is  
3       that the two halves of the agency really complement each  
4       other really well.  You really need some of the antitrust  
5       and economic thinking to understand the markets we deal  
6       with on the consumer protection side.  And I think some  
7       of the things that we do on the consumer protection also  
8       inform the antitrust side.  And as the agency has gone  
9       around the world doing more reaching out with other  
10       agencies, it has recommended that model of having both  
11       under the same roof.

12              But one of the things that makes it different  
13       on the consumer protection side is that there is not the  
14       same sort of organized interest in scholarly reporting on  
15       our consumer protection mission that there is on consumer  
16       protection.  When you start -- or on competition.

17              With the competition area, there's an Antitrust  
18       Law Journal, there's a big spring meeting in Washington,  
19       there are -- most law schools have courses in antitrust  
20       and almost none of that is true on the consumer  
21       protection side.  There are people that do national  
22       advertising.  There are people that do debt collection.  
23       There are people that do franchises.  There are people  
24       that do various marketing promotional things.  But  
25       there's very few people outside the agency that really

1 kind of get to see us across the board.

2 So this forum is particularly useful because I  
3 think we've got a really distinguished group of people  
4 here that really have kind of seen what we do across the  
5 -- the -- across the board in terms of consumer  
6 protection.

7 Just real quickly, we've got with us this  
8 morning Bill Brauch, who is head of consumer protection  
9 for the Iowa Attorney General's office, has been there  
10 many years and has been head of that office, consumer  
11 protection, for at least 13.

12 Bill is an old friend and he has done a lot of  
13 great consumer protection work. And if I might comment  
14 on my own work with the AG, Iowa's Attorney General's  
15 office has always been one of the class operations among  
16 the state attorney generals and really, really respected.

17 Henry Butler is a policy analyst, law and  
18 economics professor here at Northwestern, and he's done  
19 some other law and economics things and I'll let Henry  
20 talk about his interest and skills in a bit.

21 We've got Paul Luehr. Paul is an old friend  
22 from the Federal Trade Commission, spent 11-and-a-half  
23 years with the Federal Government doing some of our first  
24 work in spam when the internet first hit and we had to  
25 figure out how to deal with a huge new medium of mass

1 marketing communications. Paul broke a lot of ground on  
2 that. He is now with a private firm working on spyware,  
3 data security, and other kind of issues like that.

4           And finally we have or will have with us very  
5 shortly Teresa Schwartz. Teresa has been at the FTC at  
6 least twice. She was an attorney advisor many years ago  
7 for our first female commissioner, Mary Gardiner Jones.  
8 And then came back as deputy head of the Bureau of  
9 Consumer Protection for Jodie Bernstein. She is a law  
10 professor at George Washington University and we're very  
11 fortunate to have her because she is very thoughtful and  
12 has thought a lot about the FTC.

1 during the course of the morning.

2 Bill, why don't we start with you?

3 MR. BRAUCH: Thank you very much, Steve. And  
4 it is an honor for me to be invited to this very  
5 distinguished panel and I appreciate it very much. It  
6 has been also an honor for us in the Iowa Attorney  
7 General's office to work with the Federal Trade  
8 Commission. I think in the 21 years I've been there,  
9 we've done two used car rule sweeps together, we've done  
10 one funeral rule sweep together, we've worked together  
11 with folks from Washington on auto credit advertising  
12 cases, we've worked together on telemarketing cases, and  
13 we continue to work together. Our missions are very much  
14 the same.

15 I think sometimes folks don't have a modern  
16 conception of what attorney generals do these days in the  
17 consumer protection realm. But most of the companies,  
18 that residents of our states deal with on day-to-day  
19 basis are national or international corporations. The  
20 days of the mom and pop stores are pretty much gone. So  
21 a lot of what we do is parallel with what the FTC does.

22 I think we want to talk a little bit today  
23 about how we can more effectively and efficiently marshal  
24 our resources to work together. I think that would be  
25 important because so much of our jurisdiction does

1 overlap. In some respects, the state attorney's general  
2 jurisdiction may be broader. In Iowa our consumer fraud  
3 statute gives us jurisdiction over the advertisement or  
4 sale or lease of any merchandise from anybody to anybody.  
5 And so charitable contributions are also included in  
6 that. We aren't limited. Whereas, the Commission has  
7 certain statutory authority that is a little bit more  
8 constrained.

9 At the same time the Commission has, I think,  
10 very effectively used its resources to focus on things  
11 that are the most important to consumers. And, I think,  
12 I'm going to encourage in our comments a little bit later  
13 that we continue to try to identify those things which  
14 make the greater difference in the marketplace.

15 And that's really what we do in consumer  
16 protection in any event. And Steve was right-on in  
17 talking about competition and consumer protection  
18 complementing each other. Ultimately the goal of both is  
19 to enable the free enterprise system to work, for it to  
20 be efficient and that means informed buyers making  
21 choices, not being misled, that means competitors not  
22 losing business to others who defraud the public whose  
23 offers aren't real. It also means consumers  
24 understanding they even own something. I'll talk about  
25 that a little bit later, or they're buying stuff they

1 don't even know they own. It's a tremendously important  
2 area.

3           We talk about people's homes. Right now a big  
4 focus of the state attorneys general -- and has been for  
5 several years now -- has been home mortgages. And we've  
6 seen unfortunately what happens when an entire industry  
7 melts down. It's bringing our economy down with it. We  
8 work in a very, very vital area of life in our country.  
9 And the need for us will not ever go away. I do not  
10 think and there will never be enough of us to do what  
11 needs to be done to ensure that the marketplace is  
12 efficient.

13           But again, efficiency, working together, we can

1 protection guy, so to speak. I haven't been in the FTC.  
2 I'm more interested in -- over the years in antitrust  
3 issues. I'm a general law and economics person. But  
4 I've also recently been doing some work on state consumer  
5 protection acts which fits right into some of Bill's  
6 role.

7           And I think, Bill, you finished at the end with  
8 a comment that there'll never be enough people to be  
9 enforcing this. I think at some point we could have too  
10 many.

11           But what I want to talk a little bit about is  
12 the role of the states. Now, Tim Muris has an article out



1 find fraudulent. And he talked about regulation, and  
2 under regulation he talked about the role of the FTC's  
3 consumer protection missions and the important -- some of  
4 the important work that he did while -- the Commission  
5 did while he was chairman and goes into great detail on  
6 that, and a little bit self-congratulatory but it was a  
7 nice piece.

8           With all due respect to Bill -- not to Bill, to  
9 Tim, who was my law professor and colleague at George  
10 Mason, he left out an important leg of his stool. And it  
11 is the role that Bill Brauch plays, that the roles that  
12 the state consumer protection act play. And this is  
13 really a burgeoning area right now possibly because there  
14 are a lot of problems that need to be collected --  
15 corrected, possibly because of other things.

16           State consumer protection acts were passed in  
17 the late '60s, early '70s, at the behest of the FTC.  
18 They're oftentimes called little FTC acts so it's  
19 important for the FTC to think about perhaps what we've  
20 created or does this monster perhaps need to be tamed. I  
21 guess there is a question, is it a monster? And we have  
22 a project here at the Searle Center that's doing some  
23 empirical work on the state consumer protection acts.

24           And just kind of our first pass through the --  
25 through the data collecting opinions in Federal District

1 Court, applying the state law -- these are the  
2 low-hanging fruit, the easy-to-find cases. Federal  
3 District Court opinions from 2000 to 2007 and state  
4 appellate court opinions from 2000 to 2007. That, of  
5 course, we do not have the state trial court opinions on  
6 this yet because that's huge. You'd expect that the  
7 appellate opinions are the tip of the iceberg. The  
8 federal court cases are usually the larger cases and what  
9 we see in this period from 2000 to 2007 is 15,000  
10 opinions dealing with state consumer protection acts. We  
11 started off with 30,000 and we culled it down to ones  
12 that are actually dealing with this. This is a lot of  
13 litigation that's going on out there. And it's the  
14 private litigation that we're looking at.

15 Bill is from the only state that does not have  
16 private causes of action. He would like to have them.

17 But I think probably more for the small cases than the

large cases. And what we had bly cll cases than themf acwlition that's going

10 larg8ed off with 30,000 and we c We

1 parties who are harmed will be compensated.

2 So there's generally some minimum type of  
3 statutory damages, there's occasional punitive damages  
4 are awarded, there's attorneys fees, a number of things  
5 to up that problem. But on top of that, they also allow  
6 class actions.

7 Class actions solve that problem too. So the  
8 problem of having individual small injured plaintiffs'  
9 parties having access to the court is solved in two ways.  
10 And that's a classic situation where you would expect  
11 there to be overdeterrence. So we've got a -- I've got a  
12 theoretical piece with Jason Johnson from Penn that  
13 addresses that issue and then we've got some empirical  
14 work that we're looking on this. Obviously 15,000 cases  
15 in and of itself doesn't tell us whether we've got an  
16 optimum amount of regulation or litigation at all.

17 But some of these cases, I would submit to you,  
18 are things that the FTC took a look at them and they  
19 would say this doesn't come anywhere near our standards  
20 of unfair and deceptive acts or practices. So we've got  
21 this -- this large issue out there. I'm not going to  
22 call it a problem because we don't know it's a problem --  
23 whether or not it's a problem.

24 But I think it's -- we've got this consumer  
25 protection going on that's totally informed -- uninformed

1 by the expertise of the FTC. And the FTC, as the leader  
2 of consumer protection in the U.S., I think, has an  
3 important role to play in this. And one of the things  
4 I'd like to explore today as we bounce through our topics  
5 is the possibility of the FTC getting more involved in  
6 these types of cases and sharing its expertise. It's  
7 kind of the national centralized location for research  
8 and development, information about these problems and how  
9 private litigation can perhaps be better informed with  
10 this.

11 MR. BAKER: We should go there for just a  
12 moment here, Henry. What else would -- the FTC, I  
13 suppose, could be involved. I mean, other possibilities,  
14 I suppose, would be for judges to develop a common law of  
15 these state cases and start developing some principles  
16 through those by reference to ours. Or the state  
17 attorney generals obviously within their states, I think,  
18 would be influential probably with state judges.

19 Do you think there is a problem with these  
20 private actions and what other things do you think would  
21 help it?

1     FTC to be interested in. But the standards that are  
2     applied for proof in those cases are very -- for  
3     establishing a violation are very low compared to what  
4     the FTC would be concerned about compared to what the  
5     common law would be concerned about. So -- and they're  
6     also just general problems with the kind of class  
7     actions. But I think a role for encouraging the courts to  
8     try to apply some type of consumer welfare standard or  
9     public interest standard, which I think guides your  
10    behavior and a lot of your actions, to encourage the  
11    courts to think about that in these cases because there's  
12    -- and how would the -- how would the courts know what  
13    they're doing. Well, the FTC could get involved following  
14    amicus briefs or an intervening -- I'm not sure the best  
15    way for them to try to get involved in intervening with  
16    that.

17             But I think for those large cases, that would  
18    -- is where I think there's the huge problem.

19             MR. BAKER: Okay. Thank you. Thank you very  
20    much. Paul?

21             MR. LUEHR: My name is Paul Luehr and it's a  
22    great pleasure for me to be here as well. In a way, I  
23    feel like it's old home week because I see many familiar  
24    faces from my tenure at the Federal Trade Commission.

25             By way of background, I think one reason I'm





1 of a private person, sometimes acting as the agency's  
2 expert and sometimes as an expert for a private firm.

3 I think the three main points that -- when I  
4 think about the Federal Trade Commission -- and to begin  
5 on a glowing note, I think the things it does very well,  
6 having seen it from these many different perspectives --  
7 and I also -- I should -- I'll comment a little later  
8 about an international perspective since I've had a  
9 chance to travel overseas and talk to other enforcement  
10 agencies outside the country.

11 But with that background in mind, I think there  
12 are three things that stand out to me with regard to the  
13 Federal Trade Commission and what it does well.

14 First of all, it's extremely flexible. I think  
15 that comes from probably number one, its statute. It has  
16 the mission of prohibiting unfair and deceptive acts or  
17 practices in or affecting commerce -- didn't think I  
18 still remembered that, did you -- under Section 5. I  
19 think it does give it broad authority and the ability to  
20 change and shift resources as needed.

21 I think by virtue of its size, it's not a huge  
22 moribund federal agency that has, you know, rows and rows  
23 and rows of steel desks and people all doing the same  
24 thing, day after day, partly because it was a  
25 congressionally formed agency, it has that aspect of



1 independence, and it's always been fairly small. I think  
2 that has contributed to its flexibility.

3 And frankly I think there has been a culture,  
4 at least since I was there, starting in the early '90s, a  
5 management style that is much different than almost any  
6 other agency or even private office that I've been a part  
7 of.

8 And a real focus on what you my think of as  
9 bottom-up management, taking good ideas from the staff  
10 level and letting those percolate to the top, especially  
11 with regard to its enforcement mission.

12 The other thing that I think stands out with  
13 regards to the FTC is its role as an enforcer. And I  
14 think if you look at the FTC historically -- and  
15 unfortunately I actually had a chance to do some -- some  
16 retrospective historic work way back when I was in law  
17 school, looking back at things like the Capper-Volstead  
18 Act and different statutes that have been tied to the FTC  
19 over the years.

20 I think their role as an enforcer really since  
21 the early '90s, has really given the agency added heft.  
22 No longer, I think, are they considered just the nanny on  
23 Pennsylvania Avenue full of regulations, rules related to  
24 the frosted cocktail glass, and things like this. But  
25 now they're seen as someone who brings real cases in

1 federal court against real wrong doers and I think that  
2 has had a real deterrent effect and many other salutary  
3 effects on the market.

4 And the last role I think that really stands  
5 out to me and in the hallmark of the FTC as it currently  
6 exists, is its role as coordinator. The FTC I think well  
7 knows in part because of its size that it can't do  
8 everything alone. There are too many con artists out  
9 there.

10 Even among legitimate business, there are too  
11 many times when the business practices fade over into an  
12 area that would be considered by -- deceptive by most  
13 consumers. The FTC knows they can't do it alone.

14 And I think it's been very effective at  
15 bringing together various stakeholders. And I think it  
16 does that in several areas. It does it in forums like  
17 this with workshops, I think it does a good job of  
18 bringing together stakeholders when regulations are at  
19 issue, making sure that there's full comment on  
20 regulations such as the telemarketing sales rule, what  
21 some people call the dinner hour rule, probably the most  
22 popular regulation ever invented in Washington.

23 And also in enforcement actions, it does a good  
24 job of bringing together people from various walks of  
25 life with various types of enforcement authority and

1 making sure that all those different types of enforcers  
2 are really singing from the same score and trying to move  
3 in the same direction, particularly when there's a  
4 notable problem out there in the marketplace.

5 So I'm looking forward to our discussion this  
6 morning. But those would be the three things, I think,  
7 that stand out to me as the hallmark of the current FTC;  
8 its flexibility, its new role as enforcer, and it's  
9 traditional role as a coordinator among various  
10 stakeholders.

11 MR. BAKER: And finally we've got Teresa  
12 Schwartz as we do our -- give five-minute intros.  
13 Teresa, delighted to have you here.

14 MS. SCHWARTZ: I made it. I was going to be  
15 very green this morning and take the train. I was told  
16 by Chicagoans take the train from the airport. Well,  
17 this morning, that was not such a good idea. So I got in  
18 a cab with somebody else and we made it. And I don't  
19 know where he went from here. But we did get a train at  
20 Rosemont -- or anyway.

21 MR. BAKER: I'm sure you were up well before  
22 dawn this morning so we appreciate it.

23 MS. SCHWARTZ: So I'm very glad to be here. I  
24 guess you're supposed to introduce yourself and then --

25 MR. BAKER: Everybody has got five minutes to

1 do something they kind of want to say and kind of who  
2 they are, or special interests or points they want to  
3 make sure to make, if you'd like.

4 MS. SCHWARTZ: Okay. Well, I'm the oldest on  
5 this panel by far. And so I should tell you my first  
6 encounter with the FTC was in 1971. So I can be kind of  
7 a historian.

8 I came out of law school right as the FTC was  
9 waking up as a result of Ralph Nader's raiders who had  
10 pummeled the FTC for being the old do-nothing encrusted  
11 agency that it was, which was followed then by an ABA  
12 report which said, you know, Nader's raiders are right,  
13 this place is in a shambles.

14 And it was President Nixon who appointed Caspar  
15 Weinberger, who then was followed by Miles Kirkpatrick as  
16 chair, who completely turned the agency around, like a  
17 miracle. I think this is the Kellogg School. I think  
18 this is an example of turning an entire agency around and  
19 making it what -- the beginnings of what it is today,  
20 which is, you know, a very well-respected, world-wide  
21 respected, federal agency.

22 And I was there as the attorney advisor of  
23 Commissioner Mary Gardiner Jones, the first woman  
24 commissioner. And she was kind of a rabble rouser  
25 herself, making all kinds of waves at a time when



1 problems and have at least in our experience terrific  
2 ideas about how best to go about solving the problem. So  
3 it was not top down. Jodie knew how to listen and  
4 identify good people and good ideas and then she made it  
5 happen.

6           Some of the things that happened in that  
7 period, I see still reported on, you know, the complaint  
8 center, which was -- had to be created, a help line,  
9 gathering all these complaints, then converting that into  
10 a huge database of complaints, sharing all that  
11 information through the internet with all of our  
12 partners. I think there are 1500 people now,  
13 organizations, that tap into that database, totally  
14 manipulatable.

15           And all of this was not Jodie's idea, coming in  
16 saying, let's do this. It was people saying, you know,  
17 we need to do this.

18           Sweeps, organizing cases with partners again,  
19 we held the -- and I was actually in charge of this, the  
20 hearings on the global -- the high tech global market  
21 place, which started our period. And out of that came  
22 really kind of a strategic plan for how we should proceed  
23 with the internet. So it was just a wonderful experience  
24 and I think very productive for the agency.

25           What I learned about the agency -- and I just,

1 you know, say much of what Paul has said too -- is that  
2 the staff is -- is wonderful, the statute allows a fair  
3 amount of flexibility and with that combination, you  
4 know, you can do a lot. I read recently that Tim Muris,  
5 who was the chair immediately following the chair I  
6 worked for, in 2000 -- I don't know. He was there for at  
7 least three or four years, I believe. Lois would know.  
8 He was interviewed in the ABA Antitrust Magazine. And I  
9 quote him exactly, the Bureau of Consumer Protection is  
10 one of the wonders of the world. A little hyperbole but  
11 he says, extremely efficient organization, many staffers  
12 have been there for a long time, their wisdom and their  
13 ability to prosecute cases is truly impressive. And I'm  
14 not going to --

15 MS. SCHWARTZ: I have to say I'm not going to  
16 go quite that far, but I am a great admirer of the  
17 agency. I think it has tremendous potential.

18 And what I would like to do today is to spend  
19 some time talking about how it can be better because this  
20 -- this agency has almost limitless opportunities. The  
21 marketplace is in some areas in a total shambles, it

1                   MR. BAKER: Well, and that's a perfect segue  
2    into the set of questions we're going to discuss this  
1s  morning, the first of which is how should the FTC set



1 the Federal Trade Commission. The whole FTC is about  
2 1100 people. You figure about a third of those are doing  
3 consumer protection.

4 I commonly do speeches for people who presume  
5 we have several thousand people in the room reviewing all  
6 advertising before it goes on TV.

7 So we're a relatively small set of people with  
8 a big mission and the question then is how you decide  
9 what you're going to focus on and sometimes inevitably  
10 what you're not.

11 Teresa, might as well -- you had some thoughts  
12 on that? You want to start -- kick that one off?

13 MS. SCHWARTZ: Okay. I've just been talking  
14 but I'll keep -- I'll keep going.

15 I do think that what I've learned at the  
16 Commission is the value of strategic planning and again  
17 kind of bottom-up, get your ideas, identify the key  
18 issues in the marketplace. To do that, the staff of  
19 course knows from their work experience what's bubbling  
20 out there. But I think also you need to go out to the  
21 consumer groups, to the AGs, find out what they're doing.

22 I was really struck recently looking at the top  
23 six consumer protection agencies. About five years ago  
24 they identified predatory lending as one of the top five  
25 issues bothering consumers and bothering these consumer

1 organizations of which, by the way, I'm affiliated. I'm  
2 on the board of Consumers Union so I'm bringing that kind  
3 of hat to the table also.

4 I think making that kind of assessment -- and I  
5 look out there, you know, fish where the fish are. You  
6 look at where is the money now? It's in retirement  
7 accounts and you're seeing stories now about credit cards  
8 that you can use to draw your money out, reverse  
9 mortgages. People still have equity in their houses,  
10 older people, and predatory lending, payday loans and all  
11 of that, still very much out there, very, very  
12 problematic areas.

13 So you can kind of look at some of these areas  
14 and see can you get any kind of a handle on it? Because  
15 if you think about what's happened now in the  
16 marketplace, there were lots of signals that predatory  
17 lending was a really pervasive problem, very, very bad.  
18 And I think part of strategic planning is to say, you  
19 know, what's the FTC, what is our role here, because  
20 there are a lot of banks with roles. So what can we do?  
21 How can we tackle this? We have so many tools from  
22 learning about it through workshops, being an advocate  
23 for legislation, getting more jurisdiction maybe, I  
24 think, in that area, bringing the fraud cases against the  
25 mortgage brokers and so forth.

1           The FTC did some of that. But when you look at  
2 how many cases against mortgage brokers, there was not  
3 that many. I think there was a big mailing that went out  
4 of 200 letters or something to mortgage brokers that  
5 maybe they were violating the law. I think with a  
6 strategic plan in place, it might have been -- more could  
7 have been done because you would identify that area as  
8 very highly problematic and that you had a role in  
9 working with the state AGs.

10           So I'm -- I'm very much in favor of that kind  
11 of a plan in which everyone is on the same page and you  
12 see what the problems are that you most want to focus on  
13 and figure out how you want to do it the best you can.  
14 The agency doesn't have jurisdiction over all these  
15 areas.

16           So that's -- that's how I would go about it and  
17 that's what we did when I was there. You know, you  
18 always do what you've learned from our own experience. I  
19 think it worked for us. We picked the internet as one of  
20 our major focuses. It was just coming on. And we had a  
21 strategic plan that we built out of those hearings and it  
22 actually governed the next five, five-and-a-half years of  
23 how we focused our energies at the bureau.

24           MR. BAKER: Bill, what about you? I mean, you  
25 obviously head up a consumer protection office that has



1 keeping other products from being developed that are even  
2 more effective?

3 And people's financial future, their nest eggs.  
4 We're talking about -- she was talking a minute ago about  
5 -- Teresa was -- about retirement funds. And we're  
6 looking at that very, very closely. We're looking at  
7 annuities, for example, which the FTC may or may not have  
8 jurisdiction over.

9 But the bottom line is we are trying to focus  
10 on those things that have the greatest impact in the  
11 lives of Iowans and working together among state  
12 attorney's general, those things that have the greatest  
13 impact among American consumers. And I would encourage  
14 the FTC to look at that as well. Strategic planning is  
15 vital. It is absolutely vital. And I think the  
16 Commission has done a good job of that. I think do we  
17 need to -- to enhance our communications together, the  
18 Commission and the state attorney's general and the  
19 consumer groups like Consumers Union and Consumer  
20 Federation, and so on, because we all have folks who have  
21 a great deal of expertise. We also have a lot of new  
22 folks who come in with a fresh perspective as well. And  
23 I think it's important to keep that in mind. The notion  
24 of a bottom-up, I think, is absolutely vital in that  
25 respect.

1           Some of the people who come in the AG's offices  
2 with very little experience are all of the sudden  
3 leaders. Like Patrick Madigan in my office is the leader  
4 of the state AG's efforts on predatory lending. He  
5 didn't know a thing about it four years ago. And now  
6 he's the nation's expert. It can happen quickly if  
7 you're able to bring in some pretty sharp people. We've  
8 worked together very effectively, I think, with the  
9 Commission over the years in planning certain areas and  
10 some areas we haven't worked as effectively. Perhaps we  
11 need to get together at the early -- very early stages of  
12 looking at things and deciding what we are going to focus  
13 on together. Obviously, our jurisdictions don't  
14 completely overlap and so there may be certain things  
15 that certain state AGs focus on. That may be outside the  
16 FTC's jurisdiction or maybe more local in nature and the  
17 FTC may want to focus more on the things that are  
18 national in scope. But I think there's more that we can  
19 do together.

20           But that's what I would recommend, more  
21 planning, more focusing on things that are of vital  
22 concern. I think that the telemarketing sales rule,  
23 particularly the telemarketing do not call list has been  
24 extremely popular. And it's not something that we would  
25 want to have any qualms about having done. I think it's



1 AGs into that agency type process.

2 A lot of people who aren't familiar with the  
3 politics of federal versus state enforcement actions, I  
4 think, should know that -- in a way they're two different  
5 animals. The FTC relatively nonpartisan, an independent  
6 agency, federally driven, has a federal mandate, whereas

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1 annuities may be an area where the FTC has almost no  
2 authority. But the AGs do. And you could parcel up the  
3 plans that way.

4           And the second aspect, I think, is sometimes  
5 allowing the state AGs to move out in front and bring  
6 some of those first cases and kind of give them some  
7 breathing room. And then come in afterwards to make sure  
8 that there is kind of a federal bar set across the  
9 country because that -- that effect of a federal  
10 injunction against a company or group of companies can be  
11 very effective. And sometimes the FTC maybe is moving a  
12 little too far out in front of the agencies. We don't  
13 know where all the -- the FTC doesn't know where all the  
14 issues might be. And the AGs want to have a chance to

1 look at the data and let that drive your agenda.

2           There are different ways that you can do that.  
3 One is collecting the data in the first place. There is  
4 this large database called consumer sentinel. Not  
5 everybody is a part of it yet and they really should be  
6 because you can bring all that data up to a central  
7 repository and every single state and local agency could  
8 tap into it and say what is the problem in my backyard.

9           And I think it's gotten much bigger, much more  
10 effective than it used to be. I think there's a long way  
11 you can still go with that. And Chairman Pitofsky used  
12 to say, I don't want to be an agency that brings a case  
13 just because some company was unlucky enough to have a  
14 consumer walk through our door. And I think if you look  
15 at that data, it's thousands of consumers. This is the  
16 case that we should be bringing, if you let that type of  
17 data speak to you, I think the mission is much more  
18 coherent and I think it has a much more beneficial effect  
19 in the marketplace.

20           MR. BAKER: Okay. Just a couple things. We  
21 are still doing strategic planning at the FTC. For my  
22 money it's the biggest, the best innovation we've had in  
23 consumer protection since -- since I've been there. The  
24 other thing I think has changed over the last few years  
25 is Congress has kind of figured out that we're there and

1 we're now a great place for them to suggest their  
2 projects to.

3           So they end up -- I mean, I'm not suggesting --  
4 I mean, it's perfectly appropriate for the elected  
5 officials to -- to help set priorities for agencies like  
6 us. But it seems to me I've seen way more interest in  
7 them helping set our agenda than I think I had in the  
8 past.

9           Moving on, I mean, I guess the other thing that  
10 -- which would be the balance between actions against  
11 fraudulent enterprises versus unlawful activities by  
12 otherwise legitimate business. We've always done some  
13 fraud at the Federal Trade Commission going back to the  
14 beginning. But the amount, percentage of resources, we  
15 devote to it have shifted largely from time to time. I  
16 would guess that one of the biggest differences between  
17 those are people in it for the long haul and those who  
18 are in it for the quick buck and really don't care about  
19 repeat business and good will from consumers.

20           There's a good quote from Sears Roebuck saying,  
21 "being honest with consumers is the best policy, I know  
22 I've tried both ways." And so I think we've got this  
23 balance. What do people think? Is there -- how do we  
24 decide which to do?

25           Henry?

1           MR. BUTLER: Well, I mean, you've got plenty to  
2 take -- to work on here. So I mean, you obviously need  
3 to make some trade-offs there. I've flipped through the  
4 transcript from the first FTC at 100 here and I noticed  
5 in there Jack Calfee's comments about advertising. And  
6 one -- one point he made, which I think was really  
7 important is that in the area of advertising that they  
8 the F- -- the FTC is to -- to paraphrase him -- has --  
9 has been at its best when it decided what not to do. And  
10 I think the more we've learned about the economics of  
11 advertising over the -- even the time you've been at the

1     FTC should stick with its enforcement mission.  And I  
2     think continue to push that forward.  And by that, I mean  
3     bringing real cases in federal court against real  
4     hardcore fraud.

5             It's interesting that Lee Peeler, one of my old  
6     colleagues, had made this comment in the first round  
7     about street cred because I have enforcement written down  
8     and then my first bullet point under that is credibility.  
9     Because I think one thing that a federal court case does  
10    for the agency is it gives it immediate credibility.  And  
11    I think it gives you credibility in a couple of different  
12    ways.

13            It's not just the fear factor, although that  
14    has some beneficial effect across the marketplace.  
15    People don't want to be pulled into federal court.  And  
16    so they'll look at -- and I don't think people at the  
17    agency realize just how often -- and I've seen this now  
18    in the private sector -- just how often other people in  
19    the industry look at your final order and say what is the  
20    remedy that was called for in this case.  And they will  
21    look down each of those bulleted provisions in that final  
22    order and say, okay, this is what we need to do to make  
23    sure we are in compliance.

24            So I think the agency has to keep in mind just  
25    how powerful those final orders and settlements can be

1       whether it's on the administrative side or on the federal  
2       court side.

3                 But beyond the deterrent effect that a court  
4       case has, it gives you better data.  It's amazing how you  
5       get into the middle of a case as a former practitioner in  
6       this area and you find out that the facts aren't quite  
7       what you thought they were, that -- that the economics  
8       are not quite what you thought they were.

9                 It could be something like -- for example, in  
10      the telemarketing area, I think it was through practical  
11      enforcement experience that we found out a lot of these  
12      telemarketers were all getting leads from the same groups

1 be said about the effect of real federal cases.

2 MS. SCHWARTZ: Well, I think one thing maybe  
3 just worth picking up a little bit on is that it's  
4 possible -- I don't have substantiation for this but I  
5 think probably it's fair to say when the first 13B cases  
6 were brought in federal court they were what Tim Muris  
7 calls fraud and theft. You know, they were just really  
8 outright stealing people's money.

9 And that over the years, the notion of what's  
10 fraud has expanded and includes cases of deception where  
11 a company lacks substantiation. There are cases in  
12 federal court now, some cases that I think initially  
13 might've been administrative law cases. So I think when  
14 we talk about fraud cases and we're lumping all of the  
15 13B cases, all the cases that can be brought in federal  
16 court. It's a -- it's broader group of cases than when  
17 we first started out. We, I keep saying that. You know,  
18 I'm not at the FTC. I haven't been there in 5 years. I  
19 still think of it as my agency.

20 So I think that the definition of what should  
21 be a 13B action when you go to federal court, are those  
22 cases that warrant consumer restitution. I mean, there  
23 are serious cases of deception. But it is a -- it is a  
24 broader concept. And it really constitutes a very big  
25 piece now of the law enforcement. I think that's

1 appropriate.

2 When we get further into the discussion,  
3 though, I think my view about the FTC is that it is  
4 definitely a strong enforcement agency. It's a huge  
45 part. It's an important part. I think it should be mor  
16 thon that ,though,

~~ddddd~~ This is a hope in example as a regulator of the company

12



1           Another example are what I call the modified  
2       negative options free-to-pay conversions where you have a  
3       credit card issuer who has a deal with a company, perhaps  
4       Vertrue or Trilegiant. They make a phone call or they  
5       send a small denomination check and encourage the  
6       customer to agree to a free trial offer, which if they do  
7       not cancel within 30 days they will be charged for. We  
8       have done surveys on these and found that the vast  
9       majority of the consumers don't even know they own this  
10      membership in a buying club or this identify theft  
11      protection plan. They don't know they own it. And  
12      they're paying for it every year. It shows up as a  
13      charge on their credit card. They don't understand what  
14      it is, they don't read it carefully, and they just keep  
15      paying it. The vast majority, millions of dollars  
16      flowing out of the pockets of American consumers to  
17      companies that are in contract with very legitimate  
18      banks, primarily national banks, they don't even know  
19      they own it.

20           The free enterprise system is not supposed to  
21      work that way. So again, it's somewhere on the continuum  
22      but let the chips fall where they may.

23           MR. BAKER: One last point I guess I'll make,  
24      we don't have criminal authority at the FTC but we work a  
25      lot with criminal enforcers these days. And one of the

1 things I've been finding in talking to them is the model

1 form was because we had done telemarketing cases before  
2 that. And some of those same cases applied. Widely  
3 dispersed consumers, dealing with -- in some cases -- new  
4 technology because phone systems were different,  
5 criminals that were using both legal and geographical  
6 barriers to hide from law enforcement.

7 We saw all of those in telemarketing. And it  
8 was just same chapter, second verse, when we got to  
9 internet enforcement. And I think our experience in  
10 telemarketing served us well in internet enforcement.  
11 And it also helped us teach our brethren on the criminal  
12 side how to bring some of these cases such as victim  
13 venue cases.

14 MR. BAKER: Okay. The next we're going to turn  
15 to, how to allocate resources between spam,  
16 telemarketing, business opportunities, financial fraud,  
17 deceptive mass media, payment systems, privacy, data  
18 protection. In other words, this is a partial catalog of  
19 the things we can do. So bringing it down from a little  
20 bit of the more general material to the more real  
21 specifics.

22 And for each of our panelists, I would be  
23 curious from them on areas where they think we should do  
24 more or maybe one where we should do less given that  
25 you've probably got a finite amount of resources.

1           So who wants to start on this one? Paul,  
2           you've always got opinions. Teresa?

3           MS. SCHWARTZ: Well, this is something I want  
4           to say. I might as well say it here to whatever question  
5           I'm going to fit my answer into -- into your question.

6           I've been thinking about -- I think this is a  
7           wonderful idea to have these panels and thing ahead about  
8           the FTC and where should it be and, you know, the next  
9           100 years. It's a pretty long time.

10          But, you know, I've been pondering this  
11          situation that we're in now with the lending crisis and  
12          the predatory nature of the credit transactions, sort of  
13          more generally. And the extent to which they involve the  
14          banking industry, the credit cards, as well as the  
15          mortgages. The credit cards just -- you know, the Fed  
16          has come out with a regulation to limit the terms of  
17          credit cards.

18          And to me that's almost shocking that it's  
19          gotten so bad that they are going to tell them you can't  
20          have certain kinds of fees that amount to a certain  
21          amount when you have a low credit. You know, a card can  
22          go \$250 of credit, but in the first bill that you get  
23          from the credit card company, there are fees that amount  
24          to \$175. So -- and you have to start paying those. You  
25          have to pay that -- to enjoy any credit, you have to pay

1 that all off in your first month and then you have the  
2 next \$75 -- what is it -- \$75 that you can have.

3 Well, you know that nobody who needs a credit  
4 card that has such a limit can pay off those fees in the  
5 first month. So they're behind before they even start  
6 with those big charges. And the Fed is going to limit  
7 that, not enough in my view. But they're going to put  
8 limits that you can't do that, you can't have a credit  
9 card that has so much fees in the -- in the -- to get a  
10 limited amount of credit.

11 So I'm thinking about all of this and what's  
12 the role of the FTC? They don't have jurisdiction over  
13 banks. And they -- they -- they can bring cases with  
14 credit card marketers where the FDIC brings the -- the  
15 action against the bank and so forth.

16 But, you know, I think we don't have at the  
17 federal level a consumer protection agency that has a say  
18 in this -- what's going on in the marketplace. We do  
19 over the things that, you know, we have jurisdiction  
20 over. But these other agencies have other interests.  
21 They have the banks. You know, they're -- I don't want to  
22 use the capture terminology but they have other interests  
23 as the FCC has interest in the -- in the telephone  
24 business. And you -- and you look at mobile credit --  
25 credit -- not credit but mobile cell phone contracts full

1 of terms about not being able to cancel without monstrous  
2 fees and so forth. And I think the FTC, you know, in the  
3 future somehow should become the agency that is

1 cost of some of these consumer-related matters.

2 And I just throw out there, I think you're onto  
3 something. And if we -- if we purely come in with our  
4 statute in front of us and our enforcement mission, we'll  
5 be seen -- I should say the FTC will be seen as having --  
6 I make the mistake -- same mistake you do -- the FTC will  
7 be seen as having just another voice at the table,  
8 they've got their agenda, they're trying to drive their  
9 mission under the FTC Act.

10 But if you come in with statistical data, with  
11 consumer surveys, with economic data, you become almost a  
12 kind of a third-party broker saying we don't have a dog  
13 in this fight, we really don't have enforcement authority  
14 here, but this is what we found in the marketplace.

15 MS. SCHWARTZ: Well, I think -- yeah, the role  
16 of B.E. is extremely important. And I think going back  
17 to that idea of strategic planning. To the extent that  
18 you have a plan, okay, these are the things you want to  
19 do, it does seem to be terribly important to have B.E.  
20 into that -- into that strategic plan, this is what  
21 they're going to work on, and help us with the data and  
22 the studies and so forth.

23 I would say absolutely B.E. But I think the FTC  
24 needs more expertise about consumer behaviors beyond  
25 economists. The economists have absolutely a key role to

1 play but I also think that we're learning a lot more  
2 about -- through behavioral economics, but just a lot  
3 more from people who really understand consumer behavior  
4 in a way that I'm not sure the FTC has people on staff  
5 that really understand. B.E. did a wonderful study about  
6 the mortgages, mortgage documents, that showed that  
7 people, educated people, do not understand these fancy  
8 instruments with the ARMs and the balloons, and whether  
9 insurance is in or out. They're not quite sure.

10 People have been in a marketplace in which  
11 they're doing transactions and they really do not  
12 understand what they're doing. I don't think this is how  
13 the marketplace should be working.

14 MR. BAKER: Well, that would be of the things  
15 we were hoping to get out in some of these sessions is  
16 things that might be good research projects for the  
17 Bureau of Economics. So if there's other ideas, I'm  
18 certain they would welcome them.

19 Obviously one of the things that the Bureau of  
20 Economics or others at the FTC would say is, look, if  
21 you're talking about credit card markets, there's lots of  
22 competition for people trying to get you to use their  
23 credit cards. They advertise on TV. Consumers pick and  
24 choose and to the extent that they disclose the fees and  
25 the charges, shouldn't you leave consumers free to make



1 those choices and why would we want to step in?

2 MS. SCHWARTZ: I'm with the Fed on this. I  
3 don't think the FTC actually commented on the Fed rules  
4 so they may be -- they may not be in favor of limiting  
5 these terms.

6 They seem to be so one-sided, so unfair, that  
7 someone who is signing up for that cannot be -- cannot --  
8 you just -- you just cannot be signing up and paying \$187  
9 to get 75 cents worth of -- \$75 worth of credit.

10 MR. BAKER: Henry, I know you wanted to say  
11 something.

12 MR. BUTLER: Well, I mean, I think Teresa's  
13 point is an important one. And it really comes down to  
14 what is the comparative advantage of the FTC as the  
15 leader in consumer protection?

16 And -- and I -- I think the idea of spreading  
17 it kind of horizontally across the federal -- different  
18 agencies in the Federal Government is an important one.

19 My point I wanted to make earlier and didn't  
20 get in on this was related to federalism principles and  
21 the role of the FTC in exercising its leadership on  
22 consumer protection.

23 A lot of this comes down to expertise of -- of  
24 the research variety or the Consumer Protection Bureau  
25 may -- may be able to bring to the table and provide a



1 advertisement for jewelry or annuities that empty  
2 somebody's bank account into the future?

3 I know where I vote to spend my money.

4 MR. BAKER: Just in the interest of moving  
5 along, are there areas where people think the things that  
6 the FTC is doing that you say, you know what, it just  
7 kind of really doesn't need to be done and why don't they  
8 do something else instead?

9 MR. BRAUCH: I think it's hard to say that.  
10 There's just so much that needs to be done. The FTC over  
11 the past 15 years, of course, has been much more  
12 aggressive and has tried to focus on those areas that are  
13 most important. I do see the FTC jumping into a lot of  
14 areas that are kind of new and burgeoning and there are  
15 benefits to that, to sending a message of deterrence  
16 right at the outset where you see the potential for fraud  
17 whenever there's a new means of communication. There's  
18 also new opportunities for defrauding people whether it's  
19 the internet or what has flowed off the internet with  
20 that -- the kind of buzz marketing for example in more  
21 recent years trying to get in on the outset.

22 But I think you also have to be careful that  
23 you don't address something just because it's new. You  
24 have to address something because it's important. And so  
25 I think focusing again on those things that are important

1 is the most important. I don't know that there's an area  
2 where I'd say gee, the FTC shouldn't have done that.

3 MR. BAKER: Well, then the next one is kind of  
4 -- how do we -- our mission is protecting consumers, not  
5 necessarily bringing cases against evildoers, although we  
6 certainly do that. And there's a whole lot of ways. One  
7 of the fortunate things I think about the structure of  
8 the FTC is it doesn't lock us in to one tool in the  
9 toolbox. It doesn't say you have to do it this way or  
10 that. We've got -- and the FTC has used different things  
11 through the years.

12 In the 1970s we did a great number of rule  
13 makings. We've been really heavy in litigation  
14 particularly in the '90s -- '80s and '90s. More recently  
15 we've been doing a fair amount of public workshops which  
16 again are time consuming. And of course, we have a  
17 variety of consumer education tools and outreach,  
18 speeches by the regions, consumer education materials.  
19 Identify theft is probably the great example. We've  
20 really taken the national lead in developing things that  
21 help people.

22 How do we balance those out? I mean, are there  
23 tools that we are using more than we should? Are there  
24 other ways we should hit that balance? And if we've got  
25 some of these -- being from a region, I can't help but





1 small agency's clout because the FTC does have a limited  
2 amount of resources and nationwide jurisdiction and very  
3 broad jurisdiction.

4 The one thing I would ask about is the -- the  
5 advocacy piece. I know the FTC was involved in a fair  
6 amount of advocacy on class action relief.

7 MR. BAKER: Can I turn to that one --

8 MS. SCHWARTZ: Yeah.

9 MR. BAKER: -- for just a moment because I was  
10 going to ask about that and I'm sure Henry has got some  
11 thoughts too.

12 In the early 1980s, the FTC had a pretty active  
13 program. I think for the first time particularly in  
14 commenting on state laws -- when asked -- state laws,  
15 state regulations, that were essentially special interest  
16 regulation legislation that was meant to give an  
17 advantage to particular competitors. And when asked, had  
18 written comments. We got some pushback particularly from  
19 elected legislatures or legislators or Congressmen,  
20 didn't like us weighing in. We still do some of that,  
21 not that much.

22 The other thing that's come in more recently  
23 when Tim Muris was chairman was a program of act, the  
24 going out and looking for class -- consumer class actions  
25 that we thought were really not solving problems and

1 maybe weren't providing consumers with some good  
2 remedies.

3 And I know we did some advocacies, consumer  
4 amicus briefs, on some of those. There was one here in  
5 Chicago at Ameritech our office was involved in where the  
6 attorneys were going to get a ton of money and consumers  
7 were basically getting locked into longer to a program  
8 they really didn't want in the first place.

9 And I talked to the judge in that case at  
10 another program and he was delighted we'd weighed in  
11 because we reinforced his ability in the face of counsel  
12 on both sides to say this is really not pro-consumer.

13 MS. SCHWARTZ: Now, was the end result there  
14 more -- more for consumers or is it really to sort of get  
15 -- get at these large legal fees that there --

16 MR. BAKER: I think the FTC has -- has  
17 commented on -- on both.

18 MS. SCHWARTZ: Yeah.

19 MR. BAKER: Sometimes there are real problems.  
20 I think that they're required. But whether the remedies  
21 that come out of those are appropriate? And sometimes it  
22 could be, of course, that this is a weird technicality of  
23 the Fair Credit Reporting Act and we -- and nobody should  
24 be worrying about it.

25 But it's not been real extensive and it wasn't



1 really easy for us to track going on class action because  
2 there's no newspaper that I think collects these.

3 Henry, this seems to feed into some of the  
4 stuff you're talking about.

5 MR. BUTLER: Yeah, I think that is a  
6 potentially important role, you know, the courts and the  
7 judges are supposed to monitor the class action or awards  
8 and try to make sure they're proper. Obviously there's  
9 been some problem with that and there may be a role for  
10 the FTC on that.

11 I think the bigger concern may be on the  
12 substantive side of what's going on in the class actions  
13 where the FTC has the expertise on -- on what is -- what  
14 -- what they consider -- that the FTC to be unfair and  
15 deceptive practices.

16 For example, the -- a lot of the state consumer  
17 protection acts have language very similar to the FTC Act  
18 but it's interpreted more in the -- in that '70s vein as  
19 opposed to what the -- what the FTC has been doing more  
20 recently. And I think that that has been part of what's  
21 led to a lot of the increased litigation there.

22 By the way, when I was talking about the amount  
23 of litigation under the state consumer protection acts  
24 earlier, I neglected to mention that the trend on that is  
25 that the number per year doubled from 2000 to 2007. This

1 is not like just a steady state here. There's a real  
2 explosion of this type of litigation.

3 But the class action area is one where I think  
4 the substantive side of the case is important. Another  
5 thing related to that is -- is kind of the educational  
6 function of the -- of the FTC, maybe outside the  
7 litigation function. But to do a better job of working  
8 with perhaps the courts, the judges, to understand this  
9 area, to work with the state AGs. But a lot of these  
10 cases are the private cases where the state AGs are not  
11 involved. They generally focus a little better on what  
12 the consumer interest would be.

13 MR. LUEHR: Steve, when you talk about  
14 allocating resources, one thing we haven't talked a lot  
15 about -- because I almost think it's been a historic  
16 given now, but I think it's something that over 100 years  
17 is relatively recent phenomenon and that is where the FTC  
18 takes its rule-making authority from.

19 I think traditionally -- Teresa mentioned the  
20 1970s -- I think there was a greater appetite for -- for  
21 issuing some regulations kind of based on its own  
22 authority. We think there's a problem here. Let's go  
23 forward and regulate, maybe have some very specific  
24 rules.

25 I think one thing that served the FTC well and

1 you see this kind of across the board, whether it's in  
2 the area of telemarketing -- I'm thinking of things like  
3 the 900-number rule, things like that, is that the FTC  
4 often where there are very specific regulations has  
5 waited for Congress to give them specific authority to go  
6 forth and issue a set of regulations. And I think when  
7 you -- when you're in an area of law where you want to be  
8 that specific. I think it's wise to wait for Congress to  
9 give you that authority, not just because it gives the  
10 agency political cover but also because you end up with  
11 clearer direction, you end up with kind of the voice of  
12 the public telling you where you think the real problems  
13 are. And I think that has served the agency well over  
14 the years.

15           And one thing that's come out of that, and I  
16 think it's very important, is the concept of one law,  
17 many enforcers. Where Congress passes a law and says the  
18 FTC shall set forth these regulations but we're not going  
19 to kick the state AGs out of the box. The state AGs will  
20 have authority under this statute and I think that's been  
21 a very effective regulatory regime. And I think those  
22 two have really combined out of the history of -- of  
23 Congressional action and FTC action.

24           The other thing I think you're talking about,  
25 rule making, the concept of putting a rule up for review

1 on a fairly regular basis, every five years or so, I  
2 think is very healthy. And it allows you to update the  
3 rule, make sure you're taking into account new  
4 technology, for example.

5 I remember even simple things like the jewelry  
6 guides, you know, how far down do you have to scroll to  
7 see how big, you know, that two-carat diamond really is.

8 Yeah, you know with the dawn of the internet,  
9 those are some very helpful discussions with the advent  
10 of new technology.

11 And it leads into your question, which is  
12 balancing resources. If the agency doesn't feel the need  
13 to go out and issue all of these regulations on its own  
14 but can do so either on a regular basis or when Congress  
15 speaks, it kind of frees it up to take care of all the  
16 other things and then go forward with rule making when it  
17 has a very specific directive to do so.

MS. SCHWARTZ: I take a little issue ther17



1 And they had enough political cover that they can -- they  
2 can do it -- if it's needed and a good idea, they should  
3 do it.

4 MR. BRAUCH: As to class actions, the state AGs  
5 are getting notice of the settlements if they affect  
6 consumers in our states under the Federal Class Action  
7 Fairness Act. That law gives us notice. It gives us no  
8 authority to do anything about it if we don't like it.

9 We have intervened in kind of a few of these  
10 and gotten settlements improved for consumers. We have  
11 not tried to undo any of them in the sense of getting it  
12 completely eliminated but we've got them improved for  
13 consumers. It's not a role that we relish, though. It  
14 is a role that's been basically put before us. I would  
15 rather spend our resources doing something else rather  
16 than policing class action settlements. I think that is  
17 not a role for the FTC or the states. I think it's a  
18 role for the judiciary. And if the judiciary is doing  
19 it's job and looking at it and says this isn't fair or  
20 looking at it and says I want input from the state AGs, I  
21 want input from the Federal Trade Commission. I think  
22 that's the way to go.

23 But we have to focus our resources and they are  
24 limited on the things are important. And regulating  
25 class actions is not something that we need to be doing.



1           There are no Better Business Bureaus, there are  
2 no state attorney generals, there are no trade  
3 associations that I'm aware of, there are no legal  
4 services things. And anything that's done, they've got  
5 to do it. And it just brought it home how much of the  
6 overall consumer protection efforts in the United States  
7 are a system. We do some. Hopefully we provide some  
8 leadership.

9           But it also includes the state attorney  
10 generals, the state regulatory -- other state -- the  
11 local regulatory folks, a lot of private lawyers and  
12 trade associations that are counseling their clients on  
13 how to avoid these problems. And -- and -- and we're  
14 kind of all -- it's got to work together for us to do it.

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1 funeral rule offenders program, we've worked out with the  
2 National Funeral Directors Association. There's types of  
3 counseling, but I think counseling, self-regulation, and  
4 rules and guidelines of better business bureaus and  
5 various trade associations. The one that, I think,  
6 people think of most is the national advertising division  
7 of the Better Business Bureau, which reviews national  
8 advertising, which has become very effective. And I  
9 think the number of national advertising cases the FTC  
10 has done over the years has declined. And presumably --  
11 well, our best question for our panel is have we kind of  
12 given enough to the NARB, does that work? Are there  
13 other self-regulatory systems that we might have?

14 Paul?

15 MR. LUEHR: I think -- to comment on the  
16 international aspect, I think a lot of people don't  
17 realize just how unique the Federal Trade Commission is  
18 within the entire international scheme or legal scheme  
19 out there. The FTC has very few direct counterparts  
20 around the world.

21 You know, the Australian, the ACC -- A triple  
22 C, the competition commission in Australia comes somewhat  
23 close. The U.K. has a fair trade office that's somewhat  
24 close. But off of -- many of those offices, our focus on  
25 the antitrust mission or the -- or the competition



1 unique and fortunate we are to have an agency like the  
2 FTC that both has that mission and is willing to bring in  
3 enforcement actions.

4 And in terms of harmonization and working with  
5 other people, either on a self-regulatory front or on the  
6 state front, I come back to the concept of data  
7 collection and letting data and the real numbers out  
8 there drive our cases.

9 I think in some cases like the funeral  
10 directors situation, you know, part of that was driven by  
11 what the FTC was seeing when it went in with test  
12 shoppers and was finding things that were probably of  
13 surprise even to the funeral directors themselves. Just  
14 how poor the compliance rate was, for example, or how  
15 gummed up some of these price sheets looked when you  
16 walked in.

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1 here and the FBI doing it here and customs doing it over  
2 here. Well, if you put all those together, you'd have a  
3 much more robust source of information from which to work  
4 and you'd be saving resources because you would have a  
5 central repository to work from.

6 So I think in many different respects, the FTC  
7 as a facilitator and as a data collector is very  
8 important and will continue to be important.

9 MR. BAKER: Okay. So the -- one of the ideas  
10 is central source some of the data and notes and trends  
11 particularly in frauds and other things and share those  
12 out with particular parties then?

13 MR. LUEHR: Yeah. And I think one that's  
14 looming on the horizon right now that could be another  
15 laboratory for the FTC is in the area of data security.  
16 And, you know, we've talked about identity theft. They're  
17 already the repository for identity theft complaints.  
18 But the FTC is moving into this area of data privacy and  
19 data security and it's an open question where -- what  
20 role the agency should play. I think they're a little  
21 too general when they come out with a statement in an  
22 order that says you have to use commercially reasonable  
23 means.

24 All my clients come to me and say, I don't know  
25 what that means, what's commercially reasonable for data

- 1 security? And maybe part of that answer comes from
- 2 looking at data breach cases, collecting information on

1           We've had parallel activities whether it's a  
 2 data breach or it is something relating to collection of  
 3 high school student data, national research center,  
 4 college and university admissions, is a good example.  
 5 The FTC settlement reached a certain plateau. It  
 6 actually started after our multistate started, but the  
 7 FTC being a singular entity, as opposed to the AGs  
 8 working together, got done more quickly. States looked  
 9 at it and said we can do a little bit different, we can  
 10 do a little bit more to protect consumers here. And we --  
 11 I think we've achieved a little more in that settlement.  
 12 But did it make sense for the two of us to be working in  
 parallel re quickly24 -2.26? working in

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1 do. Work together and we both have fault in not  
2 communicating soon enough or -- or in bringing all of the  
3 stakeholders in enforcement together.

4 MR. BAKER: Does it sometimes feel like the  
5 movies where the FBI shows up at the crime scene and  
6 says, we're in charge now.

7 MR. BRAUCH: Well, that happens sometimes in  
8 the real world, not just in the movies, not as much with  
9 the FTC but maybe with the FBI.

10 But in any event, yeah, it does feel like that  
11 sometimes. And I think we can -- we can all do a better  
12 job of that. I think it would be helpful for us to -- to  
13 have the folks who are the heads of the different  
14 divisions of the FTC working more frequently with the  
15 folks who are the point people for the AGs in certain  
16 areas, whether it's automobile or privacy or debt  
17 collection or whatever it is. We have our working groups  
18 going. You have your different divisions working on  
19 things. You know, we just need to coordinate better  
20 because, as I mentioned before, so much of what we do is  
21 national in scope because what our consumers encounter  
22 are national advertisements.

23 MR. BAKER: Teresa? I'm sorry, Henry.

24 MR. BUTLER: I'd like to follow up with Bill  
25 just to -- I mean, maybe other people out there are

1 thinking the same about the -- a little skepticism about  
2 the AGs and their motivation on this and I wanted to just  
3 -- get you to kind of help address this because of work  
4 coordinating across states.

5           It seems that the so-called aspiring governors  
6 may get a little more aggressive than the people at the  
7 FTC would like them to be on some issues at times. Does  
the FTC have any role in trying to guide that



1 the marketplace. That's what we care about. And, you  
2 know, most of the people who are driving this are not --  
3 and most of the AGs are elected but not all -- but it's  
4 not so much the AGs themselves who are driving. This is  
5 staff who know this stuff who work it day in and day out.  
6 We are the ones generally who are negotiating the matter  
7 and certainly the AGs and chief deputies and others at  
8 the higher levels in the offices have a role to play and  
9 have an impact there. Add in some areas, like my AG has  
10 had a very, very active role in predatory lending.

11 But that's not always the case. We're trying  
12 to come up with a result that we think makes sense. We  
13 don't always agree with the FTC. I think if we were  
14 working together at an earlier point in time, the kind of  
15 impact that you think would be good would probably be  
16 more prevalent. It may have a sense of a better informed  
17 outcome but not always.

18 MS. SCHWARTZ: To pick up on Bill's earlier  
19 point about not overlapping, I mean, we don't have enough  
20 resources to be all bringing the same cases and so forth.  
21 And tying it into the international arena, that does seem  
22 to me to be a niche for the FTC. Because as the national  
23 consumer protection agency, it can go out to the world  
24 and develop relationships which are kind of long-term.  
25 The marketplace is going global and we have to be on the

1 global stage and we have to be interconnected and that  
2 takes a lot of work, which has paid off -- Steve and I  
3 talked about this yesterday, I think. It has paid off.  
4 It's kind of down the road. I think the trick for the FTC  
5 is -- is figuring out to really be efficient about making  
6 these connections in a way that we -- the Commission --  
7 Bill's long-term relationship in connection perhaps with  
8 cases that are fairly ripe so that when you take the trip  
9 you do two things. You do some sharing of information  
10 and you actually work on your case, something like that.

11 Because I do think that the boondoggle aspect  
12 of a lot of travel around the world, which is perhaps not  
13 very productive, is -- has one benefit, which I think if  
14 you can give that to the lower level staff it's a real  
15 educational opportunity and it gives those hardworking  
16 people a chance to, you know, see the world a little bit.  
17 There's some merit to that.

18 But I think the travel can really be overdone.  
19 And an agency that doesn't have a lot of resources, I  
20 think, just really close attention needs to be paid to  
21 how those resources are used because the world is very  
22 big and the resources are very limited. But I do think  
23 it's an important role for the FTC and it's uniquely  
24 positioned to play that role.

25 It's interesting you mention the travel and the

1 staff aspect of it because one thing we haven't talked  
2 about is the basic concept of training. And I think the  
3 FTC is a little different from other agencies, in part  
4 probably because of its size where there's not  
5 necessarily a formal training center or training program  
6 and maybe they could benefit from that. I mean, the  
7 justice department, for example, has something called the

1 training and -- and skills.

2 MR. BAKER: I think training is a good point.  
3 One of the things I think we bring some to the rest of  
4 the world is -- is being able to understand how some of  
5 these scams work and why they're scams and how to prove  
6 that. We occasionally ran into federal prosecutors who  
7 are kind of interested in this who say, well, they do  
8 deliver something or they've got verification tapes so  
9 therefore they must be legit. They just don't have the  
10 experience with them to understand them.

11 Or Internet auction fraud, which is a huge  
12 problem. We've got police departments all over the  
13 country with local people selling 2, \$3,000 in goods they  
14 don't have. They don't know how to prosecute them. They  
15 can't afford to bring in witnesses. They don't know what  
16 to do.

17 And I think Paul's right that some joint

12t12 d(ea.27ot had(out24 -2.y mng )Tjno haveme0Tj2.842 -os 2t auction fraud, wh



1           And I think some more communication between the  
2 consumer protection groups and the FTC and perhaps the  
3 AGs as well. I think they go to the AGs more than they  
4 go to the FTC actually because I think they find it a  
5 little daunting to figure out how to -- how to relate --  
6 would be a very positive and fairly easy step to keep the  
7 communication going.

8           MR. BAKER: I think so. I, being from a  
9 region, I kind of like to think that we can -- we can try  
10 to play some of that function --

11          MS. SCHWARTZ: Maybe you do --

12          MR. BAKER: -- but we need it. And the other  
13 kind of complement to that is sometimes you've got  
14 criminal authorities, either the state or federal level,  
15 that are kind of looking, gee, is somebody else looking  
16 at this, what other data is there, what do we do with  
17 this verification tape stuff, how do we overcome it? Who  
18 do you call? And they're facing the same --

19          MS. SCHWARTZ: Yeah.

20          MR. BAKER: -- thing on what's the point of  
21 contact for the FTC? And it's not very -- very plain.  
22 And we've been discussing a little bit whether there  
23 isn't something we can do there?

24          MR. BUTLER: Just to reiterate the point, I'm a  
25 one-note person up here, about the product actions under

1 the state consumer protection act. There's a -- there's  
2 a tone that seems to be that, you know, more enforcement  
3 is better than we -- that we've got out here. But I  
4 think particularly in areas like advertising, you can go  
5 too far. And that's where I think a lot of the private  
6 actions might be.

7 And so there's -- and, you know, the FTC needs  
8 to bring a lot of these actions and so forth. But we  
9 could get over deterrence of the type that we should be  
10 worrying about in all kind of public policy areas. And  
11 -- and more is not always better. And I think we've got  
12 a specific area that our data is going to show that  
13 there's probably some problems there that -- that need --  
14 need some intervention. So when we're talking about do  
15 you play well with others, this is an area where we  
16 perhaps need to look at later on.

17 MR. BAKER: Gosh, Henry, well taken. I mean,  
18 the FTC is trying to make sure we are not going to jump  
19 into things that we don't know and kind of impose  
20 remedies that might end up being worse for consumers.

21 MR. BRAUCH: Let me just add this, when Lydia  
22 Parnes was deputy director for consumer protection, it  
23 was very clear that she was our noted liaison, the state  
24 AGs. I'm not sure we have a liaison now. I know I can  
25 call you up and I can get what I want but I'm not sure if

1 we have a designated liaison right now.

2 So I think that would be important both for  
3 federal agencies, local law enforcement and AGs, to know  
4 that there is somebody identifiable that we can contact.

5 MR. BAKER: Okay. The Bureau of Economics has



1 income people kind of knew because they're getting it  
2 from their doctors, but the great mass of single head of  
3 household, low income, didn't get that information until  
4 they had advertising. So some of the salutary benefits  
5 of advertising, I think, it showed and these things  
6 they've done on prices in the world.

7 Are there other things that we could capture  
8 here that anybody is aware of that would be really good  
9 things for them to look at?

10 MS. SCHWARTZ: I think that -- you know, to be  
11 honest about when we did strategic planning at the Bureau  
12 of Consumer Protection, under Jodie, which was kind of  
13 the first effort at that, we did it within the Bureau of  
14 Consumer Protection. And we, to my knowledge, we did not  
15 include the Bureau of Economics looking back about that.  
16 You know, that was a terrible thing. I mean, we didn't  
17 bring them in and get them involved in our project so  
18 that we would know more about the internet.

19 And so I don't know why that -- why that  
20 happened. If it -- I don't know what is going on now in  
21 that connection. It seems to me there are key players in  
22 the -- in the law enforcement, consumer education, all  
23 the things that the bureau had as part of its strategic  
24 plan and -- and we didn't do that.

25 I would surely hope that they're doing it now



1           But some of the measures have to do with are  
2    you bringing cases that -- that reflect the concerns of  
3    consumers through your -- by looking at your database so  
4    that at least you know that you're in the ballpark. How  
5    many hits on education side and goals to get a  
6    million-plus or maybe a billion more than that. I can't  
7    remember the numbers. It does -- you know, it does show  
8    people are going there and they're reading the material  
9    so it is a measure.

10           Do they learn something and does it produce  
11   better consumer decisions, more informed decisions,  
12   that's what's very hard. They ultimately make a decision  
13   -- make an impression that makes the work -- the consumer  
14   better and informed and able to navigate.

15           I've been reading recently about the whole  
16   financial literacy area with respect to consumer  
17   education. Some people just conclude that you cannot  
18   educate people sufficiently. You have to -- you have to  
19   give them a break. You can't educate them about the  
20   complexity of this arena. And no matter how much  
21   information you put out, you're really not going to have  
22   -- because it's so complicated, you're not going to have

1 difficult to calculate. I think one measure somebody had  
2 mentioned was if you increased the price of spam, because  
3 the enforcement has been so great in that arena, that it  
4 becomes less and less attractive as an option for raising  
5 money and you move to some other scam probably. But that  
6 -- that kind of data is hard to collect. I think you end  
7 up with a lot of proxies.

8 In cases you've brought, how much money is  
9 returned to consumers? That is -- that's important.

10 MR. LUEHR: I think part of this goes to the  
11 Bureau of Economics. And I think it would be helpful to  
12 have the Bureau of Economics follow up on groups of cases  
13 more often precisely to answer this type of question.

14 I think it's a good idea to have the Bureau of Economics follow up on groups of cases more often precisely to answer this type of question. 68 Tdestination.

1           By the same token, federal criminal prosecutors  
 2           as has been mentioned are not used to doing large volume  
 3           witness cases. You mention to them, I've got 25,000  
 4           victims in this case and their eyes just turn into  
 5           saucers because they go how am I going to put 25,000  
 6           victims, you know, through the court room? And you end  
 7           up with pattern and practice types of conversations and  
 8           how many are the judge and jury going to want to hear?  
 9           Those are good cases for the FTC to bring. And so I  
 10          think numbers of consumers affected would be a measure  
 11          that should be included in the group.

12           When you mentioned B.E., I think they would be  
 13          helpful as kind of an after action set of eyes to put on  
 14          a group of cases, particularly when after a year or two  
 15          you've done a bunch of them and you sit back and say, how  
 16          have we done, is this working?

17           And the deterrent effect you mention is  
 18          probably the toughest one to get your arms around because  
 19          you don't know what you don't know. But one area where

es, y. 2.7. The traditional role played (a deterrent effect) is to put on the

1 a fraud case or something like that.

2 And some of the consumer action people would  
3 bristle a little bit because there's a different point of  
4 view being thrown into the mix. And I think in some  
5 cases it was very helpful. And in particular, where it  
6 was a new set of cases, I'm thinking about some pyramid  
7 scheme cases, where there was really a new -- a new type  
8 of economic analysis that was being applied to these  
9 pyramid cases saying at some point the house of cards  
10 falls down and we know this mathematically and we know  
11 this from an economic point of view. I think that's very  
12 helpful. But I think they probably could be even more  
13 helpful in doing some of the after action analysis.

14 MR. BAKER: And Paul's got a good point. The  
15 amount that we include B.E. and talk to them and discuss  
16 things with them has also shifted dramatically over the  
17 years at the FTC.

18 MR. BRAUCH: I think there's so many variables.  
19 It's really hard to measure this.

20 MR. BAKER: Uh-huh.

21 MR. BRAUCH: You know, if you're bringing a  
22 whole lot of lawsuits but you're bringing small cases,  
23 easy knockdowns, in areas that aren't really important,  
24 is that being effective or is it more effective to focus  
25 on larger cases that have a greater impact in the

1 marketplace. In a sense, it's almost like judging the  
2 quality of a painting or a musical performance. It's in  
3 the eyes of the beholder.

4 MR. BUTLER: Well, I think that's part of it.  
5 I mean, at the federal level, you can't tease out the  
6 effects because you just -- you don't have any control to  
7 deal with.

8 What you've got at the state level -- back to  
the states again, okay -- is -- is variability in e.tceuo

1 But if you've got one you think we should pose or if you  
2 think we could open it up, we should do that.

3 MS. OHLHAUSEN: I think we should open it up to  
4 the audience.

5 MR. BAKER: Okay. Stump the experts. Whose  
6 got a question?

7 MS. OHLHAUSEN: I've got a question. This can  
8 be for the whole panel, though, Teresa brought it up  
9 initially about using our rule-making authority more.

10 Are there particular areas that people think  
11 that we should start looking into, you know, developing  
12 new rules?

13 MS. SCHWARTZ: I don't know for sure. There  
14 are some areas that would seem to lend themselves. I  
15 don't know if they're the right areas. But the  
16 behavioral tracking. I've forgotten -- the behavioral  
17 advertising where you're doing a lot of tracking with  
18 people online. And recently there -- are the Commission  
19 put out some guidance for kind of a self-regulation  
20 approach.

21 Looking backwards -- because after the fact, we  
22 all have 20/20 vision we might have -- the Commission  
23 might have thought of regulations governing brokers that,  
24 you know, there's a lot of problems in that -- in that  
25 area.



1           But I was kind of making the more general point  
2     that I think the Commission has been kind of gun shy and  
3     I think that it's -- it should be more open to thinking  
4     about rulemaking as an alternative, as an option because  
5     it can be an efficient way and it can send the signal to  
6     the marketplace about behavior. And it certainly made a  
7     huge difference in telemarketing to have that regulation.  
8     Now that was -- that was Congressionally authorized.

9           But the fact the Commission wouldn't, you know,  
10    proceed itself until it got to Congress, and it had a  
11    great deal of information about how bad telemarketing  
12    was. So I don't say willy-nilly need to. But I do think  
13    the Commission needs to give that avenue more kind of --  
14    recognize that as an avenue to a greater extent than it  
15    has, at least than it did when I was there.

16           MR. BAKER: One -- this is purely personal, not  
17    for the agency, I suppose, but we have one of the things  
18    the telemarketing sales rule addresses is people getting  
19    consumers' credit card numbers or checking account stuff  
20    and then keep billing them. People don't realize that  
21    they're opening up the spigot on their things. But those  
22    only apply to telemarketing transactions.

23           And we have people getting consumers, these  
24    buying clubs, Bill referred to that we've done cases on  
25    too. The trick is somehow trick you out of giving that

1 out in return for a free prize or to look at a product  
2 and then they got it and then they're going to keep  
3 billing that until you can finally stop them. And I've  
4 wondered personally whether some sort of complementary  
5 rule for internet transactions, direct mail transactions,  
6 not just telemarketing.

7 MS. SCHWARTZ: Advance the credit cards within  
8 the rule.

9 MR. BRAUCH: Excellent suggestions.

10 MR. BAKER: Paul?

11 MR. LUEHR: Well, I think there's one area -- I  
12 mean, having said that I think it's often more wise for  
13 the agency to wait for Congress to act, I do take  
14 Teresa's point about the agency's hesitancy at times.  
15 And right now we're in a situation with regard to data  
16 security and data breach response where we have gone  
17 two-and-a-half years of state action, roughly speaking,  
18 there are 44 state actions -- state statutes out there  
19 that deal specifically with the concept of -- of data  
20 breach response on one side.

21 On the preventative side, the entire industry  
22 has moved forward, especially in the credit card  
23 industry. There is now something out there called the  
24 PCIDSS, the payment card industry data security  
25 standards. Very precise, very intricate in terms of

1 their level of detail in terms of what you have to do  
2 with credit cards.

3 And I think it's -- it's an interesting  
4 question whether the FTC should insert itself there.  
5 Right now as I said on most of its orders it says for  
6 data security you must use something that's commercially  
7 reasonable. And a lot of the private practitioners out  
8 there are floundering a bit because they don't quite know  
9 what that means.

10 And there is, I think, some frustration that  
11 the Federal Government has not acted at the Congressional  
12 level because the industry is frankly a little tired of  
13 dealing with 44 different statutes and trying to figure  
14 out what do I do to comply with all of these? And  
15 there's a lot of lawyer time spent trying to figure out  
16 if I take this one particular action, is it going to  
17 comply here as well as here as well as here as well as  
18 here? And I think that's an area -- it's kind of an open  
19 book right now. Like I said, it may be an interesting  
20 laboratory for the FTC because I think there is a bit of  
21 a hue and cry for federal action, there is -- there is a  
22 need for some greater specificity. And some of the other  
23 traditional actors in the marketplace have already an arm  
24 moving forward basically past the Federal Government for  
25 better or worse.

1           MR. BAKER: Okay. Bill is using the P word,  
2     preemption, which I know you have to be wondering about  
3     but we're almost out of time.

4           So let me do one thing and clearly this ship of  
5     the Federal Trade Commission is moving through time,  
6     whether we guide it or it drifts, it's going to be  
7     somewhere different. Ten years from now, where is it  
8     going to be? I mean, in 1970 Teresa was saying it was  
9     kind of dead doing worthless labeling things. By 1980  
10    they were about ready to shut the place down altogether.  
11    After a lot of single victories, 10 years ago it was  
12    different, it's going to be different again.

13           Any idea how you would expect it to be  
14    different, bigger, smaller, different mission, what do  
15    you think?

16           Last, final thoughts?

17           MR. BRAUCH: Bigger because there will be even  
18    fewer mom and pop retailers out there and so there will  
19    be even more national retail sales and advertising. The  
20    need will always be there and I think it probably will  
21    grow.

22           MR. BAKER: Okay. Henry?

23           MR. BUTLER: I -- I -- I'm -- I can't imagine  
24    it being smaller because it's in Washington.

25           MR. BAKER: Fair enough. Paul?

1           MR. LUEHR: I think it's going to be more  
2 technical in terms of the level of skills that's going to  
3 be required of the investigators and attorneys.

4           That's where the marketplace is going and  
5 that's going to be a requirement despite all those kids  
6 who went to law school to avoid math. I think they're  
7 all going to be numerically and technically oriented.  
8 And I think -- I would hope that in 10 years, they're  
9 often seen as a more credible, independent, and reliable  
10 source of information on consumer issues particularly  
11 within the federal family. So if the banking industry is  
12 having concerns about what consumers are thinking and how  
13 they're being affected, I would like to see the FTC as --  
14 as kind of a neutral broker in terms of bringing that  
15 data forward and saying this is what we think is  
16 happening in the marketplace.

17          MS. SCHWARTZ: Well, I'll go a step further and  
18 have that -- that role be a very official role; that is,  
19 Congress should give the FTC this role of representing  
20 the consumer and competitive interests, those two, with  
21 respect to these other agencies and their regulation. I  
22 think it needs to have a little more clout.

23          I think the marketplace is really changing for  
24 the -- for the reason that we have -- I mean,  
25 computerization has changed a lot, all those scams with

1 fees, and I'd include all these credit card fees, and the  
2 banking fees, and all of this which is ripping off  
3 consumers. I mean, the amount of money that is being  
4 collected, way exceeds I think what most people would say  
5 is warranted by the costs that these sellers are  
6 incurring.

7           And I would look to the FTC to be thinking  
8 ahead. They've got three basic -- under Section 5 --  
9 three basic doctrines of deception which is very clearly  
10 articulated. The requirement that you substantiate your  
11 claims, also very well articulated. It's been -- had a  
12 big impact on how people look at that requirement. And  
13 unfairness, which is regulated by statute as -- as well  
14 as principles. It's kind of a cost benefit analysis  
15 needs to be made. And I think there may be some  
16 opportunity for the FTC to develop some other doctrines  
17 to deal with the marketplace that -- that I see.

18           I was so struck by the B.E.'s study that people  
19 do not understand these contracts. Well, whose  
20 responsibility is that? Is it the responsibility of B.E.  
21 to find out that consumers don't understand these  
22 documents at all? I mean, really, educated people don't  
23 understand these documents. Or is the industry's  
24 responsibility to test out their documents, to see that  
25 the consumers they're working with understand these

1 documents.

2 I'd love to see the FTC think about that and  
3 try to figure out whose responsibility, perhaps there is  
4 a responsibility to substantiate that your document is  
5 understandable to the consumers with whom you are  
6 dealing?

7 MS. OHLHAUSEN: Teresa, I just want to mention  
8 that study was actually on government required  
9 disclosures that were being considered. So -- so that  
10 adds another element there that if the -- if, you know,  
11 another part of the government is doing this, perhaps  
12 they should realize they should be testing or something.

13 MS. SCHWARTZ: Right. Well, the instruments  
14 themselves have gotten so complicated that the truth in  
15 lending disclosures really are no longer adequate.

16 MR. BAKER: So the question is traditionally  
17 our -- our -- our main remedy at the FTC is since the  
18 information the consumer is getting is bad information,  
19 is to correct it by having disclosures so you get the  
20 more good information. But I guess the question --

21 MS. SCHWARTZ: Right.

22 MR. BAKER: -- you're kind of highlighting some  
23 too is is there a point where they disclose so much that  
24 the disclosures are no longer really useful for people.  
25 Does -- can disclosure -- or at least in just giving

1 people more, solve our problems?

2 MS. SCHWARTZ: Believe me, I don't have the  
3 solution, but I think the FTC is filled with people who  
4 are very, very intelligent. I'd love to see them  
5 thinking about these things because I think there's a lot  
6 of problems out in the market place and we don't  
7 necessarily have the tools we need to deal with them, the  
8 intellectual approach, the legal approach.

9 MR. BAKER: Well, we've had folks that have  
10 traveled from out of town, sometimes long distances,  
11 sometimes starting very early this morning who have been  
12 here to do this today, and I have heard a lot of very  
13 thoughtful comments. And I'd really like to thank  
14 everybody.

15 (A lunch break was had.)

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1 THE FTC'S COMPETITION MISSION:

2 RESOURCE DEPLOYMENT and EFFECTIVENESS

3 MR. ABBOTT: Good afternoon. I'm Alden Abbott,  
4 associate director of the FTC's Bureau of Competition. I  
5 oversee our policy office and also special projects,  
6 other matters. And I am coordinating -- well, I'm  
7 bringing a panel today on the FTC's competition mission,  
8 which will focus on resource deployment -- deployment of  
9 resources to the competition mission and effectiveness of  
10 that mission.

11 We've got several very distinguished panelists  
12 who have great experience as lawyers and scholars who  
13 have written, litigated, done research, spoken publicly  
14 on these issues.

15 Starting off to my right, Tom Campbell, partner  
16 at Baker & McKenzie, who has an extremely impressive  
17 litigation background, having litigated successfully many  
18 antitrust cases, having been a leader in the bar on  
19 antitrust matters and his practical experience on  
20 litigation issues will be of great benefit to us.

21 Next to him we have Randy Picker who holds a  
22 chair at the University of Chicago Law School, a  
23 distinguished academic who's written on intellectual  
24 property rights, antitrust regulation, and he has been a  
25 speaker at the FTC and a real polymath in the area of law



1 young scholars to the FTC. And we look forward to what  
2 he has to say.

3 So we're going -- we have just a short amount  
4 of time. Two hours doesn't seem short but we have a lot  
5 to cover. And we would like to start out the panel first  
6 by talking about how does one measure the benefits of our  
7 competition activities.

8 There is, of course, huge economics literature  
9 on competition but that doesn't tell us a great deal  
10 about the wisdom of pursuing individual matters or  
11 particular types of matters or how we should be  
12 allocating resources. And I'd like to turn the floor  
13 over first to Tom Campbell to talk about the benefits of  
14 the FTC's enforcement actions and remedies and I know  
15 he's going to bring his perspective, the perspective of  
16 distinguished antitrust litigator to bear, in commenting  
17 on the successes and failures of our approach to  
18 competition litigation. Tom?

19 MR. CAMPBELL: Thank you, Alden. Alden failed  
20 to mention my supreme qualification which is that I am  
21 undefeated in litigation against the FTC.

22 So my role here today --

23 MR. ABBOTT: Something we wanted to hide but  
24 ...

25 MR. CAMPBELL: So my role here today is to be a



1 so he can get his merger through, he doesn't care what's  
2 in there. And the FTC stuffs these consent decrees full  
3 of their exotic theories to try to validate them and I'm  
4 just waiting for a chance to litigate them because I  
5 think some of them are a little silly.

6           Anyway, in the context of a merger, I think if  
7 the FTC made a CEO dress up in a bunny suit for a week to  
8 get his transaction through, they'd all sign up, you  
9 know. So the fact of the matter is the FTC does not have  
10 a tradition of trying cases. If you're an aspiring trial  
11 lawyer, you don't go to work for the FTC. That's not  
12 where the action is.

13           And now we have the issue of Part III and I'm  
14 going to give you my view on Part III. And I, for one,  
15 think the FTC has made a mistake to argue that 13B is a  
16 different standard. And as those of you who have been  
17 following all of this in Whole Foods, they got a supreme  
18 victory when the denial of the preliminary injunctions  
19 had been reversed. I understand this is still open and  
20 may be en banc yet.

21           But for the moment, the opinion of the D.C.  
22 Circuit is that 13B is a different standard and the FTC  
23 should have gotten a preliminary injunction. And while  
24 the court suggested that this new interpretation of 13B  
25 doesn't mean that a district judge has to rubber stamp

1 any request for preliminary injunction from the FTC, it  
2 really stacks the deck in favor of the FTC. I, for one,  
3 think it's an unfortunate decision. The Antitrust  
4 Modernization Commission, of course, recommended that  
5 there not be a double standard and frankly I think it may  
6 be a ruling that the FTC in the long run is not going to  
7 welcome and Congress may in fact seek to correct.

8 So what's wrong with Part III litigation?

9 Well, for one thing, it takes forever. The Ukiah case I  
10 was speaking of took five years to get it litigated. And  
11 in that case, we were under the limits of  
12 Hart-Scott-Rodino. So on the eve of the closing of  
13 transaction we got a call from the FTC and they said,  
14 please, don't go forward, we want to look move into this.  
15 And we said sorry and we closed our transaction. And  
16 they started their Part III thing and it went on and on  
17 and on and on.

18 Now, as a trial lawyer, one of the first  
19 strategic decisions you have to make first is who  
20 benefits by the passage of time? And, of course, we  
21 care. We had gotten our transaction through.

22 Yet every time we were on the phone with the  
23 ALJ, we said we're ready to go to trial. We kept on  
24 answering ready, anytime, we're ready, we're ready. And  
25 the staff had more and more reasons, they had to look at

1 this, they had to find an expert, they had to take a  
2 deposition, five years before it got tried. And that is  
3 the history and that's my experience and maybe that's  
4 anecdotal but most of the Part III cases I look at are  
5 ridiculous for the amount of time they take.

6 And just to contrast that, in the Healthsource  
7 case which I had, the passage of time being the most  
8 crucial issue, Healthsource was slapped with this  
9 monopolization case by U.S. Healthcare, a major  
10 competitor. It stopped their financing. They were going  
11 to die if they didn't get the case moved forward.

12 And in that case I pushed to get the case to  
13 trial early. We agreed to be assigned to a magistrate.  
14 The magistrate heard the case. We had the whole  
15 antitrust case tried in six months after it was filed.

16 We bifurcated so we didn't have to have damages  
17 and got -- said there was an injunction case, won that,  
18 and a year later had the thing through the First Circuit  
19 with a nice opinion from Mike Boudin.

20 So antitrust cases don't have to take five  
21 years. You've got the Hart- -- in merger cases, you've  
22 got the Hart-Scott-Rodino, you get tons of information.  
23 The idea that you need more information is just  
24 ridiculous.

25 Now, let's then get to the issue of the

1 competency of ALJs. Some of you may remember when the  
2 FTC was compiling its losing track record in hospital  
3 merger cases. You would hear the lament that the reason  
4 they were losing them was because of local judges, local  
5 judges favoring these local businesses.

6 Of course, that lament conveniently overlooked  
7 the fact that Stanley Roszkowski, the district judge in  
8 Rockford, gave the government an injunction against the  
9 Rockford Hospital merger and a chief administrative law  
10 judge, Louis Parker, not a local judge, denied them one.  
11 But anyway, the story was that the reason they were  
12 losing their cases was local judges. To quote Bob  
13 Leibenluft, a cheerleader for the FTC, local judges  
14 typically have little experience with merger law or  
15 sophisticated antitrust economic analysis. For those of  
16 you who have my paper, I have footnotes where I get all  
17 these wonderful quotes. But anyway, so there are some  
18 FTC partisans claiming that ALJs are more competent than  
19 district judges, what we call Article III judges.

20 But there's actually a big body of evidence  
21 that the Commission thinks they're less competent than  
22 district judges. To start with an ALJ goes and hears a  
23 case and makes findings. The Commission does not even  
24 have to accept those findings.

25 So this is the opposite of what you would



1 encounter in federal court or state court where a judge,  
2 who views the witnesses and makes findings of fact, you  
3 have deference to those credibility findings and so  
4 forth. And probably the greatest example since we're  
5 right here in Chicago, which is the home of Evanston  
6 Northwestern Healthcare -- well, I have many comments  
7 about that case, there's not time for all of them. What  
8 happened in that case was that the chief administrative  
9 law judge Stephen McGuire made findings of fact. He  
10 probably spent five years on that case too. I've  
11 forgotten how long that one ran. He found the market,  
12 the geographic market. The Commission totally  
13 disregarded the market he found and found a different  
14 market. What was the point of having the trial I would  
15 ask you. And then he also made a finding that there were  
16 four hospitals in the market he defined that could  
17 constrain any increase in price by the merging hospitals.  
18 And that's a fact that it's very hard to understand how  
19 you could disregard in a merger case.

20           Anyway, for those of you who have my bio,  
21 you'll see I've got another article on the Evanston  
22 Northwestern decision which in my view is unconvincing  
23 and I think it's going to be -- going to the dustbin of  
24 FTC precedence when you come to the end of the road in  
25 Evanston and they come up with a zero relief ruling.

1 Most people will view that decision as being sort of like  
2 a consent decree. It's an editorial endorsing certain  
3 prosecution theories. It's not a litigated case that  
4 would stand as a strong precedent. So my view is the FTC  
5 would be better off trying cases before Article III  
6 judges and developing and bringing in experienced trial  
7 lawyers to head up the trial team.

8 And to take the example of the Department of  
9 Justice, bringing in David Boies, I think in the  
10 Microsoft litigation -- and there are -- and I don't mean  
11 to be slamming the FTC that they have never had any  
12 competent people because that's not my view at all.  
13 Clearly having somebody like Bill Baer behind the FTC's  
14 prosecution at FTC Staples undoubtedly helped bring that  
15 case into sharper focus.

16 So here is what I think experienced trial  
17 lawyers can bring to the table. First, they can move  
18 litigation along and not chase down every rabbit hole  
19 that the staff might in Part III; second, they can bring  
20 judgment as to what direct evidence is likely to be  
21 credible as to market definition, market power, similar  
22 issues.

23 Here we are -- and I would just point to FTC  
24 Staples as being an example of a litigated case which is  
25 both credible and convincing in explaining market power

1 based on the differential pricing. And I think the  
2 decision persuasively predicts that consumers would be  
3 hurt by permitting the merger to go forward. I don't  
4 think you can say the same about FTC and Whole Foods  
5 based on what you're seeing in the opinions that have  
6 been written so far. And I understand that's still open.

7 So just to sum up where I am on this, I think  
8 the Part III litigation, you don't need it. The idea  
9 that you need more time to sift the facts, I don't buy  
10 that. I think between Hart-Scott-Rodino and ordinary  
11 discovery, these cases can be moved along a lot more  
12 quickly. And so my recommendation would be that the FTC  
13 abandon the Part III process, take their merger  
14 prosecutions to the district courts and beef up their  
15 trial team so that they can really sift through and put  
16 the right evidence in there for most of the economic  
17 theories they're interested in.

18 MR. ABBOTT: Well, very provocative comments,  
19 Tom, to start off. And that's what we're looking for.  
20 We're looking for critiques.

21 Are there any alternatives to what you seem to  
22 be suggesting: abolishing the Part III process? For  
23 instance, statutory or regulatory reforms, that would  
24 make it a better vehicle in your view.

25 MR. CAMPBELL: I guess I have to ask who would

1 want to be an ALJ? I don't know that we're out there  
2 hiring Ph.D. economists. And it just -- and if you write  
3 an opinion and it can be totally disregarded by the  
4 Commission, what's the point?

5 So I just am not sure you can put something  
6 into Part III that makes it a better system.

7 MR. PICKER: So that's interesting. So you  
8 said -- you've said a lot of things that were actually  
9 quite interesting. So we can start with that. But I'd  
10 actually start somewhere else.

11 So I mean you started with the discussion of  
12 the consent decrees. Do you think those -- I mean, I  
13 would have thought we would have judged consent decrees  
14 based upon who gets the competition R & D part of the  
15 show, which we'll get to. Whether they were effective at  
16 shaping competition going forward, right? Having the CEO  
17 jump around in a bunny suit? Well, I guess that's not  
18 too much effect on competition, interesting, right?  
19 Great for you, two, but not for competition. So that  
20 should be the test.

21 And then we can also talk obviously about the  
22 resource constraints faced by the agency and how you  
23 trade off litigating versus settling. Those are general  
24 questions.

25 So do you think the consent decrees just do a

1 lousy job of protecting competition going forward?

2 MR. CAMPBELL: No, it's clearly their  
3 enforcement statements. So if you have a theory on  
4 enforcement as to how competition is hurt, that's where  
5 you put it, is in a consent decree and that's a big  
6 warning sign to people. I would just say as a litigator,  
7 if I had the next guy coming along that was being  
8 threatened with that prosecution, I would not be scared  
9 off by the consent decree.

10 MR. PICKER: And you're not scared off because  
11 you just -- you think it's not meaningful or you think  
12 that if you actually forced them to litigate, they can't  
13 win, see Tom Campbell?

14 MR. CAMPBELL: The latter. Yeah.

15 MR. PICKER: Exactly, see Tom Campbell. That's  
16 interesting.

17 Other people may -- I mean, I'm not assigned to  
18 respond so but I'm happy to talk. That's what I do for a  
19 living.

20 Can I ask about the ALJs?

21 MR. CAMPBELL: Yes.

22 MR. PICKER: So the institutional design point  
23 here is a perfectly general one, which is on the one hand  
24 do we use expert ALJs versus off-the-rack Article III  
25 judges who see so many different things? I would have

1 said, oh, based on what you said, we should upgrade ALJs,  
2 we should call them super ALJs or some other title that  
3 you really like. Obviously, I know something about the  
4 bankruptcy system. We call them judges. They're not  
5 Article III judges; they're Article I judges, right? You  
6 pay them more money.

7 The question as to whether or not their  
8 findings of fact are reviewable, that's a tool we can  
9 play with and all of those are things that we could  
10 design around. And the question is do you think that  
11 buys us something or, I guess, or not?

12 MR. CAMPBELL: I think there's value to having  
13 Article III judges and the breadth of experience they  
14 have in trials and finding facts. And I've never -- in  
15 my experience with ALJs, I have not been overwhelmed with  
16 a greater understanding of antitrust or antitrust theory.

17 And I think that the fact that the Commission  
18 follow their opinions on issues of law shows that they're  
19 not in the lead on those issues. And maybe there are  
20 examples that cut the other way but that's been my view.

21 MR. PICKER: And what do you think is the  
22 virtue of litigating cases, great fun for the lawyers,  
23 right?

24 MR. CAMPBELL: When you get to the end -- look  
25 at Staples. When you get to the end of that and you've

1 got findings of fact and a decision based on a contested  
2 controverted matter, you have a decision that -- that  
3 stands as a precedent.

4 MR. PICKER: The economist in me wants to know  
5 what price. Maybe that's a Rolls Royce and sometimes,  
6 you know, you need a Pontiac. I mean, so ...

7 MR. CAMPBELL: And I'm not saying they have to  
8 litigate every case. I just think the FTC's tradition is  
9 not to litigate enough cases and not to go to court often  
10 enough. And that's -- So when Terry Calvani says you  
11 didn't cite any FTC cases, I'm going where are they?

12 MR. PICKER: Right, I understand.

13 MR. HARROP: I'm not going to say anything  
14 about Article III because the State of Illinois doesn't  
15 have an Article III procedure and I don't really use it.  
16 And I haven't litigated against the FTC in probably 20  
17 years and I guess I should -- consistent with Tom -- say  
18 I'm one and 0 in that category but a smaller number than  
19 he has.

20 I do, though, have a concern about his  
21 statement that you should not be using consent decrees as  
22 an enforcement agency because I can tell you right now  
23 that all enforcement agencies have very limited  
24 resources. In fact I was joking this week the reason I'm  
25 here instead of Bob Pratt is at the moment I am the

1 antitrust bureau for Illinois. All the rest of our  
2 lawyers are otherwise tied up in other matters and doing  
3 things out, attorney leaves, whatever.

4 And if you litigate every case, it means  
5 basically you're going to do one enforcement matter a  
6 year or two enforcement matters a year, if you're in the  
7 Illinois attorney general's office.

8 We depend on bringing cases and convincing the  
9 other side that it's more feasible for them to resolve  
10 the case quickly to reach the result that we want to  
11 reach than it is to set a precedent that Tom can use  
12 later on in some litigation.

13 And also to be a little bit more provocative  
14 maybe than I should be -- and I was hoping Bob's name  
15 would be here instead of mine so I could tell you this --  
16 but I'm not that much of a fan of Article III judges in  
17 all cases either. They aren't economists by training,  
18 they don't necessarily get the things all correct the  
19 first time. And the nature of the antitrust cases are  
20 such that most of the time, the major decisions are not  
21 going to get decided by an Article III judge anyway.  
22 Even if you bring the case, even if you go through  
23 discovery, the cases usually get resolved by agreement of  
24 the parties well before they go to trial. Now, I know  
25 Tom and I have both done cases that that wasn't true on



1 and we did end up in trial. But most of those cases are  
2 going to resolve themselves some way or another and  
3 you're not going to get the precedent you want.

4 Even if they do go to trial, you're probably  
5 going to get a decision by a district court judge who has  
6 a lot of other things to deal with and he or she is not  
7 going to have time to become an expert on antitrust law.  
8 And the decisions you get out of the district courts are  
9 not necessarily going to be significantly more  
10 informative than what you would get out of an ALJ.

11 Where the precedents really get useful and  
12 interesting is when you get up to the appellate court  
13 levels where you have all the law clerks and the judges  
14 have some amount of time to deal with that and you have  
15 some judges who actually know some antitrust law and you  
16 get decisions that make a lot more reasoned sense. The  
17 problem, of course, is it takes a long time to get that  
18 process done and it doesn't happen very often, not just  
19 because the enforcement agency wants to settle but  
20 because the parties involved have too much at stake to go  
21 forward.

22 So I guess -- you know, I say, fine, if you  
23 want more litigation, but basically what you're going to  
24 get is more cases filed and more settlements reached very  
25 quickly afterwards instead of the consent decree

1 pre-filing. I don't think it's going to change the  
2 precedent a lot.

3 MR. WRIGHT: Two quick sort of responses. I  
4 think both are with my economist hat on. I love how  
5 Randy framed this issue of the ALJs versus the Article III  
6 judges as an institutional design problem of sorts. But  
we have to. But

1           Second, on the consent decrees, I think that  
2           the value that consent decrees should be given in  
3           litigation, I think, that -- that point is well-taken.  
4           But again with my economist hat on, do we really know how  
5           effective these things are and -- and -- you know, we  
6           should.

7           MR. PICKER: Don't ask what I'm going to say  
8           when we get to that part of the panel because --

9           MR. WRIGHT: Okay. Then I'm going to wait, I'm  
10          going to wait.

11          MR. PICKER: Yeah, exactly.

12          MR. WRIGHT: We'll both say it.

13          MR. PICKER: And then we'll both be in favor of  
14          knowledge. That's a bold statement.

15          MR. WRIGHT: To be provocative, I'll come out  
16          against.

17          MR. ABBOTT: Fred, Fred?

18          MR. McCHESNEY: Excuse me. I don't have a  
19          whole lot to -- to say because I tend to agree pretty  
20          much completely with what Tom had to say.

21                 In that I may be unduly influenced by the fact  
22                 that after finishing law school and a clerkship for one  
23                 year, my first assignment in private practice was to join  
24                 the army of lawyers and the phalanx of paralegals working  
25                 on the In re Exxon proceeding at the Federal Trade

1 Commission. We were defending one of the respondents in  
2 that particular case. And those of you who remember that  
3 awful episode will recall that it -- it just lasted  
4 forever and ultimately went away but not without having  
5 cost everyone a great deal of time and money.

6 The one thing that jumped out at me  
7 participating in that is a point that goes along with  
8 what Tom said but I'm not sure he mentioned it -- if I'm  
9 duplicating him, I apologize.

10 But as legal proceedings drag on, I am always  
11 reminded of what baseball fans know is axiomatically true  
12 and that is when pitchers slow down, the fielders behind  
13 them lose their focus and the game deteriorates  
14 generally. And I think that's true of litigation also.  
15 When things just bog down and drag on, the quality of the  
16 fact finding and the quality of the legal analysis, I  
17 think, declines as well. That's a particular problem as  
18 well at the FTC where there's a certain amount of  
19 turnover anyway. And as proceedings get -- get  
20 prolonged, we have brand-new groups of people taking over  
21 very old cases and an awful lot of things have to be  
22 started over again both on the fact-finding side and to  
the extent that .268 apavebehieand yegal an0crlEst m ta



1 what the theory of the case was. What the risks were to  
2 the defendant, what the risks were to the enforcement  
3 agency, and those can be useful.

4 Obviously they're not the precedent you can  
5 cite in a brief but they do -- are very useful -- we'll  
6 probably get to this later -- but they are a very useful  
7 way for an agency to tell you what they think the  
8 priorities are, what industries in particular they think  
9 are significant ones that have problems. And I think --  
10 you know, discounting them as a value into where the  
11 agency is going is a problem.

12 But if you want to, you know, set precedent, as  
13 I said, that's a very long and a very expensive process  
14 as Randy said.

15 MR. ABBOTT: Do settlements increase in  
16 importance or rise in their value with several  
17 settlements dealing with the same type of activity? I'm  
18 thinking, for example, of -- of invitations to collude.  
19 Some Section 5 complaints were settled, not fully  
20 litigated, but in the Valassis case I think you had your  
21 third -- at least your third settlement in that area.

22 Is there one -- is there real value to  
23 precedential -- informal precedential value once you've  
24 accumulated a number of -- of settlements in a particular  
25 area?

1

MR. PICKER: I think you should ask Tom whether

1       therefore, there's a bit of a bias that goes along with  
2       that entire process, one whereby the private party just  
3       wants to get out and the Commission is happy to have it  
4       settled too as long as it gets to write the official  
5       record, so to speak, as it gets to record what it is that  
6       this case was about. That's me wondering hypothetically,  
7       so to speak. I don't know whether that actually occurs  
8       or not but, Tom, you may have some insight into that.

9               MR. CAMPBELL: Well, I think that's a valid  
10       problem with consent decrees is that the agency will have  
11       a theory that they want to promote and it may or may not  
12       have any validity to -- and just to give an example of  
13       that. If you go back to Aetna Pru, which I guess that  
14       was a Justice Department consent decree, but there's a  
15       whole section in there about monopsony, which was the  
16       first time it had ever been used as enforcement theory  
17       and it hasn't been used since. But you know, there it  
18       is. And I'm sure the parties couldn't care less about  
19       it.

20              MR. PICKER: Well, and you would think, right,  
21       again, someone managing a portfolio of litigation, I  
22       think of Thurgood Marshall doing that for the NAACP, has  
23       obviously got a whole litigation path that one is  
24       envisioning and the equivalent for that for the FTC  
25       should be a whole path of consent decrees, right?



1 They're not going to litigate, that's what you say? They  
2 know they're going to settle today and they're going to  
3 settle tomorrow. And the question then is really a  
4 question for Alden, right, is how do they -- how do they  
think they can influence the thire tomwMcnh su4fAn Tmi01 Tc 10.98 0 0 10.98 55 q

MR. ABBOTT: Interesting. What about closing 1 Tc 10.98 0 0 17  
statenh ss? When the agency doesn't take action. We had 1 Tc 10.98 0 0  
some reaction to that from some panelists in Londmi01 Tc 10.98 0 0 19

1 much time litigating, but a fair amount of time. And to  
2 not sort of close the loop with the -- you know, as -- as  
3 -- a reasonably full description of why you chose not to  
4 go forward, you're depriving, as it were, the market.  
5 And Tom is our representative here for the market of what  
6 might be valuable information.

7 And so -- again -- I'm -- I'm in favor of  
8 knowledge. But yeah, I think those actually are very  
9 important. You know, I certainly read them when they come  
10 out if they're interesting.

11 MR. ABBOTT: Josh Wright.

12 MR. WRIGHT: Just a -- a quick point on the  
13 closing statements, I mean, one can imagine -- I don't  
14 know whether this is -- this is true or not. But I can  
15 certainly imagine the argument that if closing statements  
16 are going to be issued in a case, it makes -- there's  
17 incentive to make the analysis a little bit more careful  
18 along the -- along the path there.

19 MR. CAMPBELL: Sure.

20 MR. WRIGHT: And there's certainly nothing  
21 wrong with that.

22 MR. CAMPBELL: Actually, it's not just closing  
23 statements in -- for example, in Evanston Northwestern, a  
24 lot of the decision is based on a pricing study conducted  
25 by -- what's the woman's name from CRA who was their

1 expert witness, anybody remember? It what was someone  
2 else.

3 Anyway that was under seal so when you get the  
4 opinion, it's got, you know, holes in it where there's

1           MR. CAMPBELL: Is Mylan the only disgorgement  
2     example or are there others?

3           MR. ABBOTT: Well, there are certainly plenty  
4     more, I think, in the consumer protection but there  
5     haven't been many in the competition area.

6           MR. CAMPBELL: Well, I think Pitofsky wrote  
7     something to support the disgorgement remedy in Mylan and  
8     I think everybody went along with that. But again it's a  
9     settlement --

10          MR. ABBOTT: Right.

11          MR. CAMPBELL: -- and not a contest at anything  
12     so ...

13          MR. ABBOTT: There is a commission, of course,  
14     policy statement extant in -- in that area about under  
15     what -- what conditions -- you know, conditions of  
16     clarity, ability to measure, the Commission would seek  
17     disgorgement, of course.

18          MR. CAMPBELL: Well, the question I have is  
19     it's a fine remedy but who gets it?

6 bet --

1 someone and put it down on the ground and light it on  
2 fire, you get the deterrence effect. So who gets the  
3 money is a detail. But I realize, you know, you might  
4 care. The Commission shouldn't necessarily care.

5 MR. ABBOTT: What about civil penalties?  
6 Anyone think it would be a good idea for the FTC to be  
7 statutorily authorized to impose civil penalties in  
8 enforcement actions?

9 MR. PICKER: As you watch the EU levy fines

1 damage claim because they can write that off on their  
2 taxes; with a civil penalty they can't. And so  
3 oftentimes the civil penalty may be just there as a  
4 potential backstop and we usually end up talking about  
5 settling cases based on damage figures rather than civil  
6 penalty calculation.

7 MR. ABBOTT: Okay. Before leaving this topic,  
8 let me just ask you in general, the relative magnitude of  
9 bringing different kinds of actions. Of course, the FTC,  
10 like the Justice Department, gets an array of merger  
11 filings from one of the functions of the economy, should  
12 greater or -- and is it bringing a certain number of  
13 cases.

14 Is it bringing the right mix of cases, is the  
15 right emphasis on types of cases? Does anyone have any  
16 general ideas about given the scarce competition  
17 enforcement resources, how should those resources be --  
18 well, best allocated?

19 MR. PICKER: Well, to an outsider at least,  
20 I'll say Whole Foods is an interesting case. You know,  
21 premium, natural, organic, whatever we want to define the  
22 market, I would have thought -- I don't want to say it's  
23 small potatoes -- but I need some exotic type of  
24 potatoes, is what I really need, right, small organic  
25 potatoes, right? I wouldn't have thought that would have

1     been that important of a topic that, you know, fun to  
2     read, fun to think through. You know I wish the expert  
3     testimony was fully out there so we could know what the  
4     numbers are. I can't really assess the case without  
5     those numbers. Maybe there's a lot of harm going on  
6     there each time I walk into Whole Foods. I wouldn't have  
7     thought that would have been where we would have started,  
8     though, so ...

9             MR. ABBOTT: Josh?

10            MR. WRIGHT: So -- so no, we're not going to be  
11     able to estimate with any confidence the magnitude of  
12     these different effects. I mean, the whole idea is that  
13     the cost and benefits of the enforcement action or the  
14     conduct are dispersed through lots of markets in lots of  
15     different or interesting ways. And, you know, if you win  
16     an enforcement action and you stop some type of conduct,  
17     you've got, you know, an alternative form of conduct that  
18     arises.

19            And so can we measure those sensibly? Probably  
20     not. But I think thinking about these cases in terms of  
21     error costs can be useful. I mean, if you take Whole  
22     Foods as an example. So some of the numbers from those  
23     expert reports are available. And I mean, if you're  
24     talking about -- let's say, possibly at the top end of  
25     the estimates, you know, one percent changes in the

1 price, and not incredibly precise estimates. You know,  
2 you may have a weak belief that prices may go up a little  
3 bit. You compare that to Staples and you've got, you  
4 know, giant effects, you know, sort of much larger in  
5 magnitude. And -- and, you know, we can't compare sort  
6 of whether the estimates there are better or not. So I  
7 won't touch that.

8 But it strikes me that the best case scenario  
9 there is that you're going to do a little bit of a good  
10 in a market that, you know, like Randy said, I mean, this  
11 isn't -- you know, this isn't premium organic potatoes  
12 and that -- that -- that might be small potatoes relative  
13 to some of the other ways we can allocate our resources.  
14 So that -- that's one way to think about it. What's the  
15 best case scenario if you -- if you win and what sort of  
16 harm are you doing if you're wrong?

17 MR. CAMPBELL: Well, clearly, you know,  
18 supermarkets and healthcare are areas that impact  
19 consumers so an emphasis on enforcement in both of those  
20 areas is appropriate. I guess the question Randy is  
21 asking is, you know, if there's a conspiracy amongst  
22 Mercedes dealers, do we really care about protecting  
23 those consumers. I --

24 MR. PICKER: I hate to sound like an  
25 egalitarian but yeah that was, I guess, sort of the point



1 a little bit, yes.

2 MR. CAMPBELL: And I find consumer injury in  
3 the Whole Foods thing a little hard to swallow.

4 MR. ABBOTT: Okay. Well, we'll -- we'll be  
5 talking about enforcement aspects as we go on. But let's  
6 go on, shift gears, and ask Blake Harrop to talk about  
7 the issuance of guidelines. And in particular, you know,  
8 is the issuance and revision of enforcement guidelines,  
9 has that been beneficial, can you estimate the benefits  
10 or in general, what's your comment on the quality and  
11 usefulness of the guidelines?

12 MR. HARROP: Let me sort of take a general  
13 overview of guidelines, although I'm going to keep my  
14 comments a little bit shorter than Tom's because the  
15 number of guidelines that have really been a major  
16 influence in the antitrust area have been in the merger  
17 area. And I don't think that's a coincidence.

18 Merger law, particularly if you read say, 20  
19 district court decisions, is at best opaque and maybe  
20 completely and totally incomprehensible. And we're  
21 dependent to a large extent, and when I was in private  
22 practice as well, on trying to advise your client as to  
23 what the agency's responses are going to be because if  
24 you can avoid the coin flip that you often get in the  
25 district court and figure out ahead of time what the

1 likely result of the enforcement agency is, you're way  
2 ahead of the game.

3 And in that respect, I think the merger  
4 guidelines, you know, do what they purport to do, which  
5 is to give you some insight into how the agencies do what  
6 they are going to do.

7 The problem with guidelines is that they're  
8 large massive undertakings; they take a long time to get  
9 done, they get a long time to get revised. And policy  
10 issues -- or policy positions, I should say, change  
11 quickly within the agency, particularly from  
12 administration to administration. And that raises, you  
13 know, in my mind having a question -- having not issued  
14 any Illinois attorney general guidelines, whether it's,  
15 you know, it really is reflective at any one point in  
16 time of what the agencies are doing.

17 We've all heard the remarks about if you look  
18 at the HHIs indexes and, you know, which ones are likely  
19 to be challenged, which ones might be challenged, and  
20 which ones are safe and you sort of wrap everything down  
21 when we've been in the last -- you know, 8 or 10 years of  
22 administration. Where, you know, you really have to be  
23 in an absolutely definitely will be challenged category  
24 before you even have to worry a whole lot.

25 And those guidelines, if they're going to

1 reflect the first purpose being what the agencies are  
2 doing, have to be up-to-date with that particular agency  
3 and that's difficult to do.

4           The second thing that they can do is to provide  
5 an educational benefit to try to influence how the law  
6 develops. And that's been done with a variety of  
7 guidelines. The merger guidelines are probably the most  
8 successful in that regard because I think now at least  
9 every decision you read tries to mimic the merger  
10 guidelines in trying to follow through what steps to go  
11 through, the market definition, the determination of  
12 market shares, the SSNIP tests, the efficiencies  
13 defenses, et cetera, and you go through it basically  
14 almost in the order the guidelines have them.

15           Attempts to change policy in other areas have  
16 been, I think, less successful. I think that's due to  
17 the fact that the case law in those areas has developed  
18 much more extensively and much more coherently than it  
19 has in the merger area. I mean, the vertical guidelines  
20 and I could point you to either the federal ones or the  
21 state ones. And I think these are difficult for anyone  
22 here to be able to recite much of either one of those  
23 sets of guidelines because they have not been as  
24 influential. Which raises the question of whether trying  
25 to, you know, consolidate law, change law, whatever you

1 think the guidelines are, going through the guideline  
2 process is particularly useful.

3           The -- the third purpose of guidelines, though,  
4 which I think you have to be aware of if you are an  
5 enforcement agency is they become sort of a checklist  
6 that a defendant can use to say okay, did you do each of  
7 these steps in this particular case even if it's not  
8 meaningful to do so? And my -- my -- my daughter, who is  
9 a big criminal procedures kind of TV show fanatic -- you  
10 know, thinks whenever you have a murder investigation,  
11 you collect DNA evidence, you do all this other stuff,  
12 and, you know, it would be like -- you know, a prosecutor  
13 standing up and saying I'm going to prove a murder case,  
14 the defense saying, well, you didn't do all the steps we  
15 saw on TV, and the prosecutor saying, yeah, but I've got  
16 three eyewitnesses that saw the guy shoot the guy.

17           I mean, there are things you take shortcuts on  
18 sometimes. And if you have these guidelines in place and  
19 it becomes a checklist, sometimes, particularly with  
20 judges, they're having to apply them, you may be in a  
21 situation where, you know, what doesn't really make sense  
22 to be done ends up becoming a requirement in that  
23 particular litigation. And I think that's a, you know, a  
24 third consideration. They become a checklist for the  
25 defendant to use and are they really designed to do that

1 and are there ways of protecting the enforcement agency  
2 from doing that?

3 Finally, I think the other thing that you have  
4 to deal with is whether -- is the purpose of the  
5 particular guidelines. Are they, as they were originally  
6 intended to be, the original merger guidelines in the  
7 4-firm, 8-firm concentration ratios, supposed to be an  
8 insight into how the agency is going to evaluate a  
9 particular case or are they supposed to reflect the best  
10 learning we have on antitrust law at the time they come  
11 out. And those, you know, have been blended to the fact  
12 that the agencies try to say they're both.

13 And I'm not sure that's particularly useful  
14 because, as I said, oftentimes the agency will be making  
15 decisions based on issues beyond just what the law is.  
16 We've already touched on them. We have limited resources.  
17 You know, we may not bring a case which is, in fact, you  
18 know, what we think is a clear violation of the antitrust  
19 laws because the people affected happen to be Bill Gates  
20 and Warren Buffet and they can take care of themselves.

21 Or it could be that we don't bring the case  
22 because of some other factor that just doesn't have  
23 anything to do with the substantive antitrust analysis.  
24 But if that is something that we want to disclose to the  
25 public as an enforcement technique, do we also want it to

1     become substantive law down the road because those are  
2     two very different things.  And I guess with that I'll  
3     throw it open to anyone else.

4             MR. CAMPBELL:  I would just like to put on the  
5     table one other area of guidelines which is these  
6     healthcare enforcement statements which are used  
7     extensively.  And, you know, in -- in the healthcare  
8     arena, you have disproportionate bargaining with the  
9     insurance companies having size of networks and so forth  
10    and the physicians are sitting there trying to figure out  
11    how can they band together, even though, they're all  
12    independent and so forth.

13            So there's for hospitals and other healthcare  
14    organizations following these guidelines that create  
15    safety harbors, that's a very useful enforcement tool.  I  
16    think in that industry you're going to find people  
17    designing their business operations and compliance with  
18    those to a great extent.  There are gaps where the  
19    agencies haven't spoken and if you want to put on your  
20    list of things that need clarification, Alden, this issue  
21    of clinical integration would be the thing that'll be  
22    addressed so put that on your checklist.

23            MR. PICKER:  That's so interesting because --  
24    so you don't like consent decrees.

25            MR. CAMPBELL:  I knew you were going to do that

1 to me.

2 MR. PICKER: Well, of course, what else can I  
3 do? You've got guidelines.

4 MR. CAMPBELL: I've got clients. I've got to  
5 put something in my opinion letters.

6 MR. PICKER: Okay. Because I would've thought  
7 you would have said the consent decrees were a kind of a  
8 guideline, right, and so I find that really interesting.

9 MR. CAMPBELL: Do I have to be consistent?

10 MR. PICKER: Sometimes.

11 MR. CAMPBELL: I think the guidelines are an  
12 exercise in agency transparency obviously. I think how  
13 much of that you need is obviously a function of what  
14 other mechanism of transparency there are. I think in a  
15 world in which we're not going to litigate many cases --  
16 many cases, maybe that's mergers, then we need more  
17 transparency and so the guidelines are more valuable.

18 Safe harbors are interesting, obviously,  
19 because they really provide concrete guidance to the  
20 parties.

21 MR. CAMPBELL: Exactly, exactly.

22 MR. PICKER: And that's obviously very  
23 valuable.

24 MR. CAMPBELL: Right.

25 MR. PICKER: Right.

1           MR. CAMPBELL: And we should probably put in  
2 the same discussion the ability to ask for one of these  
3 letters of advice you go in for and so forth.

4           MR. WRIGHT: The business --

5           MR. ABBOTT: The staff advisory, yeah, business  
6 review letters, widely used by the Justice Department,  
7 not as widely used by -- used by the FTC, although the  
8 FTC has procedures for staff and commission letters.

9           MR. PICKERS: Yeah. And I don't litigate but  
10 from a teaching standpoint, the business review process  
11 is really interesting, right? I teach a number of those  
12 actually, the DVD one. And you know, the back and forth,  
13 and -- and you can very much see again, it's sort of like  
14 the safe harbors, a chance to have some confidence about  
15 how your business affairs are going to be organized going  
16 forward. They're obviously not -- they don't technically  
17 prevent a challenge but as a practical matter they seem  
18 to do so.

19           MR. CAMPBELL: Right.

20           MR. ABBOTT: Would it be recommended that the  
21 FTC encourage private parties to ask for more advisory  
22 letters?

23           MR. CAMPBELL: Advisory letters are negotiated  
24 and at some point you don't ask for one if you're not  
25 going to get the answer you want.





1 or conferences that the FTC will hold on various topics,  
2 I'm thinking of slotting fees, which is something I've  
3 written about, you'll get calls for guidelines about  
4 these things. You'll get, we want some slotting fee  
5 guidelines, we want some monopolization guidelines, maybe  
6 some vertical restraint guidelines too.

7 And no doubt these things could produce some  
8 welcomed transparency about what the agency would like to

1 well-defined class of cases so that you can say we're in  
2 this box and we think that we understand it.

3 MR. WRIGHT: That's right.

4 MR. HARROP: That usually comes after a lot of  
5 experience that the agency has.

6 MR. PICKER: That's true.

7 MR. HARROP: And, you know, areas like slotting  
8 or something that sort of pops us, everyone would like to  
9 know the answer right away, we just don't know the answer  
10 yet.

11 MR. WRIGHT: Right.

12 MR. HARROP: And until the agency has a lot of  
13 experience -- it both lacks information to make the  
14 decision, it also lacks the authority that comes with  
15 having litigated a lot of these cases, or at least  
16 investigated a lot of these cases, and know the answer.

1 not there yet.

2 MR. ABBOTT: Before leaving guidelines and we  
3 have a lot still to cover, one question that's been  
4 raised by commentators more recently is direct effects in  
5 merger cases. And, of course, some critiques have been,  
6 look, the guidelines talk very explicitly about market  
7 definition and that may have influenced the courts. It  
8 might make it more difficult for the agency, say, to  
9 bring a direct effects case without a detailed market  
10 definition. Is that something that should be examined,  
11 corrected, or not changed in guidelines?

12 MR. HARROP: It should be corrected right away.  
13 I think the market definition issue can get -- a lot of  
14 these cases, like I was talking about before. Often in a  
15 lot of these cases, market definition is essential  
16 obviously. But it -- it becomes a distraction in some of  
17 these cases where -- particularly, I think, in a lot of  
18 these healthcare cases, you'll see the court go through a  
19 long line of analysis of what the role of their market  
20 is. And then at the end say I don't really care, this  
21 isn't any situation where the merger needs to go through  
22 to improve healthcare in the local area.

23 Well, if that's going be to the key issue, then  
24 let's not spend resources defining the market. Let's  
25 spend resources determining what the effect on healthcare

1 is going to be in that market. And -- but unfortunately,  
2 you know, with the guidelines that you have in place and  
3 the state agencies basically end up having to live with  
4 the same guidelines, the court is going to -- the  
5 defendant is going to demand and the court is going to  
6 expect the court to have what to have a bunch of  
7 economists come in and talk about what the market is.  
8 Which is interesting because, you know, having also done  
9 a lot of economic work, markets are something economists  
10 really don't know what they are. And, you know, if you  
11 don't believe me, pick up an econ 101 text and look for  
12 relevant market in there and you'll never find the term.

13 But it's something that we do want to do in a  
14 lot of cases because it's essential to figure out whether  
15 or not there's a potential competitive concern. But a lot  
16 of the other cases, you know, we understand that the key  
17 issue is going to be something else direct and direct  
18 cases obviously one of those. So, yeah, I would like to  
19 see more flexibility in the guidelines for both the  
20 courts and the enforcement agencies to do an analysis  
21 that doesn't have to go step, by step, by step in every  
22 single case.

23 MR. CAMPBELL: I'm a cynic about direct  
24 effects. I think that the agencies have glommed on to  
25 direct effects because of their inability to define

1 persuasive markets. And I think the statutory  
2 underpinnings of Section 7 -- geographic market, product  
3 market -- require some attention to the structure. And I  
4 think that a case that doesn't have persuasive markets  
5 and points to -- for example, profits. You know, that  
6 seems to be something that some economists are looking at  
7 is profits or price differentials.

8 In Evanston Northwestern, the rate of a price  
9 increase -- you know, if you've -- what were the  
10 pre-prices, if they were below a competitive price level,  
11 the rate at which you increase a price does not show  
12 market power to me. So I just find some of this stuff  
13 that people are trying to point to show direct effects to  
14 be very unpersuasive.

15 MR. PICKER: And you think the market -- I  
16 heard what you said about the statute and, you know, the  
17 rules are the rules. But you think it's -- it's  
18 important in terms of organizing the analysis.

19 MR. CAMPBELL: And I think if you go back to  
20 most of the precedents, certainly in the Supreme Court on  
21 mergers, there's a lot of attention paid to the market  
22 and who is there and who is being hurt. And so I think  
23 that has some -- you know it's stood the test of time.

24 When we get to Evanston Northwestern, the  
25 agency spends a lot of time saying that Elzinga-Hogarty

1 is meaningless and they trot out Elzinga to say his own  
2 test doesn't work, which is -- I'll never understand  
3 that.

4 But I think it's a mistake to throw out that  
5 mode of analysis. I think the jury is out as to whether  
6 critical loss is an analysis that we ought to be paying  
7 more attention to. But I think the agencies are groping  
8 to looking at these price differentials, to look at  
9 profits, things like that, and I'm not convinced they  
10 show us direct anticompetitive effects.

11 MR. ABBOTT: I think I come out somewhere on  
12 the middle of this. I think if you think of a case like  
13 Staples, either Bill Bear or John Baker or George Cary,  
14 one of them has described this as a one-fact case where  
15 they sort of repeatedly show the market differentials.  
16 They do it in market definition, they do it in  
17 competitive effects, they do it in entry, and they say,  
18 see, price differentials, no entry, right? And so it's a  
19 one-fact case. And I think this is sort of the  
20 paradigmatic case where you can say, can we please just  
21 do competitive effects and be done?

22 MR. CAMPBELL: I agree.

23 MR. WRIGHT: And save a lot of resources. So I  
24 think there exists a set of cases out there where the  
25 direct effects approach, I think, is promising in a





1           MR. ABBOTT: Okay. Well, at this point, having  
2 made reference to -- to nonlitigation matters, we can  
3 keep on going, but unfortunately time is short. So let  
4 me turn now to Fred McChesney to discuss competition  
5 advocacy whereby the FTC attempts through letters,  
6 speeches, and so forth to provide support for taking  
7 competition and competition principles into account in  
8 regulation, in law. Fred?

9           MR. McCHESNEY: Thanks, Alden, and thanks for  
10 inviting me here today.

11           When I was at the Commission a long, long time  
12 ago, I was part of the group that went down with Jim  
13 Miller and Tim Muris, as Alden mentioned. There had been  
14 a sort of fitful history of competition advocacy  
15 beforehand but not the -- the sort of regular systematic  
16 program that we tried to introduce then. And as Alden  
17 has mentioned, it's a -- it's an unofficial, if you will,  
18 system of speeches, advocacy, attempts to influence other  
19 agencies and what have you, to the extent that those  
20 other agencies have before them issues involving  
21 competition or consumer protection. But we're talking  
22 competition here today.

23           When I was there then, I was the one who was  
24 responsible for organizing what it was that the  
25 Commission did during the time I was there in the area of

1 competition advocacy. That was sometime ago.

2 Whether things have changed a great deal since  
3 then, I don't know. But certainly based on what was done  
4 back then and I realize that our fundamental question  
5 here today is to talk about the extent to which we can  
6 say that FTC enforcement efforts have on the whole been  
7 cost-justified, have been beneficial in excess of cost.  
8 I thought that the competition advocacy was one of the  
9 great successes of the Federal Trade Commission. I  
10 thought that the benefits clearly exceeded the costs for  
11 -- for some very simple reasons.

12 First of all, the quality of the economists at  
13 the Federal Trade Commission and the level of economic  
14 understanding of the lawyers at the Federal Trade  
15 Commission is extremely high. There's a real comparative  
16 advantage among the personnel, be they economists or be  
17 they lawyers at the Federal Trade Commission in  
18 understanding the competition implications of what it is  
19 other agencies might be doing.

20 Proof of the quality, I think, is seen for  
21 example in the fact that there are very few government  
22 positions as economists where overall one could increase  
23 one's stature as an economist by going to work for the  
24 government. If you're a -- if you're an economist at  
25 some other department, commerce, agriculture, what have



1       them.

2                   What mattered was to define the property  
3       rights, get the property rights well-established, and  
4       then step back and let the market buy and sell the rights  
5       and perhaps there would be constraints imposed by the  
6       agency for various public policy reasons.  But fine, the  
7       agency could -- could -- could impose whatever additional  
8       restraints it wants to.

9                   But that was no reason to sit around and worry  
10       about who was going to end up with these things to the  
11       point of delaying year after year after year the grant of  
12       these licenses.  Go ahead, grant them -- we used to go  
13       before the Commission and repeat all the time, go ahead  
14       and grant the licenses and then stand back and let the  
15       licenses trade in the market subject to whatever  
16       constraints you want to impose for noneconomic reasons.  
17       And you'll get the best economic solution that way.

18                   Now, that seems rather elementary, rather  
19       commonsensical.  But I guarantee it was not at the  
20       Federal Trade Commission -- excuse me -- the Federal  
21       Communications Commission at that particular point in  
22       time.  They acted as if whoever got these licenses was  
23       going to have them forever and it therefore did matter to  
24       whom they gave them.  When, of course, it doesn't as long  
25       as these things can trade.





1           So again, to close, Alden, in terms of what  
2 does and does not make sense from a cost benefit  
3 standpoint, I think competition advocacy is pretty  
4 clearly a winner.

5           MR. ABBOTT: Well, that's a very positive  
6 report on competition advocacy. Of course, they were all  
7 -- you mentioned various constraints, internal, sometimes  
8 there are external constraints, public choice, I guess,  
9 that there may be outside groups including outside  
10 agencies who may or may not necessarily be very  
11 interested in responding to the substantive arguments.

12           Are there any additional thoughts on the value  
13 of advocacy and how -- not to throw, okay, resources  
14 devoted to advocacy, but what format the advocacy should  
15 take? Anyone have additional thoughts?

16           MR. CAMPBELL: I don't know. One thing we  
17 ought to throw on the table here is tension between the  
18 Federal Trade Commission's view of competition and what a  
19 state regulatory body may think and we've got that  
20 Pennsylvania Power case that's currently out there where  
21 the FTC wanted to not approve an acquisition and then the  
22 state was going to do it and then they turned around and  
23 sued them. I can't remember the name of the case. But  
24 that creates some tension that we ought to put on the  
25 table.

1           MR. ABBOTT: Blake, as a state official, do you  
2 have any thoughts on advocacy? In recent years lots of  
3 advocacy letters, for example, have been directed toward  
4 proposed state legislation.

5           MR. HARROP: I think they're quite useful. The  
6 State legislatures have a lot of things on their plate  
7 and oftentimes what they get, particularly on particular  
8 bill in particular industries, their only initial source  
9 of information on those is going to be that particular  
10 industry and the advocates for that industry may not have  
11 the best intentions towards everyone else involved  
12 particularly the consumers.

13           We've been involved -- one of the things I do  
14 is also serve as chair of the National Association of  
15 Attorney Generals Real Estate Task Force.

16           We've had several situations where we've asked  
17 the federal agencies to come in and provide a sort of

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hd impaso2iinin tt.taals severalcasens where th



1       legislation either was completely killed or changed in a  
2       major way.

3                 And I think that's, you know, a very valuable  
4       resource. I think it's -- you know, I'm very happy that  
5       the FTC is willing to devote the resources to doing that  
6       type of work. The -- you know, the other thing is,  
7       though, that, you know, part of what the FTC has is it's  
8       credibility, is the ability to challenge a lot of these  
9       types of actions, obviously not legislation, but actions  
10      by regulatory boards within the state. One way you get  
11      their attention is by bringing cases that challenge their  
12      activities when they do step over the lines. And that's  
13      in the litigation area but the litigation plays off of  
14      the advocacy letters. If the -- I'd love to be able to  
15      say that everyone is persuaded by brilliant economic  
16      analysis. But there's a little bit of the -- if we don't  
17      do it, we may get sued consideration, that also is useful  
18      in those cases.

19                MR. ABBOTT: Okay. That's very helpful. And  
20      Josh Wright?

21                MR. WRIGHT: You know, I think it's worth -- I  
22      was a little critical earlier in some of the merger  
23      discussion, monopolization, talking about allocation of  
24      resources, any of those areas, on the grounds that we  
25      don't know much. I think jumping on the bandwagon Fred's

1 point, I mean, these are really areas where you've got

1 no-brainer allocation of resource issues you have in  
2 terms of competition advocacy and given sort of the  
3 fraction of what we know, what we don't know in this  
4 area, I mean, that's really saying something, I think.

5 MR. PICKER: So we think those are typically,  
6 though, industry capture regs, right? The states aren't  
7 confused about, certainly the people pushing for these  
8 restraints aren't confused, so do you think this is about  
9 information or about raising the cost as it were which  
10 the states know they shouldn't be doing in the first  
11 place.

12 MR. WRIGHT: I think it's actually a split  
13 story, right? So the post and hold regs, I can't believe  
14 anyone in these states thinks this is anything other than  
15 a wholesaler capture reg.

16 MR. PICKER: Okay.

17 MR. WRIGHT: But when you get into things like  
18 franchise termination laws and exclusive territories, and  
19 bans on exclusive dealing, you know, I think the stories  
20 are slightly more complicated for the vertical  
21 restraints. For the post and holds, you know --

22 MR. PICKER: Right.

23 MR. WRIGHT: -- I think it's pretty straight  
24 forward.

25 MR. McCHESNEY: I think, too, if I can jump in,

1 in many of these situations, even if almost everybody  
2 understands why this is a bad idea, there isn't anybody  
3 who's willing to come forward within the agency --

4 MR. PICKER: I understand that.

5 MR. McCHESNEY: -- to make the argument because  
6 the agency, at least on that particular issue, has been  
7 captured. But to have someone come in from the outside  
8 who doesn't have a -- who doesn't have a dog in the fight  
9 really, doesn't have a stake, and is willing to make that  
10 argument. First of all the argument gets made and  
11 perhaps those on the inside who were a little reluctant  
12 to make their own views known, now have a little extra  
13 reason to come forward.

14 So like everything else in the economics, it's  
15 -- the influence is at the margin.

16 MR. PICKER: Right.

17 MR. McCHESNEY: And if you can just move that a  
18 little bit, again given the relatively low cost of doing  
19 it, probably you've got something that makes sense to do.

20 MR. PICKER: I thought Fred's initial story was  
21 interesting because I -- what I heard basically was it's  
22 about the quality of the professional economists that  
23 they've been able to attract at the FTC.

24 MR. McCHESNEY: I think that has a lot to do  
25 with it.

1           MR. PICKER:  And -- and I -- I teach a course  
2   in network industry so I pay some attention to the FCC,  
3   some attention to the FERC, you know, at least over the  
4   time period I've paid attention to the FCC, I think they  
5   actually -- the FCC chief economist position is a  
6   relatively prominent position.  I think they tend to

1           MR. PICKER: Sure, I was asked to talk for two  
2 or three minutes so I'll try to do that. I guess I want  
3 to start by saying, you know, I don't have a good sense  
4 of the full scope of the FTC activities in this arena so  
5 I -- I -- I think the lore on Microsoft Office was that  
6 something like 27 percent of the new feature requests  
7 were already in the product. So -- so it's hard to know  
8 what's going on sometimes -- and maybe you're doing all  
9 this already so you can tell me if you are.

10           You know, I've often thought that I should  
11 teach a seminar called aftermath and what the point of  
12 that seminar would be to say, well, what happens after  
13 the case is done? So the nature of teaching antitrust is  
14 you teach a lot of obviously the great Supreme Court  
15 cases, some of the newer great cases like Staples and  
16 obviously Microsoft. And the natural question is, what  
17 happens afterwards? So you teach NCAA versus Oklahoma,  
18 right? In that case -- you all know that case obviously,  
19 but there was -- the NCAA at least nominally was very  
20 concerned about in-person attendance at football games,  
21 right?

22           If we put Notre Dame on every weekend, would  
23 anyone still actually go to football games in South Bend.  
24 If we put Notre Dame on every weekend, would I stop going  
25 to see the Mighty Chicago Maroons play and just watch

1 someone else on television? Well, you know, we do the  
2 case, we see what happens afterwards. And, you know, I  
3 can, you know, watch the attendance figures.

4 And so I think a very, very important thing --  
5 and it seems to be the FTC is exactly the right agency to  
6 do this, is to systematically pull together information  
7 on what happens afterwards. That should be just as  
8 important -- it seems to me from a data collection  
9 standpoint and a standpoint of evaluating the impact of  
10 the decisions you're making as making the decisions in  
11 the first place. And I think that -- that both in terms  
12 of the consent decrees and your ability as it were to  
13 condition those consent decrees and the ability to get  
14 information going forward and the other resources. That  
15 should be a very important part of what you do. And I --  
16 and I don't have a good sense of how much of that you've  
17 done but if I were giving Chairman Kovacic advice,  
18 academic advice, I'd say you need to do a lot more of  
19 that.

20 You know, the extreme version of that -- and --  
21 and, boy, it's so tempting to me as an academic -- would  
22 be to say, you know, you ought to invest in data. And  
23 the way you do that is you look for cases that you take  
24 seriously as cases where you pair them and you apply  
25 different treatment effects. And you accept the fact

1 that maybe you're going to have a situation where you're  
2 going to have additional competitive harm but you do that  
3 because of the data you're going to acquire from it. If  
4 -- if you're seriously -- if you're seriously studying  
5 whether a drug does or does not help people, you need to  
6 have a control group and you need to have different  
7 groups that some get treated and some don't, you know,  
8 placebos, and the whole bit. And so re- -- designing  
9 your approach to -- to -- to -- to enforcement in a way  
10 that elicits, creates meaningful information is something  
11 which I suspect you haven't done much of. And which, you  
12 know, you all, as we head into the second century and  
13 that's obviously the set up of this, you know, you should  
14 -- you've got 100 years, maybe and you should be willing  
15 to have a long-term time horizon with regard to getting  
16 the value of getting the information, getting it right,  
17 and then -- and then working with that information going  
18 forward.

19 So, you know, as I -- as we were sort of  
20 talking about before, I have the nice position of being  
21 able to come out in favor of knowledge and against  
22 ignorance, which is, you know, sort of my professional  
23 posture generally. And -- and, you know, I think the FTC  
24 could devote -- you know, from an outsider's perspective  
25 -- I mean, ask this question. I mean, what percentage of



1 the FTC's resources do you currently devote to those  
2 kinds of activities. My guess is that's a relatively  
3 small number and it should be in multiples of that.

4 MR. CAMPBELL: Randy, there was a program here  
5 that Fred McChesney will remember when -- was it four,  
6 five years ago when Tim Muris came here to Northwestern.  
7 And at the time they were lamenting this track record  
8 they were getting in hospital mergers. And Tim announced  
9 that the FTC was going to do a retrospective study of  
10 these --

11 MR. PICKER: That was right.

12 MR. CAMPBELL: -- these mergers to figure out  
13 where their analysis was right and where their analysis  
14 was wrong. And that was I think applauded by a lot of  
15 people involved in those kind of cases. But it never  
16 came out as to what they looked at and so forth. Instead  
17 we did get another report which simply talked about  
18 changing the tools by which they were going to analyze  
19 mergers. But I think that would be -- to go back to  
20 cases that they won, cases that they lost, and see  
21 whether the -- the projected price of injury --

22 MR. PICKER: Exactly.

23 MR. CAMPBELL: -- and so forth would be very  
24 valid and might very well cause you to change the tools  
25 by which you analyze these transactions.

1           MR. WRIGHT: I'm guessing that they're going to  
2 talk about this on the -- the panel with the economists,  
3 right?

4           MR. PICKER: Yes.

5           MR. WRIGHT: But there's these, you know, these  
6 merger retrospectives, you know Dennis Carlton has a  
7 paper out saying we should be really careful about doing  
8 them because if you had optimal -- even if you had  
9 optimal antitrust policy that balances type 1 and type 2  
10 errors, you get -- you get errors on the margin, right?  
11 So you have it exactly right, you have your policy  
12 exactly right, you don't have systematic bias one way or  
13 the other. You're going to make some mistakes in so  
14 doing any individual merger retrospective, let's say,  
15 doesn't tell you much about systematic bias. What he  
16 proposes in there as part of the data collection efforts  
17 is that you get the predictions, right? So you get the  
18 predicted price increases and -- and you get -- and then  
19 you go and collect what really happens. You sort of  
20 institutionalize this in the agency so that that's what  
21 we're collecting. We're forcing everybody to write down  
22 their predictions and we're going to record them.

23           I don't know if that -- I don't know enough to  
24 know whether we can actually get that.

25           MR. CAMPBELL: Well, the question you're posing



1      this explains why we never saw anything coming out of

1 general of Illinois or her office or anyone else involved  
2 in that office.

3 My reaction to that is the FTC is ultimately a  
4 law enforcement agency, just like our offices and it has  
5 limited resources. These things are fascinating academic  
6 subjects. And I haven't quite figured out why with all  
7 the people needing to write Ph.D. dissertations, all of  
8 the people needing to get articles published, we haven't  
9 seen some of the people in academics take on this topic  
10 because I think academics is a better source for this.

11 It's a situation where people can put out topics and have

10 because I think academics is a better source for this.

government resources to do that with.

1     it into what I'm doing instead of trying to invent the  
2     wheel from scratch.

3             MR. PICKER:  Yeah, a couple of points on that.  
4     So what you guys have -- and I would like subpoena power  
5     and if you want to give that to me, that's great.  But, I  
6     mean, you guys obviously have a mechanism for getting  
7     access to information and can do this as part of a  
8     consent decree that I don't begin to have.  When I knock  
9     on someone's door, they close the door so often, right?

10            So there -- getting -- as an academic to get  
11    data, and especially these days, is very difficult.  And  
12    indeed the conditions under which private parties hand  
13    academics data is an enormously controversial subject  
14    these days.  You guys are insulated from all of that.

15            We can talk about academic incentives too.  
16    Obviously academics write what the market wants and the  
17    absence of these suggests either huge data problems or  
18    that this isn't what the academics think the market will  
19    ward.

20            MR. WRIGHT:  Nobody gets tenure for writing  
21    that they got it right.

22            MR. PICKER:  Okay.  Well, there you go.

23            MR. HARROP:  This hasn't been rehearsed but I  
24    think I know what Tom's answer is going to be to this.

25            Tom, if I served a subpoena to one of your

1 clients and said, you know, I'm really curious about this  
2 particular topic and I'm doing an academic paper, would  
3 you please turn over all your business records, now what  
4 answer would I get?

5 MR. PICKER: Now, I want to do this as part --

6 MR. CAMPBELL: See me in court.

7 MR. PICKER: -- of the consent decrees. Now,  
8 you've got to look for the mechanisms where you have  
9 leverage in the consent decrees. Don't do it that way.  
10 Consent decrees, that's the place to do it.

11 MR. HARROP: Consent decrees. That's right,  
12 Tom.

13 MR. CAMPBELL: Well, Hart-Scott, don't forget  
14 about all the information you can get from Hart-Scott.

15 MR. PICKER: I don't have Hart-Scott. And  
16 that's not retrospective. Maybe we need a retrospective  
17 version of Hart-Scott-Rodino.

18 MR. CAMPBELL: Put me to work.

19 MR. PICKER: Yeah, that's certainly true.

20 MR. ABBOTT: We still, believe it or not, have  
21 a lot to cover so unfortunately now we must -- tempus  
22 fugit so we must move forward.

23 Let's and we'll pass over the issue of reports,  
24 conferences, workshops. I mean the FTC has done more of  
25 that in recent years since Chairman Pitofsky



1       reinvigorated the area.

2                    But unless someone has something special they  
3       want to add --

4                    MR. PICKER:  We're in favor of them.

5                    MR. ABBOTT:  Okay.  I'll move on.

6                    Let me ask one quick question about allocating

1 to spend a lot of resources on advancing theories to  
2 improve the application of the rule of reason, for  
3 example?

4 MR. PICKER: You should maximize social  
5 welfare. Do you want more guidance than that?

6 No, I guess, I mean that seriously in the sense  
7 that -- I mean, you know, I said what I said about Whole  
8 Foods and the Three Tenors case, yeah, it seems like  
9 there's a very narrow slice. Most of my colleagues but  
10 not me.

11 So, I mean, I think bang for the buck is  
12 important. Now, the practical implementation of that I  
13 think is what matters. And so whether you think there  
14 are particular cases that you think frame an issue really  
15 nicely that in turn then will have important spillovers  
16 to the sectors of the economy where there's -- where  
17 there's -- where there's more going on. I -- I can't  
18 assess that. I mean, that's sort of what you guys do.  
19 But I do think that's what should motivate you.

20 Tom, it looks like you wanted to say something.

21 MR. CAMPBELL: No, no, no, I'm going to stay  
22 quiet on this one.

23 MR. WRIGHT: Randy, I would have thought that  
24 you would have said there that you should randomly  
25 enforce so we could learn something about -- I mean, that

1 strikes me as a -- there's been too much agreement on the  
2 panel so I think we should argue about it. And it  
3 strikes me as a really bad idea that runs maybe into some  
4 Rule 11 problems, right, taken -- taken to its extreme,  
5 which I know is not how you meant it.

6 MR. PICKER: Right.

7 MR. WRIGHT: But, you know, this trade-off I  
8 think we should start with the idea that we should be --  
9 we should be thinking about the rate of return for  
10 consumers. And obviously, I'm on board with you not  
11 really disagreeing with the social welfare point.

12 But that gets us full circle to the R & D  
13 point, which is what do we know and what do we not know?  
14 And we know something, for example, about price fixing  
15 cases, we know the next most about mergers, and we know  
16 practically nothing about monopolization. So I think  
17 that we're not going to be able to fully specify the  
18 trade-offs here. But there are lots of useful guidelines  
19 on how we ought to be allocating resources.

20 MR. PICKER: Well, try -- let's do  
21 retrospective. What did we get out of Three Tenors?  
22 When you guys look back and say ah, this is great and  
23 here's why? What do you guys say? I don't know what you  
24 say.

25 MR. ABBOTT: Well, I don't want to dominate

1 things but one thing that came out of that was sort of  
2 endorsement of the Mass Board type of structure, rule of  
3 reason analysis by the D.C. Circuit. And the D.C.  
4 Circuit, being a very important court, it becomes a very  
5 important precedent in -- in Section 1 theory.

6 MR. McCHESNEY: I would have thought, Alden,  
7 that you would have said what really mattered to the  
8 Commission -- the reason that Three Tenors was  
9 particularly welcome at 6th and Pennsylvania was that the  
10 specter of California Dental was largely exorcised  
11 because in the wake of the California Dental decision,  
12 from my visit you'll recall --

13 MR. ABBOTT: Yes.

14 MR. McCHESNEY: You were there. I visited with  
15 you. There was fear and loathing in the halls of the  
16 Federal Trade Commission that now any time we're going to  
17 bring a case that's more or less based on Section 1 type  
18 conduct, we're going to have to go out and develop our  
19 own data and do all of the things specific to the  
20 industry. And the place that the Supreme Court put us in  
21 California dental meant that our decision couldn't stand.  
22 And consequently -- and I think this was very much on the  
23 mind of Doug Ginsburg when he was hearing the appeal of  
24 Three Tenors, I would have -- I would have thought that  
25 the best thing for the FTC from Three Tenors was that

1 California Dental Association now could be dealt with and  
2 -- and did not have to be the 600-pound gorilla in  
3 enforcement any longer.

4 MR. ABBOTT: Good point. If nobody else has  
5 anything to add, let me quickly move forward.

6 Blake Harrop, do you have some comments on  
7 coordination between the FTC and state AGs and  
8 enforcement coordination in general.

9 MR. HARROP: Yeah, let me say that that's a  
10 topic I could probably spend the rest of the day on and  
11 I'll try to limit myself.

12 The -- there are a variety of areas of which  
13 you can talk about the interrelationship between the  
14 states and the federal enforcement agencies and the  
15 Federal Trade Commission. One of the -- but let me break  
16 them in two categories to limit what I talk about. One  
17 of those is the situations where the two entities are  
18 investigating the same kind of conduct, a merger where  
19 both the state AGs and the Federal Trade Commission are  
20 involved in the investigation.

21 And then the second topic I'll talk about is  
22 where we're basically doing different cases in different  
23 ways.

24 The first topic where there's -- you know, a  
25 joint investigation. It's important to recognize that

1       there are going to be different issues in play at both --  
2       at -- let me try this again.

3               There's going to be within each agency, whether  
4       within the Federal Trade Commission, within the state  
5       AG's office or more likely is the situation, multiple  
6       state AG's offices which are involved, there are going to  
7       be different viewpoints going through each of those  
8       entities. And so when you talk about the  
9       interrelationship between the two entities, you're  
10      talking about the interrelationship of multiple actors  
11      who are going to have different views. And how those  
12      interact are often a situation that depends on the  
13      personalities involved and the people that are dealing  
14      with each other.

15             You know, from my own personal experience, I  
16      will say, it's always easier to do the second case with  
17      particular FTC staff than to do the first one because we  
18      don't know each other. We don't know how each other  
19      works as well, particularly -- I think I'll put it on the  
20      FTC's burden. I mean, the states have worked with the  
21      FTC a lot, a lot of FTC shops have not worked with the  
22      states on a particular merger, and it will be difficult  
23      for them to do that the first time through because they  
24      don't understand how we work and it becomes more  
25      difficult.

1           For those parts seen on the outside, there are  
2 a lot of efforts made by the Federal Trade Commission and  
3 the states to coordinate their activities. There's a  
4 protocol in place that any entity that's involved in a  
5 merger can take advantage of, that will aid that  
6 cooperation but given the statutes involved, it's  
7 required -- necessary for the entity being investigated  
8 to agree to that protocol procedure that allows us  
9 basically to use FTC documents, the HSR documents, rather  
10 than having to issue our own subpoenas and going through  
11 that same process.

12           And how much cooperation exists often occurs --  
13 depends on how much the entity being investigated wants  
14 it to exist. If the entity believes that it's in better  
15 shape doing this as efficiently as possible and engaging  
16 in the protocol procedures, basically they're dealing  
17 with just one set of requests for documents. We do have  
18 a pretty good record with a lot of the FTC shops of being  
19 able to coordinate our requests with the FTC's if there's  
20 a need for a second request and that process moves pretty  
21 smoothly. But at the end if they decide that they don't  
22 want to enter into the protocol and they want to force  
23 the states to go their own subpoena routes, things can  
24 get very complicated and messy because different states  
25 have different subpoena requirements, different FOIA

1 laws, different all sorts of other laws. And it can  
2 really get to be a mess for one entity to have to deal  
3 with. But unfortunately those are the laws we have to  
4 operate under.

5 I also should add that the FTC in particular  
6 does a very good job of creating a position for an  
7 individual who's responsible for helping to coordinate  
8 with the states so if there are issues, there's a point  
9 person that we can go to at the Federal Trade Commission  
10 who can, you know, sort of say, wait a second, okay, this  
11 person hasn't worked with you guys before, let me talk to  
12 them and we can try to figure out where there's issues  
13 and go from there.

14 So I think the cooperation at the Federal Trade  
15 Commission-state level has been pretty good particularly  
16 in matters where we're working together. Doesn't mean  
17 we're always going to exactly reach the same conclusions.  
18 Just like two economists don't necessarily agree on  
19 absolutely everything, two lawyers looking at the same  
20 case may disagree over what the results should be.

21 But I think generally in terms of the  
22 procedures of the investigation, we coordinate pretty  
23 well. And I think it would be hard for us to come up  
24 with a lot of situations where there have been  
25 differences in substantive opinion. The other area where



1 the state and the Federal Trade Commission can overlap is  
2 when they're dealing with similar kinds of situations but  
3 maybe approaching them in different regards. It's always  
4 possible, for example, a situation where the Federal  
5 Trade Commission may be looking to end a particular  
6 action that an industry is undertaking, while the states  
7 may be more interested in getting a recovery from the  
8 consumers that were adversely affected.

9 We touched on this briefly before, but you  
10 know, the Federal Trade Commission's ability to recover  
11 on behalf of consumers has got a track record of one.  
12 And the states have done it in more cases than I can  
13 count up easily. That is one of the primary focuses of  
14 our AG offices, make sure consumer recoveries are  
15 obtained where appropriate.

16 And in those situations, there can be somewhat  
17 of a diversion because obviously the Federal Trade  
18 Commission is interested in seeing the action enjoined  
19 and stopped as quickly as possible, an interest the  
20 states share as well, but not at the cost of leaving  
21 consumers with no recovery for what's already happened.  
22 So you can have situations there where an entity  
23 negotiating an attempt to end -- get peace in their time  
24 and end disputes with both the states and the Federal  
25 Trade Commission.

1           I feel like they're in a situation where they  
2           thought they had a deal with the Federal Trade  
3           Commission, the states, would fall in place, and I think  
4           one of the messages I hope people take away is the states  
5           may very well have an interest in seeing damage recovery  
6           as part of the overall solution to the problem. And if  
7           not, the investigation and/or litigation will continue  
8           until the states get that kind of resolution.

9           Related to that, I suppose there are also areas  
10          where the states may just decide on policy reasons to  
11          take more aggressive approaches on particular topics than  
12          the Federal Trade Commission would take.

13          Joshua mentioned recently the minimum resale  
14          price issue. I know some of my fellow states, California  
15          and New York in particular, have taken a position that  
16          basically they consider under their own state laws such  
17          activity to be per se illegal and they are looking for

8 17

1 and those remedy issues tend to focus where the interests  
2 of those two entities lie.

3 MR. CAMPBELL: Like when the State of Illinois  
4 sues in an antitrust, you know, price fixing case or  
5 something like that, is it typically as *parens patriae*  
6 and injuries to state agencies or purchasing  
7 organizations and how is it you line up with the  
8 consumer? Is there ever a class action brought by the  
9 State of Illinois on behalf of the consumers?

10 MR. HARROP: We have under the federal statutes  
11 express *parens patriae* authority to enforce it in the  
12 federal antitrust laws and we usually will proceed as a  
13 *parens patriae* representative of our consumers if there's  
14 a federal case involved.

15 In the situation where there are indirect  
16 purchasers, Illinois is one of the states that does have  
17 an Illinois Brick repealer statute. In those situations,  
18 we have proceeded *parens* successfully in several cases.  
19 We have had a couple of courts who have told us we don't  
20 have *parens* authority and in those cases we have  
21 proceeded as a class representative.

22 In any event, we do try to represent our  
23 consumers in those situations.

24 MR. CAMPBELL: And what you just -- to fill out  
25 the picture mentioned, whether you work with the

1 plaintiff's indirect purchaser, class action attorneys,  
2 or you're in conflict with them, how do you work that  
3 out?

4 MR. HARROP: Well, in Illinois, we don't really  
5 run into that problem because we are the sole -- our  
6 statute sets us up so that only the attorney general may  
7 bring a class action under the indirect purchaser portion  
8 of our statute.

9 MR. CAMPBELL: Right, right.

10 MR. HARROP: So we don't run into that issue in  
11 Illinois. Outside of Illinois, obviously, it becomes an  
12 issue for a lot of states where there is concurrent  
13 enforcement of the indirect purchaser statutes. And to  
14 say that the pattern and whether we work with it or in  
15 conflict with it is very difficult to answer. It varies  
16 from case to case. There have been cases where we have  
17 worked -- where other states work cooperatively with the  
18 private bar. There are at least two litigated decisions  
19 in which there was a conflict between the parens claims  
20 and the class claims in private litigation. And this  
21 state has won both of those parens claims.

22 MR. CAMPBELL: And how does the Class Action  
23 Fairness Act affect how this goes forward?

24 MR. HARROP: That I don't know the answer to.  
25 I do know at the moment three district court decisions

1 that say our parens cases are not subject to CAFA. A  
2 2-to-1 Fifth Circuit decision came down from the first  
3 appellate court case about a month ago that said, yes,  
4 they are. I think that's going to play out over time.

5 MR. ABBOTT: Good. Any additional comments on  
6 state/FTC relations?

7 Well, let me move very quickly to closing cases  
8 at early stages. You know, obviously -- and this bears  
9 on resource allocations, on what policies are pursued.

10 Josh Wright, should the FTC adopt particular  
11 protocols or policies regarding how many resources to  
12 spend on preliminary investigations, when to pull the  
13 trigger and get compulsory process, get a Part III  
14 complaint, do you have any general observations?

15 MR. WRIGHT: As far as -- I mean this is going  
16 to vary so much case by case over the life of the  
17 investigation and whether you are still sort of still  
18 learning something new that's helping you with the  
19 analysis to figure out whether or not a violation has  
20 occurred.

21 So I don't know of a sort of general,  
22 one-size-fits-all protocol or guideline would make sense.  
23 But I certainly think there are some principles that help  
24 out in the resource allocation decisions here. If you  
25 think of, for example, a pricing case, all right? So one

1 of the differences between antitrust and whether I'm a --  
2 have an investigation about a bank robbery, is that it  
3 might be the case if I'm figuring out whether or not  
4 pricing conduct violates antitrust law.

5 If I'm wrong, it means consumers are helped by  
6 the discounts, lower prices, consumer welfare goes up.  
7 The -- you know, the counterfactual is not neutral,  
8 right? The counterfactual is consumers are being -- the  
9 thing is procompetitive not anticompetitive. Of course,  
10 it might be competitively neutral. But as we  
11 investigate, if we figure out it's competitively neutral  
12 or procompetitive or we don't have evidence that the  
13 conduct is anticompetitive and it doesn't look like we're  
14 going to get new evidence that's going to change that, it  
15 strikes me as -- that there's no reasonable explanation  
16 for not -- not closing. I mean, the counterargument, of  
17 course, is if we keep it open, maybe -- maybe things  
18 change down the road. Maybe the decision-makers change  
19 their mind and are more willing to bring the case than  
20 they are now based on the same set of information.

21 But the idea that keeping these investigations  
22 open, doesn't have some sort of chilling effect on what  
23 could be procompetitive conduct strikes me as not  
24 plausible and it's at least a factor that should weigh in  
25 to these determinations. With that particularly in mind,

1 I have -- I have single firm conduct investigations in  
2 mind rather than mergers or -- or -- or price fixing  
3 because the danger of false positives there and chilling  
4 procompetitive conduct is much higher in part because  
5 again we have a very difficult time distinguishing one  
6 form of competition from what might be an anticompetitive  
7 effect.

8 So I would caution against holding  
9 investigations open, you know, that have had a reasonable  
10 opportunity to gather facts and have some theory  
11 development and test the theory, but there's not yet  
12 evidence of a violation.

13 MR. ABBOTT: Anyone want to add to that?

14 MR. CAMPBELL: Well, I think just to give you  
15 the private bar's perception on this, I think when you  
16 have an FTC investigation or any agency investigation,  
17 the private client's going to want to get in there, the  
18 sooner the better. Find out who is leading the  
19 investigation, see if you can, identify the issues that  
20 are really going to make things turn around. And for  
21 example, even before you respond to a second request, you  
22 may want to find a way to bring people in to be  
23 interviewed or something to give them -- if they've got  
24 the wrong view of the industry or they think something is  
25 going on or customers. The sooner you can find that out,

1 get them the information you need, my experience is that  
2 if you've -- if you -- if you've got the right picture  
3 and you give them access to this stuff, you can help move  
4 these things along and get early termination or whatever  
5 it may be.

6 MR. ABBOTT: So as a matter of process, you  
7 seem to be suggesting that there shouldn't be  
8 hide-the-ball tactics, that -- if it's a good story.

9 MR. CAMPBELL: My experience has been that the  
10 agencies don't have to wait for the response to the  
11 second request or everything to come in that they're  
12 asking for if you can get in there and start the dialog.  
13 And you know, if they say, gee, we really don't know how  
14 this works and you can bring somebody in, that that can  
15 move it along.

16 MR. ABBOTT: Okay. Anyone else? Okay. Before  
17 -- we're almost running up on the end. But I think I'd  
18 like to close with one general question and it's been  
19 raised implicitly and perhaps Tom Campbell might like to  
20 address it but everyone jump in, transparency. Is there  
21 sufficient transparency to the public FTC decisions in  
22 transparency to private parties of agency theories in  
23 evidence, in cases how could we improve?

24 MR. CAMPBELL: One area I would say is  
25 ridiculous within the FTC and this goes back to Part III



1 litigation, is when Part III litigation is going on, you  
2 cannot go in and talk to the commissioners about an  
3 on-going case because they're ultimately the  
4 adjudicators. So you have this ridiculous nonsense that  
5 the case has to be withdrawn from Part III if you want to  
6 go and address a settlement issue or something.

7 And one of the reasons -- you know, we talked  
8 about Part III going on forever. This -- these things,  
9 it's a missile that gets launched and there's nobody in  
10 control of it after it gets launched because the  
11 commissioners can no longer go back and re-ex -- it's  
12 just a ridiculous situation. So I don't know if that  
13 falls directly into transparency but I've had the  
14 situation where you just can't talk to the people who run  
15 the agency because they've launched the missile and it's  
16 out there.

17 MR. ABBOTT: Any additional thoughts on  
18 transparency and openness?

19 MR. WRIGHT: More closing statements.

20 MR. ABBOTT: Okay.

21 MR. PICKER: More data.

22 MR. CAMPBELL: We're full circle, back all the  
23 way.

24 MR. PICKER: Yeah, all right. But you know  
25 what to say.

1           MR. ABBOTT: Subject to resource restraints.  
2       Okay. We're almost out of time. But questions from the  
3       audience? Yes, please identify yourselves for our  
4       purposes.

5           AUDIENCE MEMBER: Steve Baker, Midwest region,  
6       just two things. One, on the merger retrospect, is I  
7       know the FTC has done them, has done them on and off for  
8       years. I don't know what we've done recently about  
9       publicizing results, but there's certainly things you can  
10      find. We've seen one where people promise specific  
11      tangible efficiencies of things they're going to do after  
12      the merger is complete such as -- open facilities or  
13      close facilities. And you go back and look and they did  
14      not do that. I mean, it's like -- it's not rocket  
15      science. It doesn't require real data to go back and  
16      say, okay, we got fooled. We'll be better off, so maybe  
17      we should talk about that. But it certainly happens with  
18      the FTC and I believe still is.

19           Alden can probably talk -- of course Fred  
20      talked about the advocacy efforts and Maureen pointed out  
21      to me a little earlier maybe she should be the one to  
22      make this point that we still do. I mean, there was one  
23      here in Illinois not too terribly long ago. Actually  
24      appeared in the Tribune. Some of you have seen this,  
25      local medical clinics now in some of the drugstores and

1       there was some proposed Illinois legislation that was  
designed obviously to close those things down to make

1 Act, which we're going to have some more -- I don't know  
2 the exact -- you know, we're going to ask ten questions  
3 of five people or ten people and we've got to go through  
4 this 6- to 9-month process with Federal Register notices,  
5 et cetera, et cetera.

6 We also have a lot of external constraints. We  
7 have resource constraints that are largely, I think,  
8 driven -- a lot driven when we want to borrow someone  
9 from B.E. to say do some -- to help out, do some good  
10 work. You know, Congress asks us to do a lot of stuff  
11 that, you know, we probably don't want to -- you know, I  
12 speak only for myself and not for the Federal Trade  
13 Commission. But, you know, stuff that -- we -- you know,  
14 takes up a lot of resources to do a lot of these studies,  
15 so both economists and -- and attorneys. So we run into  
16 those two constraints.

17 And I just wanted to know, Fred, I look back in  
18 the tenure when you all were there and there was work  
19 that we cite, you know, great stuff on advertising,  
20 commercial practice restrictions. We -- generating that  
21 kind of work would be something we'd like to do but we  
22 run into a lot of constraints. And I wondered if you had  
23 constraints like that and if you did, how you dealt with  
24 them.

25 MR. McCHESNEY: Yes, we did, but I doubt they

1 were nearly as serious as the ones that you face today.  
2 I think -- I think your point is a good one because it  
3 also -- the availability of data and the fact that you  
4 have some of that to work with oftentimes makes it more  
5 attractive for the Commission and its personnel to get  
6 involved in something. Now, they've got something a  
7 little more tangible, they've got something more original  
8 to say. It goes beyond econ 101 or intermediate price  
9 theory. Now we've got some actual data, we've got some  
10 actual empirics.

11 So it -- it is very useful to have and we  
12 generated a fair amount of it or there was a lot being  
13 generated already. The famous study of lawyer advertising  
14 done by the Cleveland regional office is a great example  
15 with a tremendous amount of data generated there, which  
16 we then used for various advocacy purposes as the same  
17 sorts of issues as addressed in that study would come up  
18 in regulatory settings. But I just had the impression --  
19 and I can't be more specific than that, that the  
20 difficulties of getting clear and instant approval for  
21 those kinds of things is much greater than it used to be.

22 MR. ABBOTT: Okay. Well, we are running up  
23 against our time deadline. I think the next panel is  
24 supposed to start at 3:00 but if there's one last  
25 question, I might entertain it.

1                   Okay. Well, we've solved all our problems.

2       Thanks to this expert panel. Thank you very much.

3                   (A short break was had.)

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1           MEASURING THE WELFARE EFFECTS OF THE FTC'S  
2           COMPETITION AND CONSUMER PROTECTION EFFORTS

3           MR. BAYE: I guess we should probably go ahead  
4           and get started to keep this on track.

5           My name is Mike Baye. I'm the director of the  
6           Bureau of Economics at the FTC and it's really a delight  
7           to be here.

8           Before we get started in the event that we run  
9           out of time, I just wanted to -- again on behalf of the  
10          Federal Trade Commission I thank Henry and Derek for all  
11          the great work they did in helping organize this and the  
12          Searle Center as well and also on behalf of the rest of  
13          us at the FTC to thank Maureen and the gang who did a lot  
14          of work behind the scenes to set this up so it's really  
15          been a great event.

16          And just to make sure everyone is on the same  
17          page, Chairman Kovacic is very interested in not praising  
18          the Federal Trade Commission but taking a critical look  
19          at the things that we've done so that we might learn from  
20          some past mistakes so that over the next 100 years we can  
21          make better decisions. If he were here personally, he  
22          would certainly encourage you not to pull any punches and  
23          I therefore make that same -- give you that same  
24          recommendation.

25          This session is designed to come up with

1 mechanisms whereby we might more effectively measure the  
2 welfare effects of various policies and antitrust  
3 enforcement actions that we engage in at the Federal  
4 Trade Commission. Obviously we are involved in both  
5 competition or antitrust matters and also consumer  
6 protection. To the extent that we might think a little  
7 bit about the consumer protection angle, that would be  
8 very helpful although I know the esteemed panel is very  
9 interested in the antitrust side of matters.

10 Let me just very briefly introduce who the  
11 panel will be. This is will be a nice panel to have a  
12 useful dialog that I believe will help us as we move  
13 forward.



1           Then to Dennis's immediate right is Aviv Nevo.  
2       He's a professor right here at Northwestern University.  
3       He's also an expert in a number of areas, most notably  
4       the work I'm most familiar with is his work on estimating  
5       demand -- demand and analyzing the impacts of -- of  
6       competition, mergers and so forth. And he's a very  
7       unique individual because his research not only lies in  
8       the area of pure economics but he also has made important  
9       contributions on the marketing side which is very, very  
10      important as one's contemplating not only antitrust  
11      issues but issues related to consumer protection as well.

12           Carl Shapiro is over on the far right over  
13      there. Carl is a professor at the Haas School of  
14      Business at UC Berkeley. Carl also had the pleasure of  
15      serving as a Deputy Assistant Attorney General for  
16      Economics at the Justice Department in the 1990s. So the  
17      Justice Department is very well represented here.  
18      Hopefully we can learn some of their best practices and  
19      maybe learn from some of their past sins. That would be  
20      a useful thing for us to do. Carl is also a senior  
21      consultant with Charles Rivers Associates and has done  
22      consulting as has Dennis for the Justice Department as  
23      well as the FTC.

24           Who is next down there? Abe. Abe is down at  
25      the very end, Abe Wickelgren. Abe is a very unique



1 has made in the past and potentially eliminate some of  
2 the stumbles that perhaps these folks might think the  
3 Commission has made over -- over the years.

4 So what I'm going to do is it's going to be a  
5 fairly freestyle panel as we've had throughout the day.  
6 I encourage strong dialog. I'm little more than a  
7 referee up here to make sure that everyone stays on task  
8 and doesn't talk over each other. And I'd like to begin  
9 by directing a question to Carl to start and then we'll  
10 open it up for the rest of the panel to -- to -- to  
11 comment or disagree or pile on or whatever they may  
12 choose to do. I'm going to start fairly general and talk  
13 generally about the way we might measure the enforcement  
14 efforts and the actions that we take and the welfare  
15 effects of those various actions and then we'll move to  
16 more specific applications as we move on.

17 So, Carl, let me just begin by asking you what  
18 we, as an agency, should be measuring to determine the  
19 welfare effects of the policies and enforcement actions  
20 as well as the nonenforcement actions that we engage in.

21 MR. SHAPIRO: I was afraid you'd ask that.

22 MR. BAYE: I've got about five more versions of  
23 that same question so just to warn everybody.

24 MR. SHAPIRO: Well, thank you. I'm joking of  
25 course. But the emphasis on measurement is what makes

1 these questions very hard because -- in fact the group of  
2 us talking in advance, we're kind of wringing our hands  
3 about how hard it is to get accurate measurements in a  
4 broader sense of the antitrust mission, at least that was  
5 our focus.

6           And let me first indicate some of the  
7 difficulties and then maybe some glimmers of hope, I  
8 guess. I think at a very high level the problem -- the  
9 difficulty of measurement is that so many of the effects  
10 come through deterrence. I mean, basically through  
11 having -- if you have clear rules about -- if you really  
12 knew where the line is -- let's take unilateral conduct,  
13 Section 2 type of issues or Section 5 issues, you might  
14 have very few cases and yet substantial benefits from  
15 having these rules in place because companies would be  
16 adhering to them, okay?

17           So in any broad sense of measuring the impact,  
18 I don't think you're going to get an accurate measurement  
19 by looking at individual cases, the cases the agency  
20 happened to bring, for example.

21           So that, I don't see a good way to -- to do  
22 these broad measurements given the importance of  
23 deterrence and precedence. Now, that's not to say things  
24 are hopeless. In individual cases then, you want to make  
25 sure -- you want to somehow get it right, okay? So that

1 if you're drawing these lines that are having so much  
2 impact on business conduct, you want to get the line in  
3 the right place and that for the very same reason has lot  
4 of impact.

5 So how would you tell that in an individual  
6 case, okay? Well, in some cases, you can measure effects  
7 pretty well. I mean, I happen to work as the expert for  
8 the Commission on the Unocal case which was the case  
9 where Unocal was accused of deceptive conduct that  
10 allowed them to charge excessive royalties for their  
11 patents on reformulated gasoline in California. And so  
12 this was fashioned as monopolizing the technology market  
13 with these excessive royalties.

14 Well, that was -- I mentioned the case probably  
15 because I know about it, probably because it's unusually  
16 good for being able to measure because we could see what  
17 the charges were, and we could estimate this might have  
18 been raising the price of gasoline three cents a gallon.  
19 And through them there are a lot of gallons of gas that  
20 get sold and used in California so you can -- you get a  
21 measure of the direct harm there, okay, because it was an  
22 overcharge case.

23 Now, of course, that's more commonly measured  
24 than in price fixing cases for example, the  
25 monopolization cases. So you can do that and get a sense

1 of the magnitude of the importance of any one case but,  
2 of course, going back to my first argument, you know, the  
3 bigger question is what's the benefit of establishing the  
4 rule, the principle, that applied there, which in that  
5 case was if you engage in deceptive conduct to get your  
6 patent included in a product standard and therefore  
7 charge excessive royalties, that's a bad thing to do,  
8 that's adverse to the competitive process.

9           And so there may be -- if that rule were  
10 established, it doesn't look very likely after the Rambus  
11 case, but if that rule were established, then that could  
12 have, you know, very widespread benefits that we wouldn't  
13 be able to measure. And I just don't see a good way of  
14 measuring the broader thing but at least you can see in  
15 an individual instance how much that mattered and maybe  
16 that's -- you could look for other examples of that type  
17 of conduct where it was deterred or where it might have  
18 occurred to get a sense of scale. So that's kind of a  
19 high level view on it.

20           The other thing I guess you have to think -- if  
21 you really focus in on the FTC's mission, again, this is  
22 going to apply broadly and we'll drill down to particular  
23 areas, mergers, and unilateral conduct and the like, but  
24 you really have to think about how it fits in with the  
25 other parts of antitrust enforcement. So -- and I think

1 particularly about all the private actions. I mean, you  
2 can talk about DOJ, you can talk about state, you can  
3 talk internationally, right, but just to focus on the  
4 private actions, there's a lot of leverage for the FTC,  
5 okay, because when you do bring a case -- let's take --  
6 well, again, there's going to be usually some follow on  
7 private -- private actions. I mean, again an example, I  
8 know better -- it's not an FTC case, it happens to be a  
9 DOJ case. But in the Microsoft case, I think Micro- --  
10 in the end, I don't think Microsoft, the remedy did much  
11 to control Microsoft. But they paid billions of dollars  
12 of damages to private plaintiffs. Now, the problem with  
13 that system is -- at least in that case, I don't have any  
14 confidence that those private damages bore any particular  
15 good relation to the actual harm that the conduct caused.

1 where it would be harder for private plaintiffs to follow  
2 the same pattern and use the same evidence because of the  
3 unique character of Section 5.

4 So I would again return to the precedent  
5 setting role, not so much about measurement but in terms  
6 of evaluating what you are doing. And I'll close these  
7 initial comments by a more personal note.

8 I happened to just come back yesterday from  
9 China, where I was in Beijing talking to government  
10 officials about how to implement their new antimonopoly  
11 law, which went into effect August 1st and just being  
12 there in that very exciting country and city and at this  
123 time when --eaCn's like19.4 -or pherm r p1890persapps,  
124 tright? Yu aget--eaI'v, nf eounrs, nbee thaining whell,  
125



1           MR. BAYE:   Abe?

2           MR. WICKELGREN:  Yeah, I think just to return,  
3   I think, echo the deterrence point, that that I think is  
4   probably the -- you know, where the big welfare effects  
5   are.  And I think, you know, one implication that that  
6   has for measurement is if you measure specific cases, I  
7   mean, you are likely to, I think -- you know, the cases  
8   that are going to end up getting litigated or at least  
9   getting serious consideration are going to be the close  
10  cases.  And if we think that the parties have better  
11  information about what those likely effects are, right,  
12  in the close cases, you know, if the parties think really  
13  this is not as bad as it looks, right, and, you know, to  
14  the extent that the FTC needs to commit to have this  
15  threat of enforcement, you know, precisely to deter  
16  cases, the FTC is going to end up going after cases  
17  probably, you know, when they have a good chance of being  
18  wrong, precisely because it's necessary to make this  
19  commitment to, you know, not infer too much from the fact  
20  that the parties are nonetheless bringing the case.

21           And so I think, you know, the value of the  
22  deterrent, you know, could potentially be jeopardized by  
23  looking too much at, you know, retrospective saying, you  
24  know, were we right in this particular case when it may  
25  be sort of the necessity to commit to having a reasonable

1 likelihood of being wrong is important to achieving those  
2 deterrence objectives.

3 MR. SHAPIRO: So you think if they never lost,  
4 then they would be bringing too few cases, or do they  
5 have to lose a fair bit to be doing their job?

6 MR. WICKELGREN: I think that if -- yeah, I  
7 mean, you have to lose, you have to be wrong, you know,  
8 because part of what is going on with the dynamic with  
9 the firms having, you know, better information about what  
10 the likely effect is, if you try too hard to get it right  
11 in this particular case, all right, you're going to be  
12 using the information that well, the firm still brought  
13 the case and they probably -- you know, they have better  
14 evidence than we do, but if you use that information too  
15 much, then, you know, you end up undermining the  
16 deterrent threat of getting firms in situations when they  
17 are more likely to think the action is anticompetitive,  
18 you know, to not bring the case.

19 MR. BAYE: Before we move on to the other  
20 panelists, do you guys have follow-ups on how you might  
21 quantify the deterrent effect?

22 I have no such clever ideas. That's why we  
23 prefaced this whole thing with the caveat that this is a  
24 very difficult session because our task is to try to  
25 better quantify measures and it's easy to see that these

1 things exist but it's difficult to kind of draw those  
2 lines and determine whether you're overly aggressive or  
3 not.

4 MR. SHAPIRO: Well, the best I can do is if you  
5 -- if you could measure effects of individual cases that  
6 you bring, which will -- in some sense is going to be the  
7 marginal cases, we think, that people are going to step a  
8 little bit over the line, or you're arguing about where  
9 the line is. That's not going to tell you about all --  
10 you know, the inframarginal cases, if you will, that are  
11 being deterred. But if you had some sense of -- I don't

1 position.

2           So I guess I have three comments. First, I  
3 just wanted to respond to something Carl said about him  
4 having been in China. When new countries -- when  
5 countries adopt new antitrust laws and they're using the  
6 antitrust laws in part to replace government regulations  
7 of one sort or another, it's a very tricky question to  
8 figure out or even to characterize that as relying on the  
9 markets. You're really relying on judges who sometimes  
10 may not have a very good grasp of antitrust principles.  
11 And one of the fears I've had is that these antitrust  
12 laws in foreign countries can be used to impose lots of  
13 restrictions that the regulators maybe hadn't figured out  
14 to do.

15           So, for example, if you want to create laws  
16 against international trade, but that violates some  
17 international trade treaty, you can have your antitrust  
18 laws essentially do the same thing by defining predatory  
19 behavior in all sorts of unpalatable ways seem to mainly  
20 apply to foreign entry.

21           So to go back, though, to the direct question  
22 about deterrence, I agree with Carl that many times  
23 penalties that we see in antitrust cases don't seem  
24 really related to the harm. We know what the optimal  
25 penalty is; it's the net harm to others. Now, when we

1 consider the net harm to others and you include  
2 precedence of a case, that gets really hard but at least  
3 we know we could do a slightly better job with damages  
4 and how we calculate damages. I tried to do that at the  
5 antitrust modernization commission. We actually know  
6 something about how you would want to vary multiples  
7 depending upon the observeability of the action. I would  
8 say that went over like a lead balloon, that suggestion.  
9 And I think that that would be one way to improve things  
10 when you have private rights of action. I do think also  
11 that there are some before and after studies that you can  
12 do.

13 For example, in the consumer protection area,  
14 let's suppose the FTC has certain labeling laws and  
15 certain restrictions. You can see what happens not only  
16 to price but you can see what happens to products,  
17 products withdrawn. What's the consequence of having  
18 products withdrawn? A lot of regulatory actions do  
19 nothing more than just increase costs. And if you just  
20 increase costs but don't see either consumers getting a  
21 benefit from it or what you see is products disappearing,  
22 you can try and measure that in some way.

23 I think the only attempt to quantify  
24 precedential is something that -- I don't know if it was  
25 published -- that they were doing in England at the OFT.



1 answer and I think it sort of poses such as to kind of  
2 let's see how far can we go?

3           So can -- I think the mirror side is yes, we  
4 can't really answer the original question but there's a  
5 lot of things that we can do getting towards that. And I  
6 would sort of advise -- and I think, you know, we're  
7 going to be talking about this for the rest of the panel  
8 -- kind of three steps really as to how do we sort of  
9 start measuring these effects? And I would say the very  
10 first thing is just measure, you know, what happens. You  
11 know, if you look at the effects of mergers, you could  
12 ask, you know, a merger happened -- or didn't happen --  
13 you know, what was the effect? Without even sort of  
14 trying to sort of generalize anything beyond that, not  
15 even necessarily even putting a causal aspect on it. I  
16 think, you know, we know very little about it. We know a  
17 little bit about what happened to average prices a little  
18 bit. We -- or at least -- I don't know really what  
19 happens in other dimensions. I mean, what sort of  
20 happens to sort of variation in prices?

21           If you look at, you know, consumer packaged  
22 goods, you know, products that I've studied a lot, if two  
23 cereal manufacturers produce, we sort of predict that the  
24 average price is going to go up. When you look at typical  
25 supermarket pricing, there's a lot of sales. There's a

1 lot of promotions. Are there more or less promotions  
2 with the change in concentration? I don't think we know  
3 that. Just in a pure descriptive level, not sort of  
4 saying anything beyond that, just at that level, we don't  
5 know. Again, two cereal manufacturers merge, are they  
6 more or less likely to introduce new products? Is there  
7 going to be more or less innovation? You know,  
8 innovation even in the simple sense of, you know, more  
9 new product -- and I'm not talking about the big, you  
10 know, innovation of are you going to introduce the next  
11 browser or something of that sort?

12 So I think that's the very first step, just the  
13 descriptive of sort of what do we do. I think the next  
14 step is sort of what Carl was kind of talking about which  
15 is to try to, you know, measure, you know, what's the  
16 impact of a particular kind of marginal case and try to  
17 see -- kind of get the causal effect, if you want, of the  
18 activity. And then, you know, where I think we need kind  
19 of leap of faith or maybe a macroeconomist to come to our  
20 help is to kind of try to generalize from those handful  
21 of cases that we see to really understand what's  
22 happening in the inframarginal. And there, you know, at  
23 the end of the day, you know, we're going to have --  
24 we're going to see data in this range and we're going to  
25 extrapolate and do you extrapolate using sort of a linear



1 curve or exponential curve or whatever curve you want?  
2 That's what's going to determine sort of the numbers you  
3 get. So that's it, I think, as far as a general sort of  
4 ...

5 MR. BAYE: Okay. So having established that  
6 we've set up a bunch of economists to answer an  
7 impossible question, we'll now work on some specifics of  
8 that. I think as we start getting down into a more  
9 granular -- granular -- granular level, we'll see that  
10 there are in fact are some ways that we might be able to  
11 at least shed some light on some of the aspects of our  
12 work.

13 I wanted to address this to Dennis because I  
14 had the pleasure of listening to Dennis and Orley  
15 Ashenfelter go back and forth on the value of merger  
16 retrospects at the unilateral effects workshop and I'd  
17 like to get his views kind of on the record here and then  
18 invite the other panelists to perhaps comment or chime  
19 in. And the issue I'd like us to turn to is the  
20 measurement of welfare effects in -- in merger cases.

21 And in some of the previous panels this morning  
22 and this afternoon we heard about the potential value of  
23 doing merger retrospectives. I believe the hospital  
24 mergers that Tim Muris initiated in the early 2000s were  
25 one example. Incidentally, I think one reason that those

1 have not been released yet -- they will soon be released  
2 -- was because they were all in Part 3 and you can't get  
3 clearance to release something on a merger that the  
4 Commission is actually working on at the time. So  
5 probably part of the administrative process backed that  
6 up.

7 Back to this issue, Dennis, I would just hope  
8 you might be able to shed some light to us on whether  
9 merger retrospectives shed light on the value of the  
10 welfare that we might be creating for consumers in  
11 certain markets.

12 MR. CARLTON: I think they shed light. The  
13 question is do they shed enough light and can we do  
14 better. And my comments here are really based on a paper  
15 I wrote. It's in the DOJ discussion paper series. And a  
16 shorter version was just published in the Antitrust, the  
17 ABA magazine. My own sense is that we've not done a very  
18 good job of quantitative assessments of symptomatic bias  
19 in merger policy. We've really not distinguished very  
20 well between a systematic bias versus making a mistake in  
21 a particular case. And those are two very different  
22 things. You don't want to do either. You don't want to  
23 be biased and you don't want to make mistakes. But you  
24 want to separate the two.

25 I think there haven't been enough retrospective

1 studies. There should be more and they should do exactly  
2 what -- what Aviv said. We want to know what happened  
3 before we can start analyzing is it good or bad. And I  
4 don't think we've done that enough.

5 But these retrospective studies, did price go  
6 up, did products -- more -- you know, get out more  
7 products, but these types of retrospective studies that  
8 ask what happened really aren't as good as -- at least I  
9 once thought. And I think we can do a lot better. And  
10 let me explain why.

11 A retrospective study -- let's just focus on  
12 prices. Ask do prices go up after the merger? Well, if  
13 you think about it, if you've done -- even if you look at  
14 a lot of mergers, you have to ask yourself the question  
15 how come I'm observing this merger? And the answer is  
16 you're observing this merger because someone at the FTC  
17 or DOJ thought it was a good merger and prices wouldn't  
18 go up. So therefore you're looking at a sample, you're  
19 drawing from a sample, of which on average you would  
20 expect prices to not go up, quality adjusted prices. So  
21 you have self-selected sample, we know the problems with  
22 self-selected samples, so in some sense, these merger  
23 studies, retrospective studies, are primed to give you  
24 the answer prices didn't go up. So I'm telling you -- so  
25 it's obvious that you can't infer from that observation

1 without doing some correction that your merger policy is  
2 fine. So how can you solve this problem? Well, we know  
3 you can -- you know, Heckman and others have, you know,  
4 shown us how to do these self-selection corrections that  
5 might be hard in this case. But there's something else  
6 you can do if you have the data and really you do have  
7 the data. The data you want and this is what is needed  
8 to evaluate government policy is you want to know what  
9 are your economists telling you about what they're  
10 predicting from this particular merger at the time  
11 they're making their decision. Will prices go up -- are  
12 you saying prices are going to go up by 5 percent? Now,  
13 anyone who -- who's worked in the Department of Justice  
14 or in -- ever done a study knows when you do a study,  
15 it's not one approach you take. You might do a reduced  
16 form to predict price, you may do a simulation model with  
17 Logit, you may do a simulation model with nested Logit,  
18 with BLP, you know, or more complicated methodology. And  
19 you might have different games people play, I mean,



1     how those predictions compare to behavior  
2     retrospectively.  And then we can whittle out those  
3     techniques that work versus those techniques that don't.  
4     So I actually think this is in the area where there is a  
5     clear research agenda that we could go forward on.

6             MR. BAYE:  Aviv?

7             MR. NEVO:  So I expected going into this  
8     session that I would completely disagree with Dennis  
9     simply because the note that we got sort of said that  
10    Dennis thought that retrospective studies were inherently  
11    flawed and I think there is some mention to it in the  
12    previous panel, but going from kind of that extreme, I  
13    mean, I basically agree with almost everything that was  
14    said.

15            I mean, you know, it's clear that there's  
16    limitations on their sample selection.  There's issues  
17    that we have to deal with.  But you know we shouldn't  
18    stop.  We should really sort of try to sort of get the  
19    data both at the descriptive level; but you know, taking  
20    it one step further, as sort of Dennis suggested, to  
21    really understand sort of our method as to, you know,  
22    what are we doing right, what are we doing wrong?  I  
23    mean, you know, is Nash, Bertrand a good assumption or is  
24    it a bad assumption when we do merger simulation?  Do we  
25    have any hope of simulating the effects of mergers?  Are

1 we just focusing on completely the wrong dimension  
 2 because we're focusing on price and that's not the  
 3 important dimension. I mean, we don't -- we have no clue  
 4 on any of these.

5 Indeed I would actually like to sort of -- I  
 6 think it was about seven or eight years ago -- you might  
 7 remember, Carl -- there was a proposal we put through IBR  
 8 when I was still at Berkeley to the Smith Richardson  
 9 Foundation. We put a proposal to actually do some sort  
 10 of retrospective study. And I think the comments we got  
 11 from the reviewers were very nice but impossible to which  
 12 we sort of agreed but we were hoping we were going to get  
 13 funded anyway.

14 Part of the time I remember talking to people  
 15 at the DOJ. I was sort of -- you know, trying to put  
 16 them -- you know, let's sort of do this but we need kind  
 17 of a benchmark. It's like, okay, prices go up but  
 18 relative, you know -- relative to what?

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1 predicting what happened. And, you know, there are  
2 probably enough cases are involved that we've seen sort  
3 of that things actually went through that you could have





1 MR. CARLTON: So that's a good question, okay?

2 MR. SHAPIRO: Thank you, professor.

3 MR. CARLTON: And I have it in my -- I discuss  
4 this in my paper. It's actually -- I'll answer it in two  
5 parts. The first is I do view the -- and what I  
6 recommend in the paper is that we limit the analysis to  
7 second requests, okay? So I think that's exactly right.

8 The second is what I'm trying to determine is  
9 whether there's a systematic bias from government policy.  
10 And just to simplify things, do they always make a  
11 mistake and underestimate the price effect or  
12 overestimate price effect. That's what I'm trying to  
13 figure out.

14 Now, if you could tell me which mergers are  
15 right on the line, that would be a way of estimating it.  
16 I would agree. And you can write down econometrically  
17 how to estimate that. All I'm saying is that, that's  
18 actually pretty hard to estimate and I can get a much  
19 more efficient estimator if I combine my information  
20 about prices retrospectively with what the agency is  
21 predicting.

22 In other words, I'm trying to see if the agency  
23 has a systematic bias. And the easiest -- and what that  
24 means is when the government predicts what's going to  
25 happen to price, their best predictor, are they right or

1 wrong? And the easiest way to answer that question is to  
2 compare the actual price to the government's price  
3 prediction.

4 Now, there's another way of doing it. If I  
5 don't have the government's prediction, I can look at --  
6 let's see if I can draw a dia- -- I'm not going to trip,  
7 am I? No. But there's no chalk. Oh, there is chalk.  
8 Okay.

9 So if you -- let's see if I can remember. If  
10 this is the distribution of prices (indicating), price  
11 effect, a neutral policy is  $\Delta P$  equals zero in that I  
12 forbid these types of mergers, okay? And that means on  
13 average -- I'm not biased. If it's a systematic effect,  
14 if the government is doing something that is, let's say,  
15 overly stringent, then that would mean it forbids too  
16 many mergers, okay? And let's call that  $S$  and that's  
17 what I would like to estimate. So the optimal estimator  
18 is -- you know, I'm going to get observations in this  
19 tail, because that's what I'm going to observe, those are  
20 the mergers you're going to see. And then the question  
21 is how you observe it -- how you estimate  $S$ . So  $S$  is the  
22 minimum or the maximum support of this distribution,  
23 okay?

24 All I'm saying is econometrically,  $S$  is also  
25 the bias in every single prediction. And it's -- if I

1 can observe the predictions for all mergers and compare  
2 them to the actual prices, then I can observe S --  
3 actually calculate S -- over a larger body.

4 So the point you are making is exactly right.  
5 I can estimate S, as you say, and it's just a much more  
6 powerful way for me to estimate things if I can in a  
7 sense say, all right I have a thousand mergers. Instead  
8 of just concentrating on the ones that were close, for a  
9 thousand mergers, I want to compare how bias you are in  
10 price. That's all. It's an econometric point.

11 MR. SHAPIRO: So if we can figure out this  
12 group was marginal, we'd look at that with a much smaller  
13 set -- and that's what you don't like --

14 MR. CARLTON: Yeah, yeah.

15 MR. SHAPIRO: -- but it would give us a pretty  
16 good estimate.

17 MR. CARLTON: Yes.

18 MR. SHAPIRO: Except for the small sample size.

19 MR. CARLTON: Small sample size is the other  
20 problem.

21 MR. SHAPIRO: But --

22 MR. CARLTON: It's not as efficient as my --

1 stay with price, which simulation model, which reduced  
2 form, which -- which assumption about gain?

3 MR. SHAPIRO: Okay.

4 MR. CARLTON: And I think it's important for us  
5 to get some sense about all of that. My sense is that  
6 when we make predictions, we -- you know, I'm not at the  
7 Department of Justice anymore but -- that's the loyal we  
8 I guess.

9 But when economists make predictions about  
10 entry and exit, I've never been convinced that we are  
11 very good at it because I've not seen many experiments  
12 testing whether predictions of entry and exit, how robust  
13 they are, how good they are.

14 MR. SHAPIRO: So I would want to distinguish  
15 then, it seems to me, if we think about encouraging  
16 academic research, they're not going to have the  
17 information about the FTC or the DOJ economists' methods,  
18 protocols, predictions, they're just not, okay? They --  
19 this could be a method that the academics could use?

20 MR. CARLTON: Absolutely, yes.

21 MR. SHAPIRO: Okay. So now let's go -- but  
22 your other method, which you prefer then, which is more  
23 powerful --

24 MR. CARLTON: Yes.

25 MR. SHAPIRO: -- and also, you know, put in

1 principle could give a lot more operational guidance in  
2 terms of, you know, this particular merger simulation  
3 thing isn't working well. We have to use something else.

4 So that seems to be then a call for economists  
5 at both agencies to be doing that because nothing else  
6 can do that.

7 MR. CARLTON: Correct, I agree with that.

8 MR. SHAPIRO: So then I just want to make sure  
9 I understand, if we're trying to be specific, they would  
10 have to retain information so maybe there would be a  
11 closing memo about here's what we predicted with this  
12 method, with that method. I mean, in fact you need  
13 quantitative prediction --

14 MR. CARLTON: You're exactly right. I --

15 MR. SHAPIRO: -- right, the price will go down  
16 by 7 percent, up by 9, and you keep these and then some  
17 resources we put into play a year or two later, the  
18 merger went through.

19 MR. CARLTON: And I wrote such a memo to Tom  
20 Barnett, the assistant attorney general, about that  
21 that's that we should be doing.

22 MR. SHAPIRO: And is that the method he used to

1 remains a pretty competitive industry.

2 MR. SHAPIRO: Remained?

3 MR. CARLTON: But -- if --

4 MR. SHAPIRO: Let's not.

5 MR. CARLTON: The competitiveness of it has not  
6 dramatically changed.

7 MR. SHAPIRO: I brought it up, but is that  
8 something that -- forget about Whirlpool -- in general  
9 something you put into place, is that going on at DOJ  
10 now?

11 MR. CARLTON: I do think there is right now  
12 implemented a policy to gather data either at DOJ or FTC  
13 on the part of the economist and I think there should be.  
14 And I think it would be very helpful. And it would not  
15 only enlighten the agency as to what works and what  
16 doesn't to be very valuable for industrial organization.  
17 I should point out -- I mean, the industrial organization  
18 research.

19 I should point out one -- one -- one paper that  
20 I think is really excellent. Craig Peters, who's now at  
21 the DOJ and was a student at Northwestern, did his P.h.D.  
22 here. I don't know if he was your student or whose  
23 student he was. I think he was Rob's -- yeah. He did  
24 what I'm suggesting for some airline mergers where he had  
25 a number of different models, simulation models. And I

1 think he always used Bertrand competition but he did use  
 2 different demand estimation models. And asked which one  
 3 did better and had a reduced form. And I think that's  
 4 really what we have to do.

5 And when we say merger simulation, although  
 6 everybody does merger simulation, we should remember that  
 7 there are several limitations to it. One is it's a  
 8 static game and two, as I said earlier, it's a game in

8

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1 incentive to say, well, since we're talking about cases  
2 we're going to close anyway, right, maybe we don't worry  
3 too much about, you know, putting in the right estimate.  
4 Let's put in the estimate that gives us more leverage and  
5 makes people believe us later on when we have a case that  
6 we really want to challenge.

7           So it seems like, you know, it's a great  
8 project if it's something that the agencies are going to  
9 use internally but if it's something that is going to be  
10 able to be used by the courts, then I'd worry that  
11 there's too much incentive to manipulate it.

12           MR. BAYE: That's an excellent point. Let me  
13 just kind of follow up while we're on the merger  
14 retrospectives theme, I mean, you know, if you talk to a  
15 staff economist at the Federal Trade Commission or the  
16 antitrust division and ask them what a merger  
17 retrospective is, it's some kind of difference in  
18 difference estimation on what happened to prices or  
19 something like that.

20           One can imagine more broadly as you're talking  
21 about these kind of implicit predictions that one makes  
22 about whether entry is likely or if prices went up, entry  
23 would be likely to discipline those things. When you look  
24 at the vast majority of cases that come through the  
25 agencies, they're not cases where the sophisticated

1 econometrics is done either because it would be an  
2 inefficient use of resources given the information you  
3 have about potential overlap or data is completely  
4 unavailable. So the number of dots is -- is small.  
5 You've got to use the approach that Dennis proposed --  
6 let's assume that's true. Let's not argue with that --  
7 let's assume that's true and that we're looking at  
8 alternative methodologies that economists don't think of  
9 right off the bat as a -- as a logical methodology. And  
10 several of us are in business schools and we deal with  
11 case studies quite a bit or have colleagues that use the  
12 case study approach. One might imagine -- I'll put this  
13 on the table and get your comments on whether you think  
14 there would be value in this.

15           So, case study type retrospectives in instances  
16 where data is not available but when you're examining,  
17 maybe the staff memos that are making predictions about  
18 entry or predictions about the various other facets that  
19 might be in a case and doing what you might think is a  
20 descriptive rather than a quantitative retrospective, is  
21 there value in something like that?

22           MR. CARLTON: I think there is. I think  
23 there's great value. In fact, although you can imagine  
24 cases in which there's quanti- -- you know, a lot of data  
25 and you can do these complicated demand estimations and

1 merger simulations, as you say, in many cases that's not  
2 possible. That does not mean that the approach that I  
3 articulated is the -- it can't be implemented. If you're  
4 a Bayesian or a decision theorist, you know that what  
5 matters to determine if someone's prediction is right or  
6 wrong, you first have to ask them, well, what's their  
7 prediction. And if someone says, well, I don't have a  
8 prediction. Then you say you mean you're making a  
9 recommendation about whether to challenge or not  
10 challenge this merger and you don't have a prediction  
11 about price? What's your best prediction about price?  
12 Or give me your probability distribution. I mean, you  
13 can teach people, as you do in business schools, to think  
14 about probabilities in their predictions.

15           So the point is not that this data doesn't  
16 exist. It implicitly exists every time the DOJ or the  
17 FTC's economic staff write a memo telling their views.  
18 And what I'd like them to do is if they have quantitative  
19 techniques that tell me your price predictions are, fine.  
20 But if you don't, I would like a data sheet that says  
21 here's my best estimate of what I think price is, I'll  
22 tell you how sure I am about it. And there are

1 And I think it's -- you know, again, you can have them  
2 put probabilities on things, you can have them put  
3 probabilities on, I think, it's highly likely product  
4 will be repositioned. I think all of that, whether we  
5 call it a case study or descriptive, to me that is  
6 defining what the agency as a whole is doing. And just  
7 like you should be defining consultants, which I agree,  
8 that would be a useful thing to do, you might want to be  
9 keeping track of, gee, when I stick Carlton on the case  
10 at the DOJ, you know, it never goes through, he's against  
11 everything, you know, maybe a Carlton effect or there  
12 could be methodology effect. And I think that's very  
13 important to sort out.

14 MR. BAYE: Carl?

15 MR. SHAPIRO: I guess I disagree about the --  
16 the assumption that there's always a price prediction to  
17 the background here. I mean, I guess, let me start from  
18 where Mike's question -- what Michael's question was,  
19 which is a lot of the time, we don't have all of the data  
20 to do all the stuff that, you know, some sophisticated  
21 merger simulation, it's rare to be able to do it, okay,  
22 so that's not the norm, okay?

23 I think your -- your response, though, seemed  
24 to assume, of course, the way we would do merger  
25 enforcement, was we would stop the mergers and we were

1 convinced there would be a significant price increase.  
2 And maybe if we have to say whether it's 5 percent or 8  
3 percent or some notion of the scale -- and, you know,  
4 this is actually going to relate to the paper that I'm  
5 presenting tomorrow morning with Joe Farrell at  
6 tomorrow's conference on merger enforcement. I think  
7 that may be asking too much in order to have such a  
8 quantitative measure of price effects as a prerequisite  
9 for bringing the case. And I -- I guess, I may be more  
10 enforcement-oriented in saying, well, if I have reason to  
11 believe the price will go up, I don't know how much,  
12 okay? You know the traditional structural approach would  
13 have been, look at, concentration in a relevant market, I  
14 don't really know what's going to happen. That's enough  
15 for me, okay? I'm not going to tell you what the price  
16 is and I don't know, okay? So -- so that, you know, I'm  
17 wondering whether you are raising an extra requirement in  
18 a way to bring a case. So that's just a -- or assuming  
19 that those numbers do exist, when maybe they don't have  
20 to.

21 The other point, Michael, you mentioned  
22 difference in differences in this -- I mean, this  
23 Ashenfelter paper is an exemplar of that, I guess. That  
24 seems to me a very nice reduced form, some nonstructural  
25 way of trying to see what the prices effects were, more

1 along the lines of what happened? I may not know why or  
2 something but what happened? And that seems to me --  
3 again, you can only do that in special cases. I mean,  
4 that's also a consumer products where you need a sense of  
5 comparable products. But I think that -- so I would go  
6 back to look at the mergers that were marginal, which is  
7 what they did, tried to find some notion of -- of  
8 concentrating or marginal mergers that got through and

1 MR. SHAPIRO: If you could.

2 MR. CARLTON: If you could, yeah, yeah.

3 Now, it is true people can be sometimes  
4 uncomfortable about saying, you know, I just think prices  
5 are going to go up, this looks like a bad merger. On the  
6 other hand, that just means they are very flat prior as  
7 to where their beliefs are. And, you know, in a decision  
8 theory course, people are taught how to -- how to -- you  
9 know, how to articulate better their underlying beliefs.  
10 And I think economists could become comfortable with that  
11 method.

12 But, you know, I'd even be willing to say, you  
13 know, put it in categories, a lot, a little, you know, I  
14 think that they could start doing something. But it's  
15 clear when they make decisions they have some  
16 understanding that there's some threshold price increase  
17 that they think is going to occur when they want to stop  
18 a merger.

19 MR. BAYE: Go ahead.

20 MR. NEVO: So just going back to kind of the  
21 original comment about, you know, case-based studies. I  
22 mean, I think there's two points to be made.

23 One is just from a diagram we have here. I get  
24 the impression that you need a lot of mergers to kind of  
25 put them on, you know, sort of that diagram. I don't

1 think that's necessarily true.

2 I mean, you know, the Craig Peters sort of  
3 case. Well, it's literally a case study of -- and if you  
4 look at, you know, recent academic work -- recent  
5 basically being the last 25 years, sort of the new  
6 empirical IO -- it's really all about, you know,  
7 glorified case studies with a lot of econometrics, but  
8 that's really what they are.

9 So to the extent, you know, I think it's  
10 important to realize we don't need necessarily kind of a  
11 cross-section of different mergers to kind of do this  
12 sort of thing. What we do need, though, is, you know,  
13 you were talking about kind of running a nonquantitative  
14 study. I mean, I think at the end of the day, you do  
15 need somehow to measure what was the effect. It was a  
16 merger, what happened ex post. Now, it doesn't have to  
17 be price. You know, maybe you could measure, you know,  
18 the merger happened and what happened to the level of,  
19 you know, chatter, okay, where chatter is measured by,  
20 you know, certain e-mails containing certain phrases sort  
21 of exchanged between executives or I don't know, whatever  
22 it is you want, maybe something, you know, that we can't  
23 really run a regression on but you need to measure  
24 something in the effect of the merger. In that sense, it  
25 does, I think, need to be quantitative. But, yeah, it



1 doesn't necessarily have to be on price.

2 MR. BAYE: Abe, did you want to chime in at  
3 all?

4 MR. WICKELGREN: Yeah, I'm just wondering when  
5 we're thinking about case studies, I mean, how well can  
6 we generalize the results of a particular case study? So  
7 do we need that, you know, the effect of, you know, well,  
8 here, you know, there was a prediction that there would  
9 be entry and it didn't happen, does that mean there's a  
10 general bias for, you know, the agency or this  
11 particular, you know, staff member about -- about  
12 predicting entry or is it a bias of this staff member in  
13 this particular type of industry or is it just -- I guess  
14 as Dennis was talking about, you know, in the beginning,  
15 is this just noise, right? Sometimes you make a mistake,  
16 sometimes not. Do we have -- are we going to get enough  
17 information in, you know, enough similar categories to be  
18 able to make, you know, any distinctions in situations,  
19 you know, where we're talking about -- about case  
20 studies.

21 MR. SHAPIRO: Well, you can see, for example,  
22 if you saw a bunch of mergers where the department said  
23 we're -- or the FTC said we're not concerned about this  
24 particularly with the issue of closing statements, which  
25 are quite useful, okay, which might be more closing

1 statements might help here, okay? Both agencies, say,  
2 well, we're not concerned about these mergers because  
3 entry is easy. Well, then you could see whether -- if  
4 prices did go up, did entry -- at least that gives you  
5 something specific to look for. Or entry and expansion  
6 so you can see if smaller firms grew, you know, that sort  
7 of thing. That seems to me useful and so I would  
8 encourage -- the Commission has done some closing --  
9 well, both agencies have, but it's pretty unusual.

10           The Europeans, I guess, have to do it, they  
11 routinely do it. I don't know whether they have to, the  
12 Commission, the European commission. So that would help  
13 a lot and this, of course, doesn't reveal any  
14 confidential information. But it does say something  
15 about the reasoning that was relevant.

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1 MR. SHAPIRO: That's interesting.

2 MR. BAYE: Why don't we move on and basically  
3 ask the same question we're going to ask over and over  
4 again as it applies now to single firm contact --  
5 conduct.

6 And, Carl, I'll let you take this on.

7 MR. SHAPIRO: Well, I'll be briefer on this.

8 I think we have a lot more we can do on mergers  
9 actually than we're going to be able to do here. And so  
10 it's probably suitable we talk a quite while about  
11 mergers. But I also think -- still preparatory comment  
12 -- that the mergers is, I think, a huge ongoing -- we --  
13 we don't understand very well some of the effects and you  
14 know, how we're doing these things. There's -- there's  
15 quite a bit of differences about methodology. So I think  
16 there's a lot of return there to continuing to see how  
17 we're doing.

18 In the single firm area, I made my general  
19 statements about deterrence hold. I -- I think to a much  
20 greater degree we've been fine tuning single firm conduct  
21 boundaries for the past -- since maybe mid '70s, okay, in  
22 the U.S., okay? And so, you know, it's possible we're  
23 way off and we got it wrong and it's going to continue to  
24 get more favorable to dominant firms in terms of what  
25 they're allowed to do. But I do think the sort of

1 measuring the effects of moving the line a little bit  
2 here or there, I mean, you know, if we're pretty close to  
3 the optimum of the line a little bit, it's not going to  
4 matter very much. Whereas, mergers, in fact as we have a  
5 steady stream of them -- you know, a trillion dollars a  
6 year, mergers are reviewed by the agency so -- and, you  
7 know, you -- situations change. So that's -- that just  
8 seems to me there's more return there.

9           Having said that, I just don't see how to go  
10 beyond trying to get measurements in individual cases.  
11 Well, two things. That -- what I said before, the Unocal  
12 Case, I mentioned. But other cases -- you know, we could  
13 do a case, a case like Schering-Plough, you know, your  
14 Schering-Plough case where you've got drug settlements.  
15 You can also do measurements there in terms of how much  
16 gener- -- how long generics were delayed from entering  
17 the market and the impact of -- they've done a lot of  
18 studies at the FTC about the impact of generics on  
19 prices. So you can -- you can measure some of the things  
20 in some of those areas, okay, but you're not going to be  
21 able to measure the deterrence, which I continue to think  
22 is the bigger thing so that's the way it goes.

23           The other thing sadly is that if you look at  
24 the FTC's record over the last five years maybe, I'm  
25 concerned that these are negative precedential effects

1     because you keep losing -- or not just the -- I mean,  
2     both the Rambus case and the Schering-Plough case, the  
3     consequences of what the FTC has done has been -- the  
4     court of appeals decisions, that I would -- I think --  
5     and I'm not alone -- are allowing lots of anticompetitive  
6     conduct.  And companies are more comfortable engaging in  
7     that conduct now that the FTC challenged it and lost.  So  
8     maybe more effort should be -- less effort on regular

1 the risks that are faced in litigation and what seem to  
2 be very strong cases to get loss, that's got to be part  
3 of the calculations as to what you're doing. And so far  
4 it hasn't been going very well lately. I mean, what's  
5 the big success story the FTC would point to in the last  
6 five years in terms of single firm conduct? I couldn't  
7 think of one as I was flying from Beijing trying to have  
8 an the offsetting example to Schering-Plough and Rambus.

9 I mean, Unocal maybe but it was settled so  
10 it's, you know -- I mean, it was a good case but -- but  
11 that's -- you can't put it up there as, you know, it was  
12 won. It was settled because of the merger that came  
13 through.

14 MR. CARLTON: Well, I think when you bring a  
15 case and it appears to be a good case and then you  
16 subsequently lose, as you point out, it can have a  
17 harmful -- harmful effect. What it does, of course, is  
18 put pressure on the other parts of the system then to  
19 remedy it either for the Supreme Court to take the case  
20 or for there to be a legislative solution.

21 I think that part of the difficulty in the IP  
22 area is -- as many people have pointed out, including  
23 Carl -- is that IP laws are causing havocs in some  
24 places. And, therefore, that creates -- when you get  
25 cases that, say, many people think come out wrong, I

1 think that does put more pressure on the legislative body  
2 to remedy the problem if the courts can't. So the court  
3 is saying, listen, you guys pass the laws, we are just  
4 interpreting the laws. The suggestion, therefore, is  
5 that if you don't like how we're deciding cases, you  
6 should alter the laws a little bit. So there can be  
7 pressure in that regard.

8 I think the difficulty with single conduct  
9 behavior is to find out -- and again I think the issue is  
10 not whether you are making a particular mistake in a  
11 particular case but whether there's any systematic bias  
12 one way or the other, and you don't have to either have  
13 systematic bias or make mistakes. But I think you do  
14 want to distinguish between the two. And a policy is  
15 determining the systematic bias or eliminating the  
16 systematic bias. And that's hard to measure in part  
17 because there aren't a lot of single conduct cases and in  
18 part because they're quite different over time. And if  
19 you do a time trend of single conducts cases, we know the  
20 antitrust laws have changed enormously over the time  
21 period. So it is not obvious that the fact that single  
22 conduct cases 30 years ago turned out terrible tells you  
23 much about what would happen today.

24 The other area that I think is a very hard one  
25 and I think a lot more work needs to be done, is what is



1 the evidence in single conduct cases when you have an  
2 industry that's quite dynamic and rapidly changing. Is  
3 intervention in those injuries harmful or helpful? And  
4 that's a very hard question, I think, and that's an area  
5 where we really need a lot more empirical research.

6 I could go either way. The hunch is we like  
7 competition. But I'm just pointing out that there are  
8 offsetting forces the other way. So I think that is  
9 really an area where there should be more study. Dynamic  
10 industries, what's the effect of either antitrust  
11 decisions or regulation on -- on the innovative process?

12 MR. BAYE: Any thoughts -- for the whole panel  
13 -- any thoughts on how you might measure the impact of  
14 single firm conduct cases on dynamic innovation?

15 MR. SHAPIRO: Well, I mean in some cases you  
16 can measure the pace of product improvement and that's  
17 something you could track over time. But I think  
18 inherently, those industries are harder to -- to study  
19 what's going on than something that's more stable. You  
20 know, did the price of this chemical feed stock go up or  
21 down? I mean that we understand. But did DVD players  
22 get a lot more capable or computers or something? I  
23 mean, that's -- again, we could do price indices and we  
24 can do economic this and that but that's inherently much  
25 harder. And innovation incentives, you know, other than

1 our theoretical points, it's just track the impact of  
2 those. It's very hard. Maybe Dennis has a concrete idea  
3 on how to do it.

4 MR. CARLTON: No, I think it's very hard. I  
5 think people have tried to look at -- and maybe that's  
6 where case studies might help a lot just to sort out some  
7 of the details. But obviously, you know, what happened  
8 wake of IBM, what happened in wake of the AT&T decisions,  
9 and obviously the Microsoft decisions? I think you're  
10 looking at rapidly changing industries. And that's where  
11 you can have either a big positive or a big negative  
12 effect. I think there has been evidence that some of the  
13 regulations in, say, telecommunications have had enormous  
14 effects on the speed with which products get introduced  
15 or don't get introduced.

16 I think the Trinko case, if you look, for  
17 example, at the penetration rates of DSL, that they do  
18 change dramatically and the investment behavior of the  
19 telecommunications companies do change as a result of  
20 regulatory changes that alter in a sense the property  
21 rights people have to -- to gain.

22 So I think you can do that and you can also do  
23 in some of these industries cross-national studies. So,  
24 for example, if you compare telecommunications in New  
25 Zealand to telecommunications regulations in the U.S. --

1 I think Jerry actually -- Hausman -- has published a  
2 paper on this. You can see does the different access  
3 rules that you allow rivals to have to your network, does  
4 that affect your incentive to innovate and invest?

5 So there I think sometimes cross-national  
6 studies can help. But I agree with Carl that can be --  
7 it's a particularly difficult area. But I think some  
8 progress can be made.

9 MR. SHAPIRO: Well, I just have to tell a  
10 little story. Coming back from China, I learned over  
11 there that private individuals or companies can't own  
12 land. So they -- they -- so it used to be the government  
13 owned all these buildings and apartment houses and they  
14 sold a lot off them off, the building but not the land.  
15 So you could have a maximum lease, they were telling me,  
16 70 years. You know, most of them are 50, apparently. So  
17 I said, well, doesn't -- well, I'm thinking, well, you  
18 build this whole building and then you get to renegotiate  
19 with the government, you know. Now, a lot of these have  
20 been going like 20 years, 30. Doesn't that affect  
21 investment? It's a very fundamental thing. We'd be  
22 like, what a crazy system, you know, the property rights  
23 are so ambiguous, why not well define? Of course, I was  
24 like, can I prove to them that's a bad system? You know,  
25 we'll see.

1           So we take a lot of things for granted about  
2   incentives and property rights and appropriation  
3   ultimately, hard to prove.

4           MR. BAYE:   Abe?

5           MR. WICKELGREN:  You know, one thing that makes  
6   it more difficult in, you know, the competition policy  
7   context than in the regulation context is -- I mean, not  
8   only are sort of the outputs here for innovation hard to  
9   measure but it's going to be much harder to identify  
10  causal effects on whatever outputs you choose when we're  
   thinking about, you know, well, what's the pTtwell, BR harder to identify

1 other day she is sort of sitting there and saying, you  
2 know, Abba -- Abba, she calls me. Abba, I understand  
3 infinity, but what's two times infinity? So it seems  
4 like we started with a very hard problem that we've all  
5 decided was impossible and went to a two-times harder  
6 problem.

7 So that's basically kind of -- I think we can  
8 go into all the details but it basically seems to be an  
9 even harder problem to --

10 MR. BAYE: Well, on that happy note, let's move  
11 on to vertical restraints and see if you have  
12 suggestions.

13 Let's start with Abe. Any suggestions on how  
14 we might identify the benefits and costs of alternative  
15 policies aimed at vertical restraints.

16 MR. WICKELGREN: Yeah, well, I mean as far as  
17 measuring these, I guess, to take Aviv's story, you know,  
18 I try and teach my daughter the difference between  
19 countable and uncountable infinity. So maybe this is --  
20 this is a move in that direction.

21 But, you know, yeah, I think to identify the  
22 effects is -- is hard. I think we can learn a lot from,  
23 you know, the theoretical literature here on sort of  
24 identifying, you know, what are the features of a  
25 particular market that make vertical restraint more

1 likely to be problematic.

2 I mean, is there some externalities that  
3 suggest that buyers and sellers are not likely to agree  
4 on -- you know, they agree on a contract that maximizes  
5 their own welfare but not social welfare. You know,  
6 think about externalities among buyers due to scale  
7 economies or network externalities, you know,  
8 externalities due to just being an intermediate market  
9 where they can pass on a lot of these costs to final  
consumers. I mean, Brnain ate lotfnow, where tcou fully.n, Brnain at

1 MR. BAYE: Aviv?

2 MR. NEVO: If Carl gets a headache, then ...

3 MR. CARLTON: Well, I'll be the dissenting  
4 voice here. I think compared to measuring precedential  
5 value of a decision, vertical restraints are a piece of  
6 cake.

7 MR. SHAPIRO: But don't we need to measure  
8 precedential value of vertical restraints?

9 MR. WICKELGREN: That's where most of the  
10 effect is.

11 MR. CARLTON: I think that you can identify  
12 more cases of vertical restraints and get data on them  
13 than, you know, some of -- some of -- some of the other  
14 topics we've discussed. So there are plenty of instances  
15 in which a company has vertical restraints or adopted  
16 vertical restraints and then you can see what happened.

17 There are countries that allow vertical  
18 restraints and countries that don't allow vertical  
19 restraints. You can see -- you can test some of our  
20 theories of vertical restraints.

21 Now, the FTC has already done a lot of this.  
22 In the '80s I thought they had very good volume on RPM  
23 and resale price maintenance and they went through, not  
24 only case studies, but also some econometric studies, if  
25 I remember right. And, you know, you can always, you

1 know, criticize any study but I thought it was a very  
2 well-done study and very informative of trying to bring  
3 to bear all the evidence that we had, for example, on  
4 RPM.

5 I think it's possible to do similar studies on  
6 -- on where vertical restraints are used as well as to  
7 try and get an idea of are they harmful. For example,  
8 one of the important points that came up in -- in the RPM  
9 study in the FTC volume, was how frequently it was used  
10 and emphasized as an important competitive tool by firms  
11 with tiny market shares and that no one disputed that. I  
12 think just having a piece of information like that can be  
13 quite informative when you're trying to figure out the  
14 costs of either allowing or not allowing RPM.

15 So I actually think the vertical area is --  
16 although can be complicated -- we have some ability to --  
17 to measure it. Now, the difficulty with vertical  
18 restraint, as I see it, is that if you put on vertical  
19 restraint -- let's just take the simplest vertical  
20 restraint where you're trying to induce someone to  
21 advertise more to get around an agency problem. So we'll  
22 advertise more because they advertise more, provide more  
23 service or whatever, the price is going to go up. So the  
24 price goes up, you get more service. Does output go up  
25 or down? Well, you know, some people who need the



1 service, they're happier, they're willing to pay for that  
2 increased price. But other people who didn't need the  
3 service, they're probably worse off.

4 So you've got to be a little careful on how you  
5 evaluate the outcome of a vertical restraint because you  
6 want to distinguish an anticompetitive vertical restraint  
7 that harms competition, harms your rival, raises their  
8 costs, for example, versus a vertical restraint that even  
9 in the absence of competition will have this effect I  
10 just described, provide more service, so it's a higher  
11 quality product, but price will go up so that will reduce  
12 consumption by some people.

13 That is actually a complicated, you know,  
14 somewhat subtle point. It just means when you are  
15 evaluating the consequences of a vertical constraint, you  
16 have to be aware of this -- this subtly.

17 MR. BAYE: Carl?

18 MR. SHAPIRO: I won't miss getting a headache,  
19 I guess.

20 MR. CARLTON: I gave him a headache.

21 MR. SHAPIRO: So I guess then -- I -- I agree  
22 with you. There are a lot of vertical cases that are  
23 brought in private cases. They're all over the place.  
24 There's distribution deals gone bad and so forth. So if  
25 I wanted to say, oh, we can look at a lot of those cases

1 and other industries, you know, have marketing people  
2 look at these -- there's a lot of stuff to look at, okay?

3 I guess one reason I sort of passed the last  
4 time through here is that -- that seems to me not to have  
5 much of anything to do with the FTC's enforcement  
6 program as I have perceived it in recent years -- in  
7 quite a few years, okay?

8 So maybe I'm not following closely enough and  
9 maybe we need to distinguish, are we talking about RPM,  
10 are we talking about tying, are we talking about  
11 territorial restrictions, what do we mean?

12 I mean, if I said exclusive deal, I would have  
13 put that more -- to me that's more monopolization type of  
14 things that I worry about. You know, so -- so are these  
15 more garden variety restraints like RPM, are you guys  
16 bringing -- has the FTC brought any of those cases in the  
17 last five years --

18 MR. BAYE: I think -- I think one way -- well,  
19 the Nine West matter was an issue that the Commission  
20 recently dealt with that involved RPM as an example.

21 But I think more generally, if you you've read  
22 the web logs and looked at the Justice Department Section  
23 2 report and the statement of our commissioners, I mean,  
24 it's fairly clear that -- that some -- some work to help  
25 identify the benefits and costs would be useful. I think

1 everyone recognizes, as a matter of theory, potential  
2 costs and benefits exist. But to try and provide some  
3 evidence that would shed light on which of these  
4 situations -- I think that's the context in which I think  
5 this would be very helpful.

6 MR. SHAPIRO: So I think -- I'm more -- I kind  
7 of agree with what Dennis has said. Particularly --  
8 again looking at private cases and just practices out  
9 there. Not so much cases you've brought, because there  
10 haven't been that many or DOJ either. And I think you  
11 really need to start to distinguish. I mean, I think we  
12 have a lot of economists that say quite a bit about RPM.  
13 And that's a good example.

14 Tying, much more complicated. That's -- maybe  
15 it's tying that gives me the headache in particular,  
16 okay, even defining it in one product and two products,  
17 integration. I don't --- I think that's much harder,  
18 ambiguous effects all over the place theoretically, hard  
19 to track empirically. So I'm less optimistic about that.

20 Maybe, Dennis, you have some ideas on tying.  
21 You've convinced me on RPM.

22 MR. CARLTON: Well, you know what I tried to do  
23 when I was at the DOJ, I didn't really succeed. I was  
24 trying to interest Europe in contrasting some of their  
25 vertical laws to ours and seeing if we can do any

1 empirical studies. There really are very stark  
2 differences in some other countries, European countries,  
3 and what's allowed, what's not allowed. I was surprised,  
4 for example, to learn just -- didn't know about it, that  
5 I think this is correct, that in Japan, for example, if  
6 you cut price, you're not allowed to have a temporary  
7 discount. There are limitations on temporary discounts  
8 because it will induce people supposedly to improperly  
9 think your price is really staying low but in fact it's  
10 only a temporary discount and they think that that will  
11 trick consumers. So they actually have rules against  
12 such -- such -- such pricing.

13           And it seems to me somebody could study what  
14 the consequences of those rules are. Must have fewer  
15 sales, I assume than we do, what's the consequence of not  
16 having sales? Things like that I think could be quite  
17 interesting and I know around the country -- not only  
18 within the United States but actually across countries  
19 there are rules on size of retail stores. And I think  
20 that maybe it's perhaps aimed at Wal-Mart but it would be  
21 good to -- to see what's the consequence of that.

22           So I thought there was some grounds for  
23 productive studies across -- across countries. The  
24 difficulty, of course, all else equal, we have to keep  
25 all else equal, which can be hard. But the fact that

1 they have such startling different rules in some areas  
2 struck me as -- as something that could be leveraged into  
3 an interesting study.

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1 way to measure whether what I'm saying, you know, has --  
2 has any validity or not, you know, doubtfully.

3 But, yeah, I think -- given that, you know, I  
4 agree with Carl that deterrence is probably where the  
5 main benefit here is. And I think, you know, there's  
6 sort of a fine line between, you know, deterrence -- we  
7 think of deterrence of harmful activity versus, you know,  
8 potential chilling of activity that might be beneficial.  
9 And so I think, you know, to the extent deterrence is,  
10 you know, extremely important, that suggests an argument  
11 for going after clear cases even if they're small cases,  
12 right?

13 So, you know, it may be that we're talking  
14 about, you know, deterring, you know, something which has  
15 a very small market. But if there's, you know, a lot of  
16 different, you know, industries with small markets who  
17 might also try similar things, you might imagine that  
18 there's, you know, real value in demonstrating a  
19 commitment to going after something that is clearly  
20 harmful that, you know, might, you know, end up not  
21 having that big of an effect in this particular instance  
22 but having, you know, deterrent value and deterrent in a  
23 way which we're not really worried that, you know, we got  
24 it wrong and we're going to be chilling something that's  
25 -- that could end up being desirable.

1           You know, obviously if it's a big case that has  
2   the same characteristics, you know, then it's an easy  
3   call. But if we're comparing it to a big case where, you  
4   know, it's also a closer case, then I think, you know,  
   the potential deterrent value here is a lot smaller

1 point. It was some precedential value from establishing  
2 certain ideas but it was a riskier case because it was  
3 small, okay? So I would say small and clear is okay,  
4 okay, because then you can establish a principle even if  
5 it's a small case. But small and murky but interesting,  
6 not so much, okay, because you can kind of stack it  
7 against yourself.

8           The other thing is, you know, public  
9 perceptions of the Commission and what it's doing or not  
10 doing. I mean, you know, without you saying political  
11 issue factors. But I think it is important for the FTC  
12 and DOJ, for that matter, I mean, to -- as part of  
deterrence to be out there showing how they're thinking ythink it it's s.3mbpm



1           MR. NEVO: I guess, you know, one sort of  
2 dimension to add that may be orthogonal to everything  
3 that was said is I -- I -- I think it might be hard to  
4 come in all kind of on a -- you know, a general sort of  
5 rule, but you might sort of think that, you know, the  
6 trade-offs are little bit different depending on the  
7 industries and sort of the cases so let me give you sort  
8 of two extremes.

9           I mean, you might think of -- suppose there's a  
10 small, you know, merger between two small sort of grocery  
11 chains, kind of local grocery chains. Probably in the  
12 grand scheme of things you might think, you know, there's  
13 a lot of sort of potential deterrence but you might want  
14 to establish that on kind of the larger chains as opposed  
15 to, let's say, an industry that I've worked on recently,  
16 you know, real estate brokerage firms, right?

17           So there you can sort of know in some sense  
18 that almost all -- you know, real estate, everything is  
19 local, right, so it really might be that, yeah, you're  
20 just taking in one particular city. I don't know, some  
21 small city in Iowa and you might think in the grand  
22 scheme of things that's sort of a small market. But, you  
23 know, it's kind of repeated, you know, hundreds, if not  
24 thousands of times sort of across the country. So I  
25 think, you know, the value of sort of the trade-offs

1       there I think would be very different than suppose you  
2       take the exact same market and now, you know, just some  
3       two local supermarket chains, you know, sort of the --  
4       the value of kind of going after them. So I think that's  
5       sort of a -- and maybe one way to start thinking about,  
6       you know, what's the value of kind of deterrence to the  
7       extent that it's more industry specific as opposed to  
8       kind of a wider effect.

9               MR. BAYE: Dennis, did you have anything you  
10       wanted to add?

11              MR. CARLTON: I just had two comments. One, I  
12       wanted to follow up on something Carl said about sort of  
13       suggesting political motivation and I think that's  
14       actually more important than people realize in the  
15       following sense. The DOJ -- and whether to call it  
16       political, I don't know is correct. But the DOJ and FTC  
17       have not succeeded in part because of Congress in  
18       creating sharp dividing lines into which industries DOJ  
19       has and which industries FTC has. And it creates a  
20       peculiar problem that if you're an employee, a lifetime  
21       employee of one agency, obviously you want to get those  
22       new emerging areas. So you fight with the FTC if you're  
23       in the DOJ to get that area, it's really on my side of  
24       the line. And they fight, no, it's really on my side of  
25       the line. And that creates a problem, I think, sometimes

1 for private parties and that clearly should be -- should  
2 be remedied to get rid of some of the political  
3 negotiations as to who gets which case.

4           The other thing I wanted to say is I'm not sure  
5 I entirely agree that a small case where you might lose  
6 means you shouldn't go forward. I'll tell you why. It  
7 sort of relates to something I said earlier, if you  
8 really think you're right and some industry, even small,  
9 is doing something wrong, but it's unclear what the legal  
10 precedent is, and even if you lose, that will then, as I  
11 said earlier, create incentives for someone thereby to  
12 react, either the court of appeals or Supreme Court.

13           Now, you may lose and you may come out wrong  
14 but the institutions will then have to adjust.

1      try and use whatever mechanisms you can use with the

1 we could evaluate whether we're inside or on the  
2 production possibilities frontier first, then secondly,  
3 how we should allocate those scarce resources among the  
4 many things that we can do.

5 MR. SHAPIRO: Well, why don't you go first  
6 since you're the director of the Bureau of Economics?

7 MR. BAYE: I just get to ask the questions and  
8 be the announcer, you see.

9 MR. NEVO: If you give us answers to the first  
10 four questions, this is actually an easy one.

11 I mean, look at Dennis's graph there. Well,  
12 draw that same graph now to different sectors, okay?  
13 Suppose we're looking at mergers in different sectors.  
14 Well, you want the marginal S, right, in different  
15 sectors to be the same so --

16 MR. BAYE: It's all about operationalizing this  
17 stuff, right?

18 MR. NEVO: Yeah, but, you know, I guess in  
19 principle that's sort of.

20 MR. BAYE: So do you look at GDP? I mean,  
21 should you be more concerned about sectors that take up a  
22 larger share in GDP, should you be concerned about  
23 sectors where -- what do you -- I'm not looking for --  
24 for a detailed econometric analyses of how one gets the  
25 shadow values or tangencies to some hyperplane but just

1 some practical advice on how one would -- would divert  
2 resources because obviously that's a big, big problem --  
3 not only for the Bureau of Economics, as we're allocating  
4 resources, a lot of that is exogenous to us, but to the  
5 extent that there's discretion at the level of the  
6 Commission.

7 MR. WICKELGREN: Well, I guess one thought, to  
8 the extent that we really think that what's important  
9 here is deterrence, it would suggest, you know, not  
10 focusing too closely on any one particular sector to the  
11 extent that, you know, people in other sectors, maybe  
12 they have a free pass, right. So making sure that  
13 everyone has a reasonable probability of, you know,  
14 confronting an enforcement action, you know, maybe, you  
15 know, important for generating deterrence.

16 MR. CARLTON: I think it is a hard question to  
17 figure out where your value added is going to be the  
18 most.

19 And, you know, as you and I both know, we  
20 worked on an energy report and I think, for example, the  
21 value -- the incremental value of the next energy report

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1 pharmaceutical industry is a pretty big industry and some  
2 of the practices on settling lawsuits can have profoundly  
3 large consequences. So I -- I thought that was right to  
4 focus on that.

5 One area which I tried to focus more on at DOJ  
6 -- and the FTC already does a lot of this work but I  
7 think it's a place where it's a very high value added --  
8 is in competition advocacy. In both the Department of  
9 Justice and the FTC, you have a group, a really  
10 concentrated group of high-powered economists, and  
11 probably a better collection doesn't exist anywhere in  
12 the government that appreciate the value of competition.  
13 I think you could have a tremendous value added by trying  
14 to comment on and influence other branches of government  
15 that don't appreciate economics or economists as much as  
16 the FTC and DOJ.

17 And I think commenting on legislative proposals  
18 in a variety of areas and ways to solve, you know,  
19 various problems that other agencies are coming up with  
20 that strike us as anticompetitive, are very -- have --  
21 have very high value added.

22 I think it's -- one of the things I thought was  
23 odd when I came to Washington is which agencies work  
24 together and how well they work together, seems like  
25 almost a matter sometimes of personalities. I mean, I

1       assume the DOJ and FTC have always probably worked well.

2                   When I came, Mike Salinger was there. I knew  
3       Mike for years, then you came, you know, it was -- it was  
4       very easy for us to work together. Other branches of  
      governmel fobTry easystd friends in obranches of

very obranches of



1           MR. BAYE:  Anyone else?

2           MR. SHAPIRO:  I just want to step in.  I agree  
3 with everything Dennis said.  And I really agree about  
4 competition advocacy.  I guess it's not clearly exactly  
5 how that might usefully be divided between the two  
6 agencies, as one being part of the executive branch and  
7 the other being an independent expert commission.

8           I mean, I threw out the idea of educating the  
9 judiciary vehicle.  Maybe that's more appropriate for the  
10 independent commission rather than the executive.  I  
11 don't know.

12           But you might -- we talked a lot about  
13 competition advocacy when I was at the DOJ as well.  And  
14 there are sort of executive branch goings-on so maybe the  
15 FTC somehow can't be involved in the same way.  I don't  
16 -- I don't know.  But I do think there's a lot of value  
17 added there.  And it's really -- but it's only just a  
18 slight nuance really on what you said, Dennis, when you  
19 said other parts may not appreciate economics or have the  
20 economic capability.

21           I would put the focus a little bit differently,  
22 just the appreciation for and understanding of  
23 competition and not stifling it.  I mean, this is very  
24 much where the government is having rules that are  
25 screwing it up as much as anything right now.  And there

1 are a lot of those rules. I mean, the federal government  
2 in particular so you could imagine the states as well.

3 So that's very clean good stuff that, you know,  
4 obviously there's some reasons for various regulations.  
5 But there's a lot that I think are hard to justify,  
6 special interests groups, and so forth. So there's a big  
7 payoff there. And for -- I think particularly if the FTC  
8 and DOJ can figure out a way to coordinate those efforts  
9 to play to their respective strengths.

10 MR. BAYE: Go ahead, Abe.

11 MR. WICKELGREN: Yeah, I guess I also want to  
12 second Dennis's point about interacting with foreign  
13 competition policy, you know, regulators.

14 You know, I certainly have had some experience  
15 at -- when I was on staff at the FTC with that and, you  
16 know, I think there was certainly a lot of value added  
17 there in -- you know, to some extent in educating, you  
18 know, them because I think, you know, to a large degree  
19 they weren't thinking about things exactly the same way  
20 that we did.

21 I think also there's sort of interesting  
22 implications for however sort of -- on the other side,  
23 but for case selection. You know, particularly Europe  
24 always tends to take a -- or almost always tends to take  
25 a much stricter view of things, which suggests that, you

1 know, education aside, if we think Europe is going to  
2 look at it, there might not be any real value added to,  
3 you know, the FTC examining something, right, because  
4 it's going to be almost never the case that the FTC is  
5 going to decide to, you know, block some particular  
6 activity and -- and Europe is going to be okay with it.

7           You know, there may be value in getting  
8 involved for the purposes of maybe trying to influence  
9 the European outcome but, you know, sort of the  
10 independent force of, you know -- if it's a -- this same  
11 merger that needs approval of both, the FTC and the EU,  
12 there might not be any real value in, you know, the FTC  
13 looking too closely at it because it's almost never going  
14 to make a difference.

15           MR. SHAPIRO: If it's a strict worldwide  
16 market.

17           MR. WICKELGREN: Right.

18           MR. SHAPIRO: Because otherwise, it's very  
19 different.

20           MR. WICKELGREN: Right, that's what I said. So  
21 if it's the case, that it's something that, you know,

1 U.S. and Europe, need approval from both, but the remedy  
2 in one might be totally inadequate in the other.

3 I just think -- I think your argument only  
4 works, I think, if it's really -- the effects are kind of  
5 uniform worldwide. And even so, maybe the FTC has a role  
6 like to tell the Europeans not to be crazy, you might  
7 think about that. But ...

8 MR. WICKELGREN: Right, well, that's what I  
9 said. I mean, I think there's an, you know, there's an  
10 education role but that -- that may be separate from the  
11 enforcement the role.

12 MR. SHAPIRO: Yeah, okay. But the enforcement  
13 role, I think, assuming it's a worldwide market with some  
14 uniform ...

15 MR. WICKELGREN: Right, with uniform -- but  
16 that's not, you know ...

17 MR. SHAPIRO: That's not unheard of.

18 MR. WICKELGREN: Not unheard of.

19 MR. BAYE: Just one more round of questions.  
20 I'll address this to Aviv to start and you guys can  
21 finish up. And then hopefully we'll have time for a few  
22 questions if there are any from the folks in the  
23 audience.

24 It's pretty clear that it's pretty hard to  
25 measure the welfare effects of FTC policy. And kind of a

1 question folks back home wanted me to ask you is whether

1 I have basically very little knowledge of what's actually  
2 being done right now. So a lot of what I'm, you know,  
3 might be sort of bringing up is stuff that, you know,  
4 you're already doing. And I know at least at one point,  
5 just from the comments earlier, it seemed like that's  
6 sort of the case.

7 So, you know, I'm not going to offer sort of,  
8 you know, here is exactly, you know, what you should  
9 start doing but just so if you want kind of pillars or  
10 sort of some ideas. So, you know, I think the very first  
11 thing is, you know, whatever research effort starts,  
12 should be sort of a very systematic effort. The bit of  
13 impression that I get -- you know, we're talking about  
14 retrospective studies of mergers and there's been some --  
15 you know, including, you know, co-authored by people at  
16 the FTC.

17 It seemed to me it's more kind of individual  
18 effort. I mean, you know, they might get support and  
19 encouragement from the FTC, but it almost seems to me,  
20 you know, people kind of doing it because they just like  
21 to do research or they just want to know the answer. And  
22 it seems to me that, you know, something more systematic  
23 needs to be done.

24 If that means sort of, you know, setting up a  
25 research group, I know other government agencies have

1       that. I mean, I do a lot of work with the U.S.  
2       Department of Agriculture and they have the whole ERS,  
3       Economic Research Service. So obviously that's a  
4       completely different order of magnitude without talking  
5       or going to something like that. But, you know, there is  
6       sort of some precedent for that.

7                 In terms of what the agenda should be, I mean,  
8       I think there's basically kind of three pillars that I  
9       think really have to be included.

10                One is, you know -- and that's kind of to  
11       answer your second question. I mean, I think you kind of  
12       have to get academics involved for a variety of reasons.  
13       Both because of -- at the end of the day, it's unlikely  
14       that you will have, you know, all the labor force kind of  
15       to do it sort of internally. I think the credibility of  
16       what you get -- going back to kind of all the strategic  
17       issues, you know, that Abe kind of mentioned a while ago.  
18       I mean, I think if it's sort of done by external  
19       independent academics, that's going to glean a lot of --  
20       a lot of credibility.

21                I think you want to get them involved at  
22       different levels. I mean, anything from starting from,  
23       you know, having third-year graduate students who are  
24       kind of looking for a topic to work on, come and spend a  
25       summer, maybe kind of look around. I mean, I know --

1 just to give sort of an example. A lot of consulting  
2 firms will have, you, know, a graduate student come and  
3 hang out for a summer. We're not going to get much from  
4 you but maybe you'll learn a little bit of what -- what  
5 we do, you know, you'll learn something you might be  
6 interested in sort of later down the road in sort of  
7 getting involved.

8 I think I mentioned this example, the USDA have  
9 a, you know, current student that's actually spending the  
10 summer in Washington working on data. They have -- they  
11 are hoping to find sort of a topic for dissertation.

12 So starting, you know, from that level and then  
13 obviously sort of later on, you know, pre- and posttenure  
14 sort of getting faculty involved.

15 Now, the question is how? And I think, you  
16 know, there are sort of two perceptions that I actually  
17 disagree with but there are sort of two perceptions out  
18 there.

19 I believe actually on this sort of this  
20 equivalent panel that was in D.C., I think, Greg Werden



1 perception that I disagree with.

2           The other is the fact that, you know, we were  
3 talking about retrospective studies of mergers, I think  
4 there's maybe a belief, well, this stuff isn't  
5 publishable and if it's not publishable, people aren't  
6 going to do that. And I strongly disagree that it's not  
7 publishable. I think it is publishable. I think a good  
8 study -- you know, a retrospective mergers sort of study  
9 will get published -- you know, there are no upper  
10 boundaries to where it can published as far as journals.

11           The other thing we have to remember, you know,  
12 even if the AER is not going to publish 20 papers like  
13 this, it might publish, one, two, maybe a few more,  
14 there's a lot of other journals. And there's a lot of  
15 academics at different levels, right? So it's not just  
16 people at Chicago or Berkeley or Northwestern that should  
17 be doing a lot of these studies. You know, there are  
18 people kind of sort of in schools that are kind of a  
19 little bit lower than that.

20           You know, they're not getting tenured based on  
21 AERs. You know, if they manage to get, you know, five  
22 papers into the Journal of Industrial Economics, from any  
23 of them, that will make sort of the tenure case. So the  
24 usual claim is you're not going to get this published,  
25 academics are not going to do it, I just don't think

1 that's correct.

2           So, you know, that's kind of -- you know,  
3 trying to put those sort of two things aside, ways to get  
4 academics involved. So -- you know, there is sort of an  
5 issue of money but, you know, not getting hired, so if  
6 it's consultants, paying consultants, there's a lot of  
7 government agencies that basically offer grants. These  
8 are fairly sort of small and relatively cheap, you know,  
9 in the grand scheme of things.

10           Again, you know, the USDA, the Bureau of  
11 Economic Analysis, the BLS, you know, if you're able to  
12 sort of get someone and pay them basically two summer  
13 months, that's not a lot of money. And you might get  
14 sort of people working on sort of -- you know on the  
15 margin, kind of tilting them to work on things that  
16 you're interested in.

17           Granted, obviously you're not going to take  
18 someone who is completely not interested in IO, in  
19 antitrust policy, to kind of work on these issues. But  
20 on the margin, that's going to have, sort of, a lot of  
21 impact.

22           Another way to sort of get academics involved  
23 is work with research centers. I want to kind of get  
24 back to that. There's a lot of sort of research centers.  
25 You know, we have a couple here at Northwestern that I'll

1     mention.  You know, they are kind of looking for these  
2     sort of connections.  And I think that would be sort of a  
3     very cheap and cost-effective way to get academics  
4     involved.

5                   And then the final thing -- and I think, you  
6     know, for anyone who has done serious empirical work, you  
7     know, at the end of the day the limiting factor is data,  
8     okay?  So, you know, if you get data, you'll get  
9     academics.  You know, that's it.  You know, we'll --  
10    we'll follow the trail, you know, like mice following --  
11    going after the cheese.  I mean, that's where it is.

12                   So I think the big question is how can you get

1 look at the, you know, number of sort of industries that  
2 have been studied by academics and these are, you know,  
3 poor academics that had, you know -- most of them do not  
4 have a huge research budget to go spend hundreds of  
5 thousands of dollars on data. I don't want to say every  
6 industry but, you know, almost every industry has sort of  
7 been studied. So it's just a matter of, you know,  
8 finding sort of those industries and having data, you  
9 know, for, let's say, ex-post merger or ex-post -- you  
10 know, whatever antitrust event you want. Some of them  
11 are either, you know, public or can be purchased for very  
12 low amounts, especially if it's historical data.

13 In other cases, you know, if you go, for  
14 example, you know scanner data. There's a lot of scanner  
15 data out there. You can actually buy them for not that  
16 -- large amounts of money and again create some sort of  
17 data set.

18 I think the key issue in sort of all of the  
19 data is to really be opportunistic, to really find sort  
20 of the right situation, where the data is there, where  
21 you're going to find sort of mergers, where you're going  
22 to find some sort of nice effects kind of in the -- you  
23 know, either change in regulation or sort of change that  
24 will actually give you maybe some -- you know, some sort  
25 of a variation in the data that would actually be

1 interesting to look at and get at some of the issues and  
2 some of the difficulties we were talking about.

3 And then finally, let me just sort of throw  
4 something out there and this might be completely kind of  
5 a wacky academic idea, but you know, it might not. And  
6 that is, you know, up to now, we've sort of taken, you  
7 know, the data is sort of -- is there, you know, the  
8 mergers are kind of, you know, sort of set the lines.

9 Well, how about if you start running  
10 experiments? What happens if you take a merger that you  
11 clearly think it's on the other side of the line, okay?  
12 Now, obviously, you know, if it's a really big merger  
13 that gets a lot of sort of publicity, you're not going to  
14 be able to do that. But you take actually one of these  
15 small cases that maybe you shouldn't have taken to start  
16 off with and, you know, you let it go through, right?  
17 That would be -- and sometimes if you want -- you know,  
18 from a -- I mean, I did warn you it was a wacky academic  
19 idea. But, you know, that would be sort of the way to  
20 kind of really -- if you wanted -- not from a social  
21 point of view. You know, as economists, we're kind of  
22 used to the fact that we're getting nonexperimental data.

23 But suppose you said, you know what? Let's  
24 give up on economists. Let's put a chemist here or  
25 physicist here, right, I mean, that's what they will tell

1     you.  If you really want to learn, do you want to learn  
2     what the effect of a particular drug is, how do you do  
3     that?  You give the people drugs that you know shouldn't  
4     be working -- you know, obviously within -- on the  
5     margin, you're not going to sort of take it --

6             MR. BAYE:  See if you can kill the firm or not?

7             MR. NEVO:  Yeah, I mean, maybe not to sort of  
8     that extent but, you know, try it, maybe under sort of a  
9     more localized sort of event.  I mean, there is something  
10    there.  Obviously, there's the close sort of cousin of  
11    these experiments, quasi-experiments, where you have the  
12    data actually generated for you.

13            Maybe, you know, again, this is not at the  
14    federal level, but maybe a localized market that with  
15    some sort of regulation that actually changed things that  
16    you get to see the case of what happens when the  
17    enforcement was changed, you know, maybe exogenously or  
18    not.  And I think that's kind of one example of trying to  
19    be opportunistic and trying to sort of get that.

20            And then the final kind of point that I want to  
21    raise is sort of the issue of corporation.  And it was  
22    raised sort of a little bit before but I think, you know,  
23    corporation both with academics, which I think is  
24    essential.  It seems to me again as a complete outsider  
25    that, you know, you need to have cooperation within the

1 agency. They just -- it seems it's just too hard of a  
2 problem for any one agency to do alone. And again,  
3 something that was talked about a lot, you know, sort of  
4 today is cooperation in other countries, both in the  
5 sense of enlarging, you know, sort of the data  
6 availability, the -- what we learn, but also, you know,  
7 maybe things, you know, some of these sort of things that  
8 we can't do in the U.S. I mean, I can imagine if in  
9 China, they really wanted to experiment, they would  
10 experiment, again, not knowing anything about Chinese  
11 politics but just so -- that's my impression.

12           You know, maybe that would be sort of the way  
13 you could learn a lot from this and not just from  
14 cross-country -- you know, cross-country studies, which,  
15 you know, they're -- they're very difficult to do in sort  
16 of an unofficial way. But, you know, that might be sort  
17 of a way to learn.

18           And then, you know, finally -- let me just sort  
19 of throw out kind of one point on the issue of  
20 cooperation. You know, here at Northwestern, we have,  
21 you know, two centers, you know, the Searle Center, we  
22 also have, you know, the center for the study of IO,  
23 that's sponsoring the conference that Bill is organizing  
24 tomorrow.

25           I mean, that, I think, would be kind of a

1 natural place -- you know, not us in particular, sort of  
2 others. You know, I know Berkeley has a competition  
3 policy center, there's sort of other places like that. I  
4 mean, that would be kind of the -- you know, the -- the  
5 optimal place to start to get academics involved and try  
6 to see is there a common ground that, you know, and  
7 common interests of finding ways to look at these very  
8 hard problems together.

9 MR. BAYE: Thanks a lot, very thoughtful  
10 response.

11 Abe, did you want to chime in?

12 MR. WICKELGREN: Yeah, I mean, I completely  
13 agree sort of on the overall level, but just one  
14 qualification. You know, there may be less issue of  
15 strategic behavior with academics but there's certainly,  
16 you know, potential for publication but some results are  
17 more publishable than others. So you still -- you  
18 wouldn't be completely removing the possibility that, you  
19 know, what studies you end up finding, you know, might  
20 not be fully representative of -- of what the actual  
21 results are.

22 MR. SHAPIRO: I would say another kind of  
23 wildcard in this, there are all these firms, private  
24 firms, consulting firms. I work with one, in fact, that  
25 have a lot of experience on mergers and these antitrust



1 matters and private matters, not just FTC matters.

2 And, you know, they like to have good relations  
3 with the Commission. And the DOJ and maybe you could tap  
4 into obviously particularly being maybe sensitive if not  
5 weary to biases or, you know, the commercial interests.  
6 But there's a lot of expertise there. So there's ideas  
7 on research tasks or studies they've done seems to be  
8 worth at least asking and tapping into that they would  
9 generally, I think, be pretty eager to provide input.

10 Now, we'll have maybe a bias, you know, in  
11 mergers, most all the work except for the merging company  
12 so then that's not neutral but you try to factor that in.  
13 So I think there's -- there's a lot of experience and  
14 skill there that is worth tapping into that complements  
15 what you get in academia.

16 MR. BAYE: Dennis, the last word on the topic?

17 MR. CARLTON: I think all of these suggestions  
18 are good ones. I think that I agree especially with what  
19 Aviv said. If you want to get academics, you've got to  
20 give them data.

21 I think it's hard to convince academics,  
22 certainly young academics, to get involved in a policy  
23 area because it's harder to get published in that area.  
24 Telling the FTC how to improve their policies is not  
25 something that may be a publishable paper. It could be

1 but it's not your typical research.

2           So I think if you're looking for the more  
3 practical type of advice, I think the suggestion Carl  
4 made is -- is correct that a lot of the people in the  
5 consulting firms either have been at the agencies as  
6 former employees or they've made a lot of presentations.  
7 And I think tapping them for what are the strengths and  
8 weaknesses is helpful.

9           I think if you're talking about fundamental  
10 research, though, I -- I agree with what Aviv said that  
11 having academic centers that have relationships with the  
12 FTC and the FTC data is a -- probably a better way of  
13 making young graduate students and young assistant  
14 professors knowledgeable about how to get in touch with  
15 you guys and that it can serve as a repository perhaps or  
16 a conduit to -- it could be a repository of data, but it  
17 could also be a conduit through which people, academics,  
18 naturally go.

19           They'd be more like to go to a center and go to  
20 Aviv and say, you know, I'm assistant professor here at  
21 Northwestern, how do I do this? Rather than calling  
22 someone up at the FTC. I think there will be an  
23 inhibition to do that. And I think having academic  
24 centers in a liaison with the FTC is a -- is a way to  
25 promote academic research.

1           MR. BAYE: Thanks. We have no more minutes,  
2 but I'll use my discretion and take a couple of questions  
3 from the audiences. State your name formally.

4           AUDIENCE MEMBER: Joe Farrell. Going back to  
5 the beginning of the discussion with Dennis's comment on  
6 how you have a sample selection issue with mergers that  
7 have gone through. That's obviously right but I think  
8 you were too quick to move onto so what should we do  
9 instead.

10           Even with that sample selection, I think it  
11 would be useful to know what's the price impact of the  
12 average permitted merger.

13           So, for example, if you discovered that the  
14 average permitted merger leads to a 2-percent reduction  
15 in prices, that would be a very different world in terms  
16 of the possible costs of tightening merger policy, let's  
17 say, from if the average permitted merger leads to a  
18 10-percent reduction in price. And there's always some  
19 chance to say the unthinkable. You might discover that  
20 the average permitted merger leads to a 2-percent  
21 increase in price and that would really tell you  
22 something, working against the sample selection. So it  
23 seems to me that would be a very straight forward project  
24 relatively speaking and it wouldn't be as ideal as the  
25 ones that you've proposed but it would be in some sense

1 very robust, very straightforward and seems worth doing.

2 MR. CARLTON: Yeah, I don't disagree at all. I  
3 think retrospective mergers are very valuable to do. I  
4 think they are less valuable than I once thought because  
5 of the sample selection problem that doesn't -- but I  
6 know how to solve the sample selection problem. It's  
7 just I can think of an even better thing to do -- a  
8 better way to do it.

9 But there is one thing that I think is useful  
10 to say. If you find that on average the merger is  
11 increasing price, given the sample selection problem, you  
12 know your estimate is too low of how much it really is,  
13 increase in price. So my paper and my views -- is not  
14 that retrospective merger studies aren't valuable.  
15 They're very valuable. I just can think of a better way  
16 to do things and I think in doing it in those better ways  
17 we would learn a lot, not only about industrial  
18 organization techniques but how to improve the practices  
19 of the agencies.

20 MR. BAYE: One more question, I think we're  
21 going to have to stick -- one more question, go ahead.

22 AUDIENCE MEMBER: Louis Kaplow. Two sets of  
23 comments.

24 One is on the empirical question most of the  
25 first series was what is the effect of a law regulation



1 we know the line moved a fair amount, we ought to be  
2 learning a fair amount there. That's sort of one  
3 empirical.

4 The other is a couple things specifically about  
5 the FTC. And they're two points I think are worth  
6 thinking about more.

7 One is there was an awful lot of talk about  
8 deterrence, which is my favorite thing to talk about and  
9 I think it was the right thing to focus on. But in areas  
10 the FTC operates, mergers is different from some others.  
11 The FTC doesn't dish out penalties, it doesn't put people  
12 in jail, it doesn't fine them a billion dollars or  
13 whatever. So you have to sort of ask, well, how does  
14 deterrence work in that setting? We set an example, you  
15 know. If you tiptoe over the line, we might with a  
16 probability ten years later make you tiptoe back. It's  
17 not so clear there's a lot of deterrence from that. This  
18 has a big implication for allocation of resources between  
19 FTC versus private DOJ. This has a big implication for  
20 the big industry, small industry. Since if you can't  
21 deter very much in some of your areas of operation, then  
22 you really need to go for the big impact, setting an  
23 example, when the example doesn't really deter because  
24 there isn't real penalty.

25 Now, I'm overstating a little bit, but I'm just



1 the panel for their cooperation and their excellent  
2 comments and to you as well. So thank you.

3 (Proceedings ended.)

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