

FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION: INTO OUR 2ND CENTURY

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## P R O C E E D I N G S

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3 MS. OHLHAUSEN: Good morning, everyone. I  
4 think we will get started. I will just do the required  
5 security announcement, but today remember to introduce  
6 myself. You probably all know me. I am Maureen  
7 Ohlhausen, Director of Policy Planning. And welcome to  
8 the second day of the Federal Trade Commission: Into Our  
9 Second Century: FTC at 100. We will start off our  
10 roundtables this morning and go through until the end of  
11 the day.

12 But before we start, I just wanted to give the  
13 security announcement, which is that if there is an  
14 incident, if something happens and we have to evacuate  
15 the building, we gather at the corner on this side of  
16 building. When you go out, you will turn right, across  
17 from Georgetown Law School, but on this side of the  
18 school.

19 I would also remind people if you are going to  
20 use cell phones, please do not use them right outside  
21 these doors because the sound carries. Use them through  
22 the double doors.

23 And if people leave for lunch, just remember if  
24 you are not an FTC employee, you need to leave time to go  
25 back through security.

1                   So, with that, I think we will begin our first  
2           panel.

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1                   **SESSION 1: CHARACTERISTICS OF A SUCCESSFUL**  
2                                   **GOVERNMENT AGENCY**

3                   MS. OHLHAUSEN: Now, I am taking on my  
4 moderator hat here. So, the first panel today is  
5 Characteristics of a Successful Government Agency.  
6 Yesterday, we spent basically the whole day talking very  
7 specifically about the FTC, particular things that have  
8 worked well at the FTC, challenges we have faced over the  
9 years, ideas for changing or adapting so that we could do  
10 things better in the future.

11                   But what this panel this morning is trying to  
12 do is take a little step back from the direct FTC focus  
13 to see if there are lessons from management of government  
14 agencies in general that we can learn from. Do all  
15 agencies face similar challenges? Have other agencies  
16 overcome them in ways that we should consider emulating?

17                   And to help us with that, we have Jerry Ellig.  
18 He is the former Acting Director and Deputy Director of  
19 the Office of Policy Planning. Jerry and I used to work  
20 together. And he is also a Senior Research Fellow at  
21 Mercatus Center. And Jonathan Breul, who is a partner at  
22 IBM Global Business Services and also, as you will see  
23 from the bios, has a long history in government service.  
24 Also, my co-moderator, Greg Luib.

25                   So, I think what we might do to start is just,

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1 plans to remedy shortcomings.

2 One of the best examples of that I have seen is  
3 the Department of Veterans Affairs. They always rank  
4 very highly in our performance report score card for  
5 doing an informative performance report. And then we get  
6 letters from ticked off veterans saying "Your project  
7 must be a whitewash because you ranked the Department of  
8 Veterans Affairs so highly on performance." Well, we are  
9 not ranking them on performance, we are ranking them on  
10 the report.

11 In fact, if you look at their report last year,  
12 they will admit that they missed half of their goals and  
13 that they have a lot of major challenges identified by  
14 the Government Accountability Office and by their  
15 Inspector General, but they are very forthright about  
16 what they are trying to do to fix these things and when  
17 they expect to fix it. So, that is the good concrete  
18 example of an agency that does not treat reality as  
19 optional and takes a realistic look at where are they not  
20 doing well and how do they need to improve.

21 And, finally, the organization also has the  
22 people with the capabilities and, depending on its job,  
23 the other assets that it needs to actually accomplish the  
24 mission.

25 MS. OHLHAUSEN: Great. Thank you. Jonathan?

1                   MR. BREUL: Well, let me just as a starter  
2 explain where I'm coming from because it will perhaps be  
3 helpful here. I spent many years in government, the last  
4 22 of which were at the Office of Management and Budget  
5 dealing with management reform and particularly  
6 government-wide management reform the various  
7 administrations wanted to put in place. So, I have quite  
8 a bit of perspective on various agencies and what works  
9 and doesn't work across the government.

10                   And I left government a number of years ago,  
11 five I guess it is now, and joined IBM in what is a  
12 little think-tank where two or three of us actually  
13 sponsor research with university experts, whether it's  
14 Michael Barzelay at the London School of Economics or  
15 Steve Kelman at Harvard and people out in Arizona who are  
16 doing on networks and partnerships, which we might talk  
17 about in a little bit, but trying to get the best ideas  
18 from the cutting edge thinkers on what works, what  
19 doesn't work and where things are heading.

20                   And with that, we put out three dozen reports a  
21 year on matters dealing with management issues, run a  
22 radio show every week featuring government officials and  
23 letting them tell their story about, again, what works,  
24 what doesn't, how they have wrestled with public service  
25 careers. And we put out a magazine. We do a number of

1 things that basically support the question of management.

2 And, so, with that in background, let me give  
3 you five sort of conclusions or characteristics about  
4 what I'll call high-performing organizations, and even  
5 high-performing organizations don't all succeed, but they  
6 at least are working well and are at the top of their  
7 game.

8 The first characteristic and thing I think to  
9 keep in mind is that you're never done. Being a high-  
10 performance organization is not sort of one of those  
11 things that all of a sudden you get the gold star and  
12 you're there. Becoming one and remaining one is a  
13 constant struggle and a constant effort. You really  
14 can't ever think that you're there. And part of that is  
15 because the reform and restructuring or whatever the  
16 changes are that are necessary never fully solve the  
17 first problem and usually lead you on to another set of  
18 problems. In other words, lingering issues usually  
19 create the next set of problems you have to deal with.

20 And, so, the real question of these public  
21 management kind of issues of reform and change is that  
22 it's not so much about problem solving as it is  
23 continuing a constant balance of what the competing  
24 issues and demands are and being able to adjust those  
25 going forward. You're never ever going to get it quite

1 right and it's never ever going to be stable. And, in  
2 fact, you're going to constantly be dealing with issues  
3 at the margin. Do a little bit more of this, a little  
4 bit more of that. That constant adjustment is part of  
5 the lesson that you really have to keep in mind. You're  
6 never really done with this.

7 The second issue on high-performing  
8 organizations is that they are fundamentally different  
9 than other non-high performing, particularly government  
10 organizations. They've got a number of characteristics  
11 that Jerry began to suggest and I'll repeat a few, as  
12 well. The first is they don't operate primarily based on  
13 bureaucratic authority. In fact, they've replaced  
14 bureaucratic authority with very different tactics.

15 They use incentives, which you folks know all  
16 about. They have very much a customer focus. And they  
17 typically rely on what, in the management role, we call  
18 different sourcing arrangements. But they don't do  
19 everything themselves. Some things they may contract  
20 out. Some they may use partners. But they use various  
21 techniques and devices to get the work done. They don't  
22 view it all as an in-house bureaucratic exercise.

23 So, the real high-performing organizations defy  
24 a neat clean definition, but they operate very  
25 differently from the traditional bureaucratic command and

1 control structure that's familiar with the government  
2 particularly in the past.  
3





1       you. I think they tie in with Jerry's pretty nicely.

2       The first is: You need some clarity of purpos000r000 0y



1 do in that project is improve transparency and  
2 accountability in government agencies or, rather, help  
3 federal agencies improve their own transparency and  
4 accountability.

5 Kind of the flagship project of that has been  
6 our annual evaluation of performance and accountability  
7 reports where we essentially ask: To what extent do  
8 these reports present relevant information about agency  
9 performance in a transparent way that a reasonably  
10 intelligent and interested person who is not an insider  
11 could understand? So, it's very much an evaluation of  
12 the quality of reporting and communication rather than  
13 the quality of the agency's actual performance.

14 But there are some of the questions we ask and  
15 some of the things we look at in the reports where if you  
16 assume that the agencies are actually doing the things  
17 they say they're doing in the reports do shed light on  
18 some actual management practices, strategies and things  
19 that are maybe more relevant directly to what you are  
20 doing in this project here at the FTC.

21 And one cluster of things relates to  
22 essentially having goals that are stated as outcomes and  
23 that are measured. So that your goals are laid out as  
24 the actual good things we are trying to achieve for the  
25 public that legislators, members of the public and others

1 would kind of look at, nod their heads and say, yes,  
2 those are good things that we want to see happen, and the  
3 focus is on the goal rather than the means of the goal.  
4 You can dispose of a way of doing things or a means if it  
5 doesn't work, but the focus on the goal remains.

6 For example, one of the better reports this  
7 year was produced by the Department of Health and Human  
8 Services. I mention that because traditionally they had  
9 not done very well. But they had a very outcome-oriented  
10 statement of their mission in their latest strategic plan

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1 people and percent of people in the country with ongoing  
2 access to healthcare. The percentage of the population  
3 with immunization coverage. These are all things that  
4 are either health outcomes or closely related to health  
5 outcomes that fall right out of their mission.

6 Another cluster of things involves  
7 understanding how the actions of the agency contribute to  
8 the outcomes and knowing what it costs. So, it's not  
9 enough to measure an outcome and say, gee, that went  
10 better, we did a fantastic job. I hope that's not the  
11 approach you want to take or else \$4 a gallon gasoline is  
12 going to make the FTC look real bad. Of course, I know  
13 from reading Bill Kovacic's multitude of testimonies that  
14 85 percent of the price of gasoline is determined by the  
15 price of crude oil. So, I am not going to blame the FTC  
16 for the fact gasoline prices are high.

17 But what you want to be able to do, whether  
18 it's gasoline, groceries or the broader consumer  
19 protection issues, you want to be able to -- ideally, you  
20 will have had some good program evaluations that give you  
21 an idea of how has the Federal Trade Commission's  
22 activity contributed to the observed change in the  
23 outcome? Kind of a controlled experiment rather than  
24 just looking at a trend.

25 And then some of the best agencies, in terms of



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1 measurable just by sheer output numbers? Both or whoever  
2 wants to answer.

3 MR. BREUL: Well, let me take a crack at it.  
4 The whole business of measuring performance and results  
5 is inherently difficult in the public sector. If it was  
6 easy, someone else would have been doing it. That's why  
7 it's a public sector responsibility. It's usually

8

1 manage, or they have for a while, particularly under  
2 Colin Powell, the State Department was spectacular, and  
3 probably had some of the clearest goals and they fell  
4 apart this year in your report. But they've done, in the  
5 past, a spectacular job of coming to an understanding and  
6 clarity of what they're about, what's important and what  
7 to measure.

8 Without getting carried away with the geekiness  
9 of it all, Maureen used a couple terms in what you  
10 described. And I think, at some point, a little  
11 precision there is helpful. Yes, indeed, a focus on  
12 outputs, and if it's cases and so forth are easy enough  
13 to measure. People feel comfortable with those. The  
14 budget weanies will love to be able to attach those to a  
15 budget number. And the budget often does sort of  
16 associate outputs to dollars. Frankly, that's okay  
17 because there is a relationship there and that works.

18 The more important thing, in fact, if you look  
19 at the title of the Government Performance and Results  
20 Act, there are actually two terms at the ends there,  
21 there's performance and there's results. And that was  
22 deliberate because performance was aimed at those output  
23 kind of things, those kinds of matters that are in front  
24 of you that you can control, that you can count more  
25 readily. But, frankly, at some point, those don't tell

1 the whole story.

2 The idea of results at the end of the term in  
3 the Government Performance Results Act was aimed at at  
4 least one other, if not two other, kinds of measures.  
5 The first and primary and most important one in GPRA is  
6 outcomes. What's the larger outcome that you're trying  
7 to achieve? And putting some focus and clarity on that  
8 is terribly important, and I would argue is the most  
9 important. Because what you want to do is line up your  
10 outputs to contribute to those outcomes.

11 And having a logic and a theory about that is  
12 terribly important to understanding what you're doing.  
13 And you may, again, on a daily basis, focus more on the  
14 outputs because that's what's in front of you. But you  
15 want to make sure they are leading to the outcomes that  
16 are important, that are most meaningful.

17 And, finally, in the measurement business, the  
18 whole business of impact is most important, what would  
19 have happened in the absence of your intervention and in  
20 the absence of your activity? And that's an even more  
21 difficult matter to measure. And, again, when I stressed  
22 earlier the need to have a high-performing organization  
23 be clear and then evaluate what the changes are, you've  
24 got to start thinking in those terms. What is the impact  
25 of what you're doing? What would have happened in the



1 remember the Department of Transportation one year laid  
2 out some measures where they measured the quality of  
3 pavement in the highways, conditions of the highways.  
4 And they said, we realize this is not an outcome, it's an  
5 output, basically. And the reason we do this is because  
6 if you look at these studies over here, it has been  
7 pretty well statistically demonstrated that if the roads  
8 are in this condition, that translates into these kind of  
9 effects on accidents, fatalities, injuries, which are the  
10 safety outcomes that we're really interested in.  
11

1 know their enforcement division seems to want to measure  
2 the enforcement function separate from everything else,  
3 so that way they are only measuring stuff they control.  
4 I think that's common in other agencies where there's a  
5 separate enforcement division, as well.

6 But, in any case, DOT could measure that kind  
7 of stuff. But they went further and said, okay, we do  
8 inspections on these motor carriers. They went out and  
9 did a program evaluation where they looked, before and  
10 after, to figure out when you do a safety inspection of a  
11 motor carrier, does its safety record actually improve or  
12 not? And they found that, in fact, when they looked at  
13 all the ones that they had done the inspections on, they  
14 found that there was indeed an improvement in the safety  
15 records of motor carriers as a result of the inspections  
16 they did.

17 So, basically, they were able to go beyond just  
18 measuring their output, the amount of inspection  
19 activity, to the actual outcome, which is, well, gee, how  
20 much did we improve safety as a result of the year's  
21 activity? How much better did something in the world get  
22 because of what we did, is the critical thing.

23 And the only other thing I'll mention in ten  
24 seconds is I think the evaluation that the Office of  
25 Policy Planning did on competition advocacy is a good

1 example of that where you didn't just say, well, here's  
2 how many comments we submitted, but rather you went back  
3 to the decision makers the comments went to to try to  
4 figure out what changed as a result of what we did.  
5 That's looking at outcomes.

6 MR. BREUL: Let me go back to DOT one more  
7 time. DOT is a fine example and actually one that  
8 everybody can sort of understand. As Jerry suggested,  
9 safety is one of their three or four major strategic  
10 goals. And that means fewer fatalities or injuries  
11 whether you're boating, in the air, on the rails or on  
12 the highways. And if you look at the highway program and  
13 what it does, it issues grants. The output there is more  
14 grants and public service announcements and this and  
15 that.

16 They do not control driver's licenses, they  
17 don't control your alcohol consumption, and they do not  
18 control the speed on the highway. Three probably pretty  
19 important factors in injuries and fatalities. They  
20 control none of that. But their goal is to reduce  
21 fatalities and injuries. The SES are held to some goals  
22 in those programs and the programs are all oriented to do  
23 that, even though they have no control or direct  
24 connection to the critical factors involved.

25 And, so, figuring out what the outputs ought to

1 be that could have an influence on those outcomes and  
2 contribute positively to a reduction in injuries and  
3 fatalities is what they struggle with. And, in a sense,  
4 it's the same kind of problem you've got here.

5 These kind of sort of measurement outcome  
6 questions are common throughout the government. And  
7 they're not easy. There's not a quick fix. There's no  
8 magical solution here. But don't ignore those kind of  
9 questions because, again, without that focus on outcomes,  
10 you're likely to be spending your time on a lot of  
11 activity that may or may not be critical to achieving the  
12 real purpose and the real objective of the Commission.

13 MR. LUIB: Turning to the issue of clarity of  
14 mission, as most of us here know, the FTC's organic  
15 statute is very broad or flexible depending on how you'd  
16 like to characterize it, prohibiting unfair deceptive  
17 acts or practices, unfair methods of competition. At  
18 yesterday's discussion, we had former Bureau of Consumer  
19 Protection Director Jodie Bernstein embracing that  
20 flexibility that the statute provides while former  
21 Chairman Tim Muris was cautioning that that broad statute  
22 can sometimes lead the agency to stray from being a  
23 referee, a process-oriented agency at its core.

24 Are there other agencies with similarly broad  
25 statutes? Are there lessons to be learned from other

1 agencies in that regard?

2 MR. BREUL: Let me offer you a suggestion there  
3 because I think there are a number. And what I would  
4 suggest, believe it or not, is the Department of Defense.  
5 The Department of Defense has a pretty broad and sweeping  
6 responsibility. The notion of national security is not  
7 exactly something you put in a tight little box.  
8 National security threats and the question of whether  
9 it's one war, two wars, in the Pacific, the Mideast, in  
10 outer space, wherever, the nature of those threats is  
11 pretty broad.

12 In this world, with terrorism, with tsunamis,  
13 you can even argue that financial problems, that  
14 financial collapse is a national security problem at some  
15 point. So, there is a very broad, very broad set of  
16 responsibilities there. And some of what are regarded as  
17 the high-performing organizations in DoD, one of them is  
18 Special Forces. And the whole idea of Special Forces was  
19 not to be so expert in doing this, that or another thing,  
20 not to have a very narrow doctrine, a narrow set of  
21 outcomes, but rather to have a set of capabilities. And,  
22 in fact, they think about their outcomes and their  
23 mission in terms of capabilities that can then be  
24 deployed by the President in the face of a national  
25 security problem.

1                   And those capabilities, in their case, have to  
2 do with jointness in terms of mission, mobility and  
3 certain other kind of weapons and force measures that let  
4 them be ready for a lot of different circumstances and  
5 can let them move based on what emerges as a national  
6 security threat. And it seems to me there may be some  
7 lessons in that for you because, indeed, part of your  
8 role is to respond to market conditions, market failures  
9 and maybe some of you are way ahead of the game and saw  
10 subprime mortgages five years ago. But what the problem  
11 is each day sometimes catches at least some of the  
12 government by surprise.

13                   And being able to shift, being able to move and  
14 being able to adjust to market changes and what's next, I  
15 think, is an enormous capability you've got to deal with.  
16 And I think one of the big threats going forward to all  
17 departments and agencies is what we've called the need to  
18 expect surprises. Stuff happens. Earthquake in L.A.  
19 yesterday, you could have another Katrina, you could have  
20 a market challenge of some sort.

21                   The notion that we're dealing with a stable and  
22 predictable set of conditions is probably not realistic.  
23 And, so, you've got to have that ability to have  
24 capabilities and the agility to move around that may be a  
25 little uncomfortable, but gives you the ability to

1           respond as the market and other conditions change.

2                       MR. ELLIG: I'm an economist, so I'm going to  
3           give you an on the one hand, on the other hand. On the  
4           one hand, I think the FTC's organic statute is more  
5           focused than the mandates that some federal agencies  
6           have, where at least there's clearly a focus on the  
7           consumer which in some cases is specific enough to guide



1 define the consumer protection mission if some folks feel  
2 that that could be defined too broadly.

3 In practice from what I saw, I'm not sure that  
4 the FTC today is defining the consumer protection mission  
5 too broadly.

6 MS. OHLHAUSEN: Jonathan, I wanted to go back  
7 to one of the points that you raised about how political  
8 reality drives performance. You said high-performing  
9 agencies sustain attention where it has political value.  
10 Two threads in that that I wanted you to expand on a  
11 little bit. First, when you say political reality, do  
12 you mean simply relations with Congress or do you mean  
13 sort of the public in general and sort of the overall  
14 perception of the agency? And then, secondly, how do  
15 they sustain attention on those kinds of topics?

16 MR. BREUL: I mean it broadly. It's the  
17 Congress, it's the White House, it's the public. Because  
18 there is a sentiment there that's often a pretty good  
19 indicator of where some problems are. And organizations  
20 that are deaf to those are going to find themselves sort  
21 of left out of the action or, even worse, in trouble when  
22 Congress or the White House decides that they're part of  
23 the problem and not really part of the solution.

24 The way you do that, obviously, is -- to me,  
25 the most important piece of it is often leadership. It's

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1 before.

2 And the example I gave quickly before was  
3 Special Forces with a fellow named General Downing. A  
4 lot isn't known and a lot can't be told about what goes  
5 on in Special Forces, but from all I can gather and tell,  
6 that they really had a very different view of things.  
7 And that was connected, again, to the National Security  
8 Council, the President, the Secretary of Defense and a  
9 larger set of political players that gave them a  
10 direction and a sense of purpose.

11 And, again, when I use politics there, it's not  
12 politics in necessarily the Republican-Democratic sense,  
13 but it's what's really in play and what's important. And  
14 that has to, at some point, for public programs be part  
15 of the picture.

16 MS. OHLHAUSEN: Jerry, I don't know if you had  
17 anything to add on that.

18 MR. ELLIG: Just politicians will often want  
19 all kinds of things from an agency that may be kind of a  
20 distraction from the principal mission. And it's  
21 important to demonstrate and to explain to them how  
22 performance of the core mission is probably 99 times out  
23 of 100 anyway, good politics. I think James Lee Witt  
24 demonstrated that with FEMA, that when the Federal  
25 Government can very effectively coordinate disaster



1 five years outdated. So, I'm going to take the cowardly  
2 way out and point out the obvious challenge, which is  
3 whenever you have a change of administrations and new  
4 folks coming in at the top, whether it's a change in  
5 party and control of the White House or not, it's the  
6 whole challenge of how do you keep the good things going  
7 and also be responsive to the priorities of the new  
8 leadership and not just have a year of interregnum where  
9 not much happens.

10 MR. BREUL: Let me just jump in there because  
11 there's some common problems around the government that I  
12 would suspect you share in some degree, and maybe those  
13 just ought to help you out a little because I think they  
14 bear attention anyway. And if you've got these under  
15 control, great. But if you don't, watch out.

16 The first would be the competence factor. And  
17 some describe it around the government simply as the  
18 workforce, the FTE factor. We don't have enough people  
19 or we've got the baby boomer retirements and all that. I  
20 think it's a broader question of the competence. You've  
21 really got to have the people and the capabilities, with  
22 the right skills and the right experience in the right  
23 place here to get on with those outcomes. And that's a  
24 huge challenge that is affected by, in many cases,  
25 limited FTE or limited dollars. It is affected by the



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1 discussion. And, so, there's some actual homework and  
2 research done before decisions get made. That's a  
3 crucial input into the good decision-making that you all  
4 should make sure that you keep as you move forward into  
5 the next century.

6 MS. OHLHAUSEN: In our remaining couple  
7 minutes, I just wanted to see if anybody from the  
8 audience had any questions for our panelists.

1 tank, try to open the aperture at this point and see what  
2 else is going on and look around and see what others  
3 might think.

4 I mean, you've obviously got to be the filter  
5 and judgment on that, but I think the biggest risk is  
6 thinking that you do have the answers or that what you've  
7 done in the past is necessarily going to work going  
8 forward. It may well. But, again, I think you've got to  
9 challenge that and be ready for some change and some new  
10 challenges and new thinking. And, again, opening the  
11 aperture is the way to think about that and see what you  
12 come up with.

13 MR. ELLIG: It's funny because my knee-jerk  
14 response was it's very easy for an exercise like this --  
15 and I've seen this outside government as well as in  
16 government, so I'm not saying it's a government thing.  
17 But it's very easy for an exercise like this to become an  
18 exercise in justifying the current activities we're  
19 engaged in rather than actually figuring out what ought  
20 we be accomplishing and how ought we be accomplishing  
21 that.

22 MS. OHLHAUSEN: Well, I hope you all will join  
23 me in thanking our panelists for their very good  
24 observations.

25 **(Applause.)**

1 MS. OHLHAUSEN: We are just slightly off  
2 schedule. So, what I would suggest is that we take a  
3 10-minute break and reconvene at 10:20 for the  
4 Effectiveness of the FTC's Competition Mission Panel.  
5 Thanks.

6 (Session 1 concluded.)  
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1                   **SESSION 2: EFFECTIVENESS OF THE FTC'S**  
2                                   **COMPETITION MISSION**

3                   MR. HEIMERT: Good morning, and welcome to  
4 today's second panel, which is titled the Effectiveness  
5 of the FTC's Competition Mission. My name is Andrew  
6 Heimert. I'm an attorney in the Office of Policy and  
7 Coordination within the Bureau of Competition. For those  
8 of you less familiar with the FTC, yes, there are a lot  
9 of policy offices, I'm in one of them.

10                   Yesterday and earlier this morning, panels took  
11 a look at the Commission's efforts from a variety of  
12 broad perspectives and how we could go about evaluating  
13 the Commission's work. With this panel, and the two to  
14 follow this afternoon, we are going to dig a little bit  
15 deeper into specific aspects of the Commission's mission.  
16 This one, in particular, will focus on the competition  
17 mission.

18                   There are three principal topics we're hoping  
19 to cover on this panel this morning. The first is how  
20 can we measure the benefits of the various competition  
21 activities the Commission undertakes? For example, what  
22 are the benefits of enforcement action? Does the  
23 issuance of guidelines offer benefits to the public? Are  
24 workshops, like this one and many others we have held  
25 this year and the past, of benefit to consumers, even if



1 still take a couple of minutes to lavish some praise on  
2 them for their accomplishments, all of them having many,  
3 and more are fully laid out in the bios list in your  
4 packets that were distributed.

5 I'll start first with Jan McDavid. Jan is a  
6 partner at Hogan and Hartson where her practice focuses  
7 on antitrust, competition and trade regulation, with a  
8 particular emphasis on government investigations  
9 litigation and antitrust policy issues. She is a former  
10 chair of the American Bar Association Antitrust Section  
11 and she has handled numerous high profile mergers before  
12 the FTC and DOJ, but we'

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1 Counsel at the Federal Trade Commission from 1995 to 1997  
2 and has taught at other universities, including those of  
3 Michigan, Pennsylvania and Utrecht in the Netherlands.  
4 Steve is also serving his third three-year term on the  
5 Council of the American Bar Association Section of  
6 Antitrust Law.

7 So, with that, I'd like to begin the  
8 discussion. The FTC engages in several different types  
9 of competition-related activities which perhaps can be  
10 grouped into four categories. First, enforcement;  
11 second, issuance of guidelines; third, competition  
12 advocacy such as presentations to Congress, foreign  
13 officials, state governments and other regulators as well  
14 as consumers at large in an effort to reduce obstacles to  
15 the benefits of a free market; fourth, competition  
16 research and development, competition R&D, which can  
17 consist of such things as internal studies to understand  
18 competitive dynamics, workshops and conferences like this  
19 one and others where the Commission learns from the  
20 members of the public.

21 So, I'd like to ask the panel the same  
22 questions regarding each of these types of activities.  
23 First, how can we measure the benefits of each of those  
24 activities? Second, if one were to try, how might one  
25 measure the magnitude of the benefits of the activity?

1 I'll go activity by activity and have each of you take  
2 the lead on one of them and then everyone can follow-up.

3 So, I'll call on Jan to discuss the primary  
4 benefits of enforcement actions. Is there a way to  
5 measure the magnitude of these benefits? What are the  
6 direct consumer benefits from bringing cases and blocking  
7 anticompetitive mergers or stopping anticompetitive  
8 conduct? Is it deterrence of other activities? Is it of  
9 other similar activities by other companies and  
10 competitors? Is it the development and clarification of  
11 legal doctrine? Each of those, I think, are possible  
12 benefits. Is one larger than another? Is there a way to  
13 say?

14 MS. McDAVID: Well, thanks. I think it's hard  
15 to quantify these in numerical terms. But speaking as a  
16 counselor who tries to tell clients where the lines are  
17 and what conduct is and is not appropriate, I think that  
18 quite apart from, and let's park the notion of the impact  
19 on a particular case, which can be very significant in  
20 some cases. From my perspective, the notion of  
21 demonstrating to the bar and the business community that  
22 the cop is really on the beat is a really important part  
23 of the agency's enforcement mission.

24 And the other is the clarification of doctrine,  
25 of which we've had just an illustration within the last

1           24 hours.

2                       Let me go back to the first one to begin with.  
3           Most antitrust enforcement in this country, and I think  
4           around the world, actually doesn't happen in a building  
5           like this. It happens in my clients' boardrooms, in the  
6           conference rooms in our law firms, where we tell the  
7           clients the risks that attach to the conduct that they  
8           are proposing, whether they are or are not close to line,  
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1 typical class is very small, there's lots of intimate  
2 contact between students and faculty and how do you know?  
3 And all these things are so incredibly hard.

4 So, I wanted to find the answer. And I went to  
5 the Federal Trade Commission Performance and  
6 Accountability Report Fiscal Year 2007 because you guys  
7 quantify all that sort of stuff. And we got numbers here  
8 on exactly how much consumers have benefitted. I can  
9 tell you that back in Fiscal 2007, merger enforcement  
10 saved \$805 million which was \$305 million more than the  
11 goal. And that if you go to another measure, you find  
12 that in terms of a key measure of a success rate, you'll  
13 find that the success rate here, achieving positive  
14 outcomes was -- the goal is 90 percent and the answer is  
15 there was 100 percent achieving positive outcomes for  
16 that particular measure. A positive outcome was either  
17 getting a consent order or voting out a complaint or  
18 closing the matter.

19 **(Laughter.)**

20 MR. HEIMERT: And that kind of would lead to

losing the 100 percent. What 0.00009duc per8 pppppm5a8i?ET1.00000 0.00000 0.00

1 MR. HEIMERT: Within that fiscal year.

2 MR. CALKINS: It's so hard. I mean, I applaud  
3 and I think counting is terribly important. And I guess  
4 I just want to emphasize the one little part of this  
5 that's not in here. When you went through the numbers of  
6 cases that were the dollars -- it was focused in on the  
7 cases that were brought and how much was saved in this  
8 particular case and how much consumers benefitted and all  
9 that.

10 And in that connection, I wanted to -- I don't  
11 know, I guess I'm being webcast so I have to talk in  
12 front of a microphone. I wanted some objective way of  
13 knowing what is it that the antitrust agencies do that is  
14 recognized by an objective impartial source as important  
15 and, in particular, an objective impartial source that I  
16 had with me on the airplane this morning. And, happily,  
17 I had a very objective and impartial source that the  
18 Chairman can't object to, namely, his and my coauthored  
19 antitrust nutshell.

20 MR. HEYER: Copies on sale in the lobby.

21 MR. CALKINS: New edition overdue a little bit.

22 MS. McDAVID: Do you carry it with you  
23 everywhere you go?

24 MR. CALKINS: When in doubt, it's always good  
25 for all antitrust people to carry it.

1                   **(Laughter.)**

2                   MR. CALKINS: So, I did extensive research. I  
3 went to the index of this book and checked it out and I  
4 looked up what this book actually cites. And to do that,  
5 let's see what we found. Here we go. We close that out  
6 and, bingo, then you open it up and then you try to go  
7 and F5. Bingo, you go to the nutshell index of what's  
8 really important. And there's very little in the way, I  
9 regret to say, Maureen, of studies and reports that get a  
10 whole lot of attention in something as simplistic as  
11 this. Instead what you see are cases.

12                   And, indeed, then if you do a simple mindless  
13 count of the number of pages in the index on which cases  
14 appear, which is a rough and ready guess as to sort of a  
15 little bit of what do you see a lot when you're reading  
16 what we all know as antitrust law, what do you find? And  
17 that was my count. You find that the big winner was the  
18 Microsoft case. This is, of course, biased in favor of  
19 stuff that was current and that Bill and I liked at the  
20 time we were working on this thing.

21                   **(Laughter.)**

22                   MR. CALKINS: And you also see I can't type  
23 very well on an airplane and so I have typos and things.  
24 But that's sort of antitrust law as we know it. And in  
25 terms of what is antitrust law, this is what antitrust





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1 not equal facts. And I guess I think that with respect  
2 to -- the questions you're posing here on the  
3 enforcement, in my experience it's kind of a red herring.  
4 Neither in my time at the Department of Justice nor in my  
5 time at the Federal Trade Commission did I ever see a  
6 bureau director or a division chief say, I think we have  
7 a violation of the antitrust laws here, but I'm not going  
8 to bring the case.

9           Whether that's right or wrong, I do not believe  
10 that people who have the antitrust laws have the option  
11 to say, here's a case that's too small, it's beneath me.  
12 So, today, that just doesn't seem to me to be a realistic  
13 issue. It would, as Ken would say right away, shift us  
14 over into the question of how many resources do you put  
15 in there, because how many cases you see is partly a  
16 function of how many resources you have there.

17           I also don't know what to make of Stephen's  
18 chart. I noticed that some of the big ones were Standard  
19 Stations, which is, at best, a very lousy opinion that no  
20 one follows anymore. Cal Dental, which I hope didn't  
21 survive Three Tenors. And I hope nobody is giving  
22 information on the basis of that except that, yes, if  
23 it's doctors, they won't indict them even though they  
24 should treat doctor price-fixing just like they treat  
25 cement truck price-fixing.

1                   So, I must say I think these are absolutely  
2 crucial questions. But unless Ken's got an answer coming  
3 from the empirical economic side to it, on this  
4 particular topic, some of the others I could see open on  
5 the enforcement issue, I just don't see how the agency  
6 has the choice to say, yes, we have all these merger  
7 guidelines, yes, we've issued this second request, yes,  
8 this is way over the line, but we're not going to bring  
9 the case.

10                   MR. HEIMERT: Ken?

11                   MR. KRATTENMAKER: Oh, footnote, one reason you  
12 don't say that is because you can get cases like Three  
13 Tenors that can, in fact, have a large, as Jan suggested,  
14 a large impact in shaping the doctrine out there that is  
15 then being used widely outside the Commission.

16                   MR. HEIMERT: Ken?

17                   MR. HEYER: Well, let me first make a couple of  
18 more general points rather than trying to pick at each of  
19 the questions you're going to ask and each of the issues  
20 one by one. Oh, first, I should say I'm not speaking for  
21 the Department of Justice. I am speaking for the Federal  
22 Trade Commission.

23                   **(Laughter.)**

24                   MR. HEYER: I'm actually never speaking for the  
25 Department of Justice, which gives me a little more

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1 training in law schools, that we hope to get us good  
2 outcomes. So, the back and forth between people with  
3 different views; the idea of hashing things out in a  
4 courtroom occasionally, rather than just talking  
5 internally about what we think the right answer should  
6 be; engaging in competition advocacy and other forms of  
7 public debate, I think is an important way of having  
8 maybe two sides, or more than two sides in some cases,  
9 wrestle with some of these difficult issues, whether  
10 they're policy issues or whether they're case-specific  
11 issues. And through that process, repeated over time,  
12 hopefully, moving towards more efficient outcomes.

13 That doesn't literally answer questions like  
14 how many resources should be given to the Federal Trade  
15 Commission? But it's a start as far as I think how to  
16 improve outcomes. And I would add to that the  
17 transparency that comes from things like some of the very  
18 informative closing statements that the Federal Trade  
19 Commission pioneered a while back, the cruise lines one I  
20 thought was very good because it not only informed  
21 people, and maybe it gave further guidance to people like  
22 Jan and her clients, but it also allowed people to debate  
23 things publicly, and that is something that helps lead  
24 you towards a better answer.

25 And I think, for example, the Europeans with

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1                   To me, there are two reasons for it. One, it's  
2                   like applying antitrust concepts to antitrust law.  
3                   You're filling in the gap. You're looking at the market  
4                   failure. Where isn't the market working? It's not  
5                   working in areas where we've supplanted competition for  
6                   reasons that don't give us some sort of strong  
7                   countervailing justification.

8                   And I also think there are potentially large  
9                   pay-offs out there. Because of my background in the  
10                  telecommunications area, I immediately think of things.  
11                  Suppose the agencies had told the Federal Communications  
12                  Commission just what it was doing through its spectrum  
13                  allocation policies and limited the world to three and  
14                  only three networks for three decades? Or when they  
15                  first announced that wireless telephony was a natural  
16                  duopoly? Or when local cities were handing out monopoly  
17                  cable franchises? The data are in on all three of those  
18                  areas, and millions and millions of dollars in monopoly  
19                  profits were flowing to the beneficiaries of that  
20                  government action right out of consumers' pockets.

21                  What if this Commission had talked about the  
22                  impact of the steel import quotas back in the '70s? What  
23                  if it went out and talked to local authorities about just  
24                  what our silly system of picking up trash is doing both  
25                  economically and environmentally? So, I think there are

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1                   Lest I be accused of just saying, well, it's a  
2                   great idea, but how are we going to measure the benefit,  
3                   I will throw in one way of -- what the Commission already  
4                   does, which is very good, could be improved, is if there  
5                   were more extensive and more overt collaboration between  
6                   lawyers and economists. I would like to see in the  
7                   competition advocacy work more extensive and rigorous  
8                   economic work being done right alongside the legal.

9                   MR. HEIMERT: Jan?

10                  Ms. McDAVID: I agree with what Tom had to say  
11                  because the effect of competency advocacy can be across  
12                  an entire sector, whereas even a case like Staples which  
13                  helped develop the law in unilateral effects -- I mean,  
14                  the impact of Staples isn't that we pay less for paper  
15                  clips, but the doctrine of unilateral effects analysis  
16                  was advanced. Here you can have an impact across an  
17                  entire sector. And the work that was done in recent  
18



1 respond also, but let me throw into the mix a follow-up  
2 question. It came up yesterday. One of the things that  
3 the Consumer Protection Bureau does a lot of is what we  
4 call consumer education. If you're a consumer, I think  
5 the example is how not to get ripped off by a contractor,  
6 take these ten steps. The Bureau of Competition, I don't  
7 think, does that to nearly the same degree. A lot of the  
8 time, we're talking to people like each other who know  
9 the benefits of competition, we understand it. But I'm  
10 not sure the average consumer necessarily does.

11 We see that obviously gas prices, there's a  
12 solid group of people who believe gas prices are high not  
13 because the price of crude oil is high as a result of  
14 greater demand, but because oil companies collude at  
15 every part of the distribution system and that raises  
16 prices. And Congress seemingly feeds on that and asks  
17 the FTC to determine why there's not enough competition  
18 in gasoline. That's just the most prominent example.

19 The Whole Foods merger was laughed at by some.  
20 A grocery store is a grocery store. Other people said,  
21 well, it's organic. I understand the debate. But,  
22 certainly, the consumer on the street, if you will,  
23 perhaps didn't understand what the problem was with that  
24 merger.

25 Can the FTC, should the FTC engage in sort of



1 local cable monopolies from being created and things.  
2 And, yet, he didn't say that the FTC had succeeded in  
3 preventing that. He didn't even go on and say the FTC  
4 was out there leading the charge against steel import  
5 limits and leading the charge against local monopolies.

6 And, so, you sort of sit down and you say,  
7 well, okay, given that we all like competition, given  
8 that we all know that there's lots of ways that  
9 governments can harm consumers and harm competition, you  
10 then need to do, if you really wanted to do this in terms  
11 of the difficult metrics stuff that Bill is talking  
12 about, you then need to figure out, okay, to what extent  
13 is the FTC actually making a difference that benefits  
14 consumer and then compare the use of those resources to  
15 alternative uses. And, obviously, it's so hard to  
16 quantify this. That's why it's easy to point to the  
17 simplicity of just counting up to six advocacy filings.  
18 If you're short one, go throw in another. You're opposed  
19 to lawyers agreeing on fees and you've made your quota  
20 and things.

21 And, yet, it's such a hard question. How do  
22 you tell whether the agency's actually made a difference?  
23 If it testifies on the side of the angels in favor of  
24 letting people import wine from out of state, which is a  
25 cause I dearly believe in, how do you end up proving that

1 it made a difference?

2 When we see all sorts of anticompetition,  
3 government regulation and the FTC is sitting on the  
4 sidelines, is that because it is prudently holding its  
5 fire? Is that because its prudently going to things that  
6 are more likely to be places where it could make a  
7 difference or is that because it is shying away from the  
8 big, challenging, controversial issues? Very, very hard  
9 questions.

10 And I wish I had the answer, but I guess I  
11 think that it's important to be asking those questions  
12 and to try to, really, in a searching way, figure out  
13 whether or not competition advocacy, which seems like a  
14 good idea, does it make a difference, when does it make a  
15 difference and what kind of cases does it make a  
16 difference?

17 Jan talked about real estate but immediately  
18 cited a lawsuit which we know makes a difference. My  
19 guess is that that actually is an example of the whole  
20 process working well because the agencies are litigating  
21 and doing advocacy and doing R&D and using a whole  
22 panoply of their resources, which I tend to think is when  
23 things work best. But I can't say I've studied  
24 carefully. My guess is that that linking together is  
25 what really works.

1                   In terms of your suggestion about should the  
2                   FTC be out there telling consumers that competition's a  
3                   good thing? I must say if it's hard to measure success  
4                   when we're talking about influencing government behavior,  
5                   the chance that we could really measure success on  
6                   whether communicating with consumers about competition  
7                   being a good thing, I have my doubts about it. And given  
8                   all the other needs, I wonder whether there aren't better  
9                   resources.

10                   But I'm willing to sit back and look at what  
11                   the FTC would do and judge it on the merits. And I've  
12                   never done that. So, I don't think I'm in a position to  
13                   really have an informed opinion on that one.

1 the reasons why regulations and laws that are harmful or  
2 anticompetitive in some way manage to flourish, there are  
3 many reasons, but one is because the costs associated  
4 with them are not obvious to people who don't spend their  
5 lives studying them.

6 A lot of times it's a very complicated thing  
7 and it gets through in some bill or some regulatory  
8 thing. Most consumers don't read the Federal Register  
9 every day. And one value to folks in the competition  
10 agencies or anywhere for publishing things and doing  
11 studies that don't have to be very high tech is to  
12 illustrate the costs associated with certain types of  
13 policies. And, at that point, you have to leave things  
14 up to democracy to decide. But at least you're  
15 clarifying and highlighting what the costs of certain  
16 things are. And then if people say, we want to keep out  
17 steel because there's \$200,000 of costs for every job  
18 that's saved in Ohio, then that's up to them. But at  
19 least it's made clear.

20 Another value -- and this is something I think  
21 is very important and underappreciated -- but at the  
22 agencies, we have a lot of very good people and they like  
23 doing this kind of work, some of them. It's very helpful  
24 in terms of recruiting and retaining human capital, which  
25 is, as someone had mentioned, the most important thing



1 spots for when and where you think you'll be most  
2 effective, try to allocate your resources there.

3 And, perhaps, one way is to stay a little bit  
4 closer to the competition area. Even though I like the  
5 idea of sometimes straying outside and writing or talking  
6 about things that are not antitrust specific, I think the  
7 more we focus on what's our natural comparative  
8 advantage, the more authority we speak with and,  
9 therefore, the bigger bang for the buck.

10 MS. McDAVID: Let me just put in a brief pitch  
11 for the international mission on competition advocacy.  
12 It's on the list as one of the things you mentioned. If  
13 you go back sometime, the agency's devoted some  
14 resources, some of it funded by o0000e agency's 0000 0.00000 0.00000

1                   This has been an extremely worthwhile effort  
2                   that has had effects around the globe. We now have 100  
3                   countries around the world with antitrust statutes and  
4                   antitrust enforcement agencies. And they're out  
5                   protecting competition in each of their countries. And  
6                   the efforts in the ICN, modest though they may have been  
7                   in terms of dollars spent by the agencies, I think have  
8                   been extraordinary.

9                   And the U.S. agencies have had the extremely  
10                  good judgment to let other governments lead the ICN in  
11                  its principal roles because they understand that it's  
12                  important that other governments be perceived to have an  
13                  important voice in this mission. So, that was money well  
14                  spent. It wasn't a lot of money, but it was well spent  
15                  and it was over probably a 20-year time period.

16                 MR. HEIMERT: Let me turn to guidelines and the  
17                 issuance of guidelines. And, Ken, I'll direct the  
18                 question to you, but, again, everyone can weigh in. Is  
19                 there a benefit to issuing guidelines? Should we do it  
20                 more? Should we do it less? Should we update them,  
21                 revise them? How can we measure what benefits they  
22                 bring, again, to the public, to competition generally?

23                 MR. HEYER: Well, I think they are most  
24                 valuable when there is a strong consensus behind  
25                 something. I think there's a stronger consensus behind

1 horizontal merger policy, for example, and I think the  
2 guidelines there have been of value, although I'll  
3 qualify that in a second.

4 To my mind, issuing guidelines on things like  
5 vertical mergers and issuing guidelines on things like  
6 Section 2, which none of us fully understand anyway, have  
7 only limited value. I think an understanding of those  
8 things needs to sort itself out better through academic  
9 work and through research that folks do internally and  
10 through proceedings in courts before we even think of  
11 issuing guidelines there.

12 The one negative -- it's not a negative so  
13 much, it's a qualification. The guidelines that are out  
14 there, the horizontal merger guidelines, the  
15 international licensing guidelines, a number of things,  
16 often receive tremendous praise, and they are the product  
17 of a good deal of fine work by talented people.

18 I'm not someone who advises clients. And, so,  
19 I'll defer to Jan a bit on how valuable they are. But a  
20 lot of times the fights that I see taking place in the  
21 merger area, for example, the guidelines have these  
22 numbers, which most people don't pay a lot of attention  
23 to now anyway, but let's say we did arrive at certain  
24 numbers that people thought were reasonable. Let's say  
25 we had 2,000 or 3,000 or whatever as a realistic number

1 for typical mergers that we might be very concerned  
2 about.

3 I think the biggest fight that takes place in  
4 the merger area has to do with what the market is, not  
5 what concentration is. Because we'll say, well, the  
6 Herfindahl was over 2,000 or over 3,000 or over 4,000  
7 and, therefore, there should be a presumption of harm.  
8 The big fight that takes place isn't usually over whether  
9 that's reasonable, although the other side would never  
10 stipulate anyway. The big fight is over whether the  
11 Herfindahl is really 600 or 800 as opposed to 3,000 or  
12 4,000 because they're arguing all this other stuff is in  
13 the market. And that is when you have to get into all  
14 nitty-gritty difficult case-specific analysis that you  
15 can't put in the guidelines.

16 So, I think it can be overstated how much  
17 guidance these things really give. Although in certain  
18 clear cases, they obviously help.

19 MS. McDAVID: The framework that was  
20 established by the merger guidelines is applied almost  
21 universally today. And the framework, whatever the  
22 failings in particular provisions, such as the fact that  
23 everyone knows the HHIs don't reflect enforcement policy  
24 and that different kinds of efficiencies get credited and  
25 there's no discussion of potential competition and that

1 vertical mergers are basically not treated, those sorts  
2 of failings don't really undercut the value of the  
3 fundamental structure for thinking about how one analyzes  
4 a merger. That's been the value, I think, in the merger  
5 guidelines.

6 And when they were issued -- there certainly is  
7 broad consensus today, but Bill Baxter's first guidelines  
8 were regarded as a little revolutionary when first  
9 brought out. Consensus evolved pretty quickly as people  
10 understood how they worked. But at the time they were  
11 done, they were on the edge.

12 MR. HEIMERT: Steve, care to comment? And let  
13 me throw in a couple of additional questions to the mix.

14 MR. CALKINS: I did such a good job with your  
15 extra question the last time?

16 MR. HEIMERT: Just trying to get things out on  
17 the table. The commentaries we had for the merger  
18 guidelines, the horizontal merger guidelines commentaries  
19 and the data that were released, does that add value to  
20 the guidelines? And then a different, but I think  
21 related, area is advisory opinions. Is that something  
22 that the Commission provides value in issuing? Should it  
23 do more of it? Again, you have to have someone come in  
24 and ask for an advisory opinion. But feel free also just  
25

1 those to the mix and then we'll go around.

2 MR. CALKINS: All right, very quickly. I agree  
3 with everything that Ken said. One of the things that  
4 made the mergers guidelines work and a good thing was  
5 that they were real, they were used. They were not an  
6 academic exercise. They were not a sales pitch that was  
7 just thrown out there for the purpose of selling. They  
8 stand in sharp contrast, for instance, to one of the  
9 vertical restraint guidelines that the Department of  
10 Justice issued at a time when it was all a piece of a  
11 sales pitch to the courts because the Department of  
12 Justice wasn't bringing any vertical cases at all.

13 And, so, setting out a document saying this is  
14 how we identify the cases to bring was a little bit of a  
15 fraud. And it made it into less of an important process  
16 developing the document, it made it much less credible,  
17 it made it much less real.

18 The merger guidelines were something that Bill  
19 could at least say was how things were being done and  
20 people believed that and everybody knew that they would  
21 matter and they did matter and you needed to know them  
22 and think about them and the agency needed to care about  
23 them because they would be used against the agency in  
24 courts and cases the agency would bring. And, so, there  
25 was a lot of integrity to the process and they became



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1                   Last, and I'll be very quick. In terms of  
2 mergers, I think the thing that really made a massive  
3 difference were the reports showing the mergers that were  
4 actually challenged. And that became part of an  
5 essential piece of understanding about government  
6 enforcement of mergers. You could no longer, as a  
7 responsible person, look only at the merger guidelines.  
8 You had to pull out your nifty little report that told  
9 you what cases actually get challenged. And that greatly  
10 enriched our understanding of what the agencies are  
11 actually doing and then greatly enriched the discussion  
12 about what the agencies ought to do. And, so, that  
13 stands as one of the great, great accomplishments of the  
14 agencies.

15                   MS. McDAVID: And those merger data are  
16 incredibly useful in walking a business person through  
17 the likelihood that their particular merger will or will  
18 not be challenged. Because you say to them, okay, if  
19 your customers are unhappy about this, your chance of  
20 getting challenged goes up dramatically, look at these  
21 data. It's a way of focusing their attention in a way  
22 that almost nothing else we had has.

23                   Let me throw out one other thing that I think  
24 this agency has done extremely well and I would encourage  
25 it to do more of, and that's retrospective. How well



1 I assume there are benefits to all of these  
2 activities, but perhaps each of you could offer up some  
3 rough impressionistic sense of the size or magnitude of  
4 those benefits. Ken?

5 MR. HEYER: Let me start. Because I've been  
6 thinking a lot about retrospectives for a little while  
7 now. I used to be in the camp that thought they were  
8 fantastic and wonderful and it would be great to do more  
9 of them. In fact, I used to joke that every time a new  
10 deputy came into the Antitrust Division, one of the first  
11 things he would say is, you know, I've been thinking,  
12 maybe we should try to do more retrospectives. Every  
13 single one of them would say it as if it was like a brand  
14 new idea.

15 Well, first of all, let's put aside the fact  
16 they're hard to do, and they are hard to do, both in  
17 terms of getting the data and controlling for intervening  
18 events. I've become more worried over time with what one  
19 can actually draw from doing some of them.

20 Let's say you do a few of them extremely well.  
21 Exactly how much is that going to inform future policy?  
22 Is it going to tell you whether in general a four-to-  
23 three merger is a good thing or a bad thing if you found  
24 that in three out of five cases with very fact-specific  
25 circumstances, the agency got it sort of right or sort of

1 wrong with some standard error based on inability to do  
2 the study perfectly anyway? I'm not quite so sure. It  
3 might help people point fingers about whether you got  
4 that one right or wrong, but I'm not certain how well it  
5 informs policy, broad policy going forward. Not that I  
6 have a simple answer for how to inform broad policy going  
7 forward, but I think individual studies can be  
8 overstated.

9 I will say that I do like the idea of studying  
10 certainly more than the Antitrust Division has. And  
11 perhaps for the other agencies, the FTC and the  
12 Europeans, they have done some work trying to look at the  
13 effectiveness of remedies. I think that's extremely  
14 important because it bears greatly on when and whether  
15 one should litigate versus taking effects of some sort.

16 I think that all else equal, it's best not to  
17 be in court because it sort of has the same kind of  
18 flavor as wars, which are inefficient. You might as well  
19 just cut a deal ahead of time. Why engage in all these  
20 costs? But I think it presupposes that when you do cut a  
21 deal, things are going to work well.

22 Remediating something is a little bit different  
23 from analyzing the competitive effects of a merger.  
24 There's a lot of idiosyncratic stuff going on that you  
25 might not -- well, certainly you won't be able to study

1 if you don't have past data on that remedy in that  
2 industry, which it's unlikely you will. You will  
3 probably have better data when you're trying to predict  
4 the effects of a merger. And I think that very often,  
5 very often -- all the time, I might say, the parties who  
6 are asked to remedy something or are ordered to remedy  
7 something, they know a great deal more about their  
8 business and they know a great deal more about what  
9 remedy is going to be good enough and what remedy isn't  
10 going to be good enough.

11 And it's a very difficult situation for a  
12 government agency to be in where the other party knows a  
13 lot better than you do exactly how things are going to  
14 work out in the business world. And, so, I think not  
15 only studying the effects of remedies, the types of  
16 remedies that work, when they do, when they don't, but  
17 perhaps even being a little bit more willing to go in  
18 court to challenge things when the alternative is  
19 something that appears to be a non-surgical remedy,  
20 particularly when there are conduct provisions.

21 MR. HEIMERT: Tom or Steve?

22 MR. KRATTENMAKER: On the R&D? Yeah, I guess I  
23 would pick up a little bit. I don't know if my thoughts,  
24 as you can tell, are focused enough on it, but it seems  
25 to me people have made a lot of sense here. And



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1 not at all say try to avoid court but, in fact, Ken, in  
2 the end, ended up right where I am by saying that for  
3 God's sakes don't accept a stupid conduct remedy and stay  
4 out of court that way. And, so, I think we probably  
5 would agree when it comes down to most of the cases.

6 On the conduct remedy, the things I really find  
7 absurd are when you see a conduct remedy subject to a  
8 five-year or ten-year expiration provision as the ticket  
9 for approving a lifetime merger. I mean, this just does  
10 not make sense, folks. Unless you've got a really  
11 strange situation where you can say that we only got to  
12 worry about the next five or ten years, after that we  
13 know that because the following things, it's going to --  
14 I have just a strong, strong bias against conduct  
15 remedies.

16 In terms of the going back into retrospectives,  
17 I mean, obviously he makes a sensible point. He always  
18 does. Let me play devil's advocate the other way. If  
19 you were going through a phase as a merger agency where  
20 you found yourself saying terrible increase in  
21 concentration but entry is easy and, so, there won't be  
22 any problem and you find yourself saying that in a bunch  
23 of cases, I would sure think you'd want to go back after  
24 a while and say, you know, we have been blessing these  
25 amazing increases in concentration because fancy

1 economists paid a fortune and fancy outside lawyers have  
2 come in and persuaded us that entry was easy and would  
3 take care of any problems. Shouldn't we go back and just  
4 check to see whether we were being sold a bill of goods?  
5 And I would think that an agency ought to want to go  
6 back.

7 And although each of those cases is going to be  
8 fact-specific, if you found that, by golly, entry wasn't  
9 so easy as you'd thought, at least it would make you say,  
10 golly, maybe we need to think about this a little bit  
11 more and maybe sort of the way that we were proceeding  
12 didn't make sense. And, so, I think it is important to  
13 go back from time to time and just do the best you can to  
14 try to get lessons from the decisions you've made.

15 MR. KRATTENMAKER: Steve, how does that help  
16 you in the next case?

17 MR. CALKINS: Well, if you discover that --

18 MR. KRATTENMAKER: If you had a case and you  
19 think entry is easy and you're going to say, I got fooled  
20 last time, you know, fool me once, shame on you, fool me  
21 twice, shame on me.

22 MR. CALKINS: Well, then you try to figure  
23 out --

24 MR. KRATTENMAKER: What if it is a different  
25 lawyer? It's not Jan this time, it's me that came in and

1 told you --

2 MR. HEYER: Then we have a challenge.

3 MR. CALKINS: I agree.

4 MR. KRATTENMAKER: I think you don't want to do  
5 a retrospective on cases. A study of conditions of  
6 entry, that would be fantastic. But why would that be a  
7 retrospective on cases in which we rolled over because we  
8 thought entry was easy? Because the next time we think  
9 entry is easy, we are going to roll over again because we  
10 believe it.

11 MR. CALKINS: Well, maybe you could go back and  
12 -- I mean, obviously, if you can go off and do a really  
13 marvelous wonderful study of entry, that would be great.  
14 But there are limited resources. You need to start  
15 somewhere. And one place to begin are with some cases  
16 where you know what your thinking was, which will then  
17 let you know how things played out.

18 MR. KRATTENMAKER: But wouldn't it be a mistake  
19 to only do those?

20 MR. CALKINS: Oh, I wouldn't say only do those.  
21 Obviously, one hopes there are all sorts of studies going  
22 on. I couldn't agree more.

23 MR. KRATTENMAKER: Okay, I'm sorry to  
24 interrupt.

25 MR. CALKINS: No, no, not at all, that sort of

1 finishes it.

2 MR. HEIMERT: I think we've already answered  
3 this question, which is we've tried to establish the  
4 benefits. Is there a way to allocate, in a principled  
5 fashion, among these? I don't think that is going to be  
6 a very productive discussion. But maybe,  
7 impressionistically, we could each take 10 seconds to  
8 answer does the FTC have the right mix of these  
9 activities now? Should it have more of something or less  
10 of something in your opinion and nothing more?

11 MR. KRATTENMAKER: No, they could do a lot more  
12 because you --

13 MR. HEIMERT: Finite resources, Tom. Assuming  
14 the resources we currently have.

15 MR. KRATTENMAKER: You've got a whole Bureau of  
16 Economics out there that could be doing the studies that  
17 Ken and I have outlined here, and they're not doing them.  
18 It's not their fault. Turn them loose. Ken's got a  
19 bunch of people, too.

20 MR. HEIMERT: I don't think they're going home  
21 at noon, though.

22 MR. KRATTENMAKER: I know that.

23 MR. HEIMERT: They must be working on  
24 something. Jan?

25 MS. McDAVID: Under the Goldilocks standard

1 it's probably just about right.

2 MR. HEIMERT: Steve?

3 MR. CALKINS: I don't know enough.

4 MR. HEYER: I don't know enough, but I'll say  
5 something anyway.

6 **(Laughter.)**

7 MR. HEYER: I haven't looked carefully at the  
8 FTC's allocation of things, but I will say that I've been  
9 impressed with the fact that they've been playing in a  
10 variety of areas. And I think they've been reasonably  
11 aggressive in mergers, for example. I mean, Whole Foods  
12 was a bit of a stretch, which they've just gotten a good  
13 opinion on, and some others were close calls. I think  
14 that you don't want to be in a position where every case  
15 you bring you win. That suggests maybe you're not  
16 bringing enough. And I like the idea of pushing a bit  
17 and being in court more often.

18 I mean, Steve qualified his criticism a little  
19 toward the end of something I had said. I began by  
20 s1 -.( )Tjf 10.000 Wholeos9e0000t000 cm1.00000 0.ion where.

1 probably could do more, as Tom was suggesting. And  
2 maybe, my view, allocating slightly away from  
3 retrospectives and slightly more towards other things  
4 that I think might be a little more helpful. But the  
5 fact they've been -- they filed comments frequently on  
6 matters. Whether one agrees or disagrees, they've been  
7 very bold in certain areas, in intellectual property,  
8 Rambus stuff, the Schering Plough stuff.

9 And, internationally, I mean that's probably a  
10 whole other conference, whether we're spending enough,  
11 too much or whatever we're saying internationally. But  
12 they've been obviously very aggressive there as well.  
13 So, I think that whatever their resources happen to be,  
14 they're allocating them reasonably nicely.

15 MR. HEIMERT: All right. Let's shift the focus  
16 a little bit to even more granular questions about some  
17 of the FTC process questions. One thing we have, it's  
18 not unique but it certainly differs from the Department  
19 of Justice, is our administrative adjudication mechanism.  
20 Two recent developments, the first I think was yesterday,  
21 was the Whole Foods case which at least suggests perhaps  
22 that it should have a more prominent role or can have a  
23 more prominent role when the FTC seeks a preliminary  
24 injunction. At least in my quick review of the opinion -  
25 - obviously, I don't speak for anyone at the FTC -- is



1 little bit complicated. And I know we have a limited  
2 amount of time, so I'll try to truncate my responses  
3 rather than talking even twice as fast as I usually do.

4 Number one, I am not a litigator. Number two,  
5 that doesn't stop me from saying I don't know why we do  
6 any adjudication in this area anyway. If it's not a  
7 criminal case and your antitrust complaint whether you  
8 win or lose depends upon the credibility of a witness, I  
9 don't think you have an antitrust case. So, I don't know  
10 why we do adjudication on these.

11 Partly, this is very personal. I've done  
12 mergers here and at the DOJ and at the Federal  
13 Communications Commission. At the FCC, they're done on a  
14 paper record. And I don't see a difference in the  
15 quality. I see a lot of difference in the ability to  
16 bring hard thinking to it and a quicker and more sensible  
17 resolution to complicated matters that don't turn on the  
18 credibility of whether the red car hit the blue car or  
19 the blue car hit the red car.

20 So, one of the reasons why my thoughts here are  
21 complicated is I don't see the value of it as opposed to  
22 trying to do something that would be an equally  
23 responsible way of trying to get at the right answer for  
24 this particular case.

25 If you are going to have adjudication, I do

1 think the present system is an anachronism. I mean no  
2 personal offense here, but there is no requirement that  
3 the people whom the cases are being tried before have any  
4 antitrust knowledge or any experience in a courtroom. We  
5 have a Commission which is, to the outside world, acting  
6 as judge and jury. I mean, you talk about trying to  
7 explain things to clients. Try to explain to them how,  
8 yes, you have a chance now to go litigate this case  
9 inside this agency that just voted that complaint out  
10 against you. That's a very hard thing to understand.

11 On the other hand, finally, there's a wonderful  
12 advantage here to having this administrative agency. I  
13 mean, the possibility that you have a truly expert group  
14 of Commissioners who could be thinking and focusing on  
15 antitrust law and consumer protection law and how markets  
16 work as another parallel track to just going to  
17 generalist lawyers, which is what federal trial judges  
18

1 wear robes. You don't need to issue formal findings.  
2 We're the ones who are going to do this.

3 I thought it was a wonderful idea to have  
4 Commissioner Rosch try the case for the reasons I'm  
5 suggesting, assuming you could deal with the ex parte  
6 issues that are inevitably going to arise.

7 And why doesn't the Commission say, here's the  
8 complaint. Here's why we think it's bad. Here's what we  
9 think are the contested issues of fact. People are going  
10 to submit papers on this in three weeks. I don't care  
11 about three weeks. Three months. Janet will be in here  
12 with a motion that we need to double that. And our  
13 hearing examiner, our magistrate is to put together a  
14 paper record that we can review. We want it back here in  
15 six weeks.

16 Why don't we try to do some of that? And then  
17 maybe it wouldn't seem quite so anachronistic. Maybe it  
18 would try to keep some of the advantage of a collegial  
19 expert body looking at these issues as opposed to one  
20 individual federal trial judge doing it. And maybe it  
21 would get us away from the idea that the way to resolve a  
22 merger case is to put a couple of -- I'm sorry, there's a  
23 bunch of really good litigators out here, and you all  
24 know I'm not among you -- people in the courtroom who say  
25 I object every 30 seconds to testimony that's going to be



1           then going decide whether or not to do something,  
2           although exactly what, given that the merger closed  
3           almost a year ago, is hard to know. And then there will  
4           be a Part III adjudication which will take God knows how  
5           long, followed by an appeal to the Commission, followed  
6           by the appeal to a federal court. Sometime five years  
7           from now we may have the final resolution of Whole Foods  
8           on a transaction that closed a year ago.

9                         So, how do you do administrative adjudication  
10           in something that has to move quickly? Maybe it's for  
11           closed mergers like Chicago Bridge and Iron. I regard  
12           the Inova thing as an experiment to try to prove to the  
13           courts that the agency can, in fact, move it along  
14           quickly.

15                        It raises issues. It compounds the issues that  
16           Tom talked about with the kangaroo court. You have a  
17           Commissioner presumably who was briefed on the matter  
18           while it was under investigation, who didn't participate  
19           in the decision to bring the complaint, but is now going  
20           to be the judge. And then some other Commissioner is  
21           going to also do the appeal. These are issues that have  
22           to be sorted through. But I think that one of the  
23           principal ones is: How are you going to make these cases  
24           be resolved more quickly than the Rambus case?

25                        MR. HEIMERT: Steve, do you want to share some



1 is -- it's important for this agency to get it right, to  
2 make it work, because it's one of reasons we have a  
3 Federal Trade Commission. And if you're not going to  
4 have them in the business of adjudicating, then you're  
5 really back to wondering in a very serious way whether we  
6 ought to continue on having a group like this.

7 That said, I want to first say that I don't  
8 think it's fair to continuously bash the Commission for  
9 taking forever. I mean, you look at the doctor case that  
10 was just -- the Commission just won down in the Fifth  
11 Circuit on appeal. I mean, the Fifth Circuit Court of  
12 Appeals had that pending before it for just an  
13 unbelievably long time. And, so, you can find all sorts  
14 of federal courts that have taken forever to decide  
15 things. And, so, it's just not fair to say, oh, the  
16 Federal Trade Commission is slow. The federal courts can  
17 be very slow as well. That's point one.

18 Point two, any time you have an operation like  
19 the Federal Trade Commission that does investigating and  
20 then deciding, you're either going to either decide that  
21 you can live with that approach or you're not. And if  
22 you're going to live with it, then there will be a period  
23 of time when the Commissioners are thinking about whether  
24 a case should be brought. And then at the end of the  
25 day, they're supposed to sit back and decide whether or

1 not the valid cause of action was set out. And then the  
2 defendant has the immense advantage, thank the Eleventh  
3 Circuit, of almost choosing any circuit to which to  
4 appeal and complain that it was not treated properly  
5 under the various standards. And, so, there's a mix of  
6 benefits depending upon what you do.

7 In terms of the Tom Rosch thing, I have been  
8 struck with the vigor of the cries of dismay and  
9 disbelief and horror and just sort of the friends of mine  
10 in the private bar saying, my God, what are we talking  
11 about here. And I view it really as the Commission  
12 saying, by golly, we need to make this thing work, and a  
13 sense that what's going on now isn't working and wanting  
14 to try something different. And maybe it is saying, by  
15 golly, we should be a better court and we should be a  
16 better way to decide these things and we need to figure  
17

1 better way to resolve some of these issues. I think  
2 that's a very good thing.

3 And I suppose one last thing I'd mention is  
4 that although the problems with a Tom Rosch doing this  
5 have been talked about a lot, I'd add one other benefit  
6 on the benefits side, which is that one of the  
7 interesting problems at the Federal Trade Commission is  
8 what do you do if you're not the chair and you're a  
9 commissioner? How do you feel good about yourself at the  
10 end of the day that you spent your time well and you've  
11 made a contribution to society? And how do we persuade a  
12 president not to appoint some idiot who's an old family  
13 friend or somebody who's been sitting in the White House  
14 needing someplace to go for their next job or something?

15 And, so, the more that we have important things  
16 for non-chair commissioners to do, the more there's a  
17 benefit, both in attracting good people and persuading  
18 the process to appoint good people and then letting them  
19 do good things that they can feel good about and stay  
20 energized and continue doing a good job. And, so, if  
21 having somebody serve as a trial judge is a way of doing  
22 that, I'd just put that down on the benefit side of the  
23 ledger on what is really a very interesting, challenging  
24 and important problem.

25 MR. HEIMERT: Ken, do you want to opine on Part

1 III?

2 MR. HEYER: Since I don't even know what it is,  
3 I won't opine. But can I take my time to talk about a  
4 different issue while we --

5 MR. HEIMERT: Sure, could I move us on to the  
6 next issue then?

7 MR. HEYER: Put some other things into the mix.

8 MR. HEIMERT: One thing -- and we had a couple  
9 of other specific topics. Ken, I know you wanted to talk  
10 about transparency. If you want to take a cut at  
11 transparency first, then I will flip back to somebody  
12 else.

13 MR. HEYER: I did try to talk about it in kind  
14 of my opening remarks where I talked about the value of  
15 having things out there so that the battle, if you will,  
16 in the court of public opinion, in the court of actual  
17 court opinion can help burnish people's arguments and  
18 lead to better policy.

19 One other thing about transparency before  
20 smuggling in my other point is that I found that when  
21 something is going to be made transparent, it forces the  
22 competition agency to be more careful and to have  
23 stronger support for whatever it is they're doing. If  
24 you're committed to having to explain yourself publicly  
25 in any kind of detail, you're going to do a better job

1 ahead of time. And, so, that's one reason I value  
2 committing to transparency.

3 The one very quick thing I was going to say as  
4 my substitute for commenting on Part III is in deciding  
5 where to allocate resources -- I'm kind of harkening back  
6 to one of the things we're supposed to be focusing on.  
7 One thing that we haven't mentioned yet, but is  
8 important, I think, is this type one, type two error cost  
9 issue. Type one and type two accidentally getting things  
10 wrong by doing something and then one of the other ones  
11 is doing something you shouldn't have done. Anyway,  
12 making mistakes. That's what type one and type two are  
13 about, making mistakes.

14 And I think in deciding where to put your  
15 resources, whether it's bringing a case, whether it's  
16 competition advocacy, I think you want to start with,  
17 number one, realizing you may not be right even though  
18 you think you're probably right. And thinking harder  
19 about the costs if you're wrong. If you're wrong in  
20 bringing something or if you're wrong in not bringing  
21 something. I mean, you can do it with math and expected  
22 value and such, but one example might be, should you  
23 challenge a merger that you think, in a worst case  
24 scenario, might raise prices a couple of cents?

25 If you had reason to believe that with some



1 months, five months, eight months, it's always too long,  
2 the financing, holding the deal together, keeping the  
3 companies viable.

4 But there are also nonmerger investigations and  
5 they drag even longer for a variety of reasons. One is  
6 the parties don't have an incentive to move the  
7 investigation forward quickly, but sometimes they get





1 allocate your resources is well done.

2 We all make these kinds of judgments based on  
3 our background. And I'm not only a federal pensioner.

1                   MR. CALKINS: I got a whole lot of things that  
2 we didn't get to cover. I will go through them real  
3 quickly. One of the things that we might have talked  
4 about that's on one of the lists was remedies and civil  
5 penalties and things like that. On that I've talked  
6 before about the fact that penalties can change the  
7 substantive standards, but maybe that's good, maybe  
8 that's bad. You just have to think it through.

9                   One of the things that I've been intrigued in  
10 the reference to Part III is the question of whether or  
11 not if you could have some kind of a financial penalty at  
12 the end of the day in a Part III case, whether that would  
13 have the effect of having the FTC, especially in consumer  
14 protection, less rarely always rushing into federal court  
15 and might it be a good thing or might it be a bad thing?  
16 I just thought about that as I was sitting here. So, I  
17 toss that out as part of the mix you'd have to think  
18 about if you were to tweak the remedies of the agency.

19                   Next, competition R&D and things like that. We  
20 didn't spend a lot of time on workshops. Of course, all  
21 of us up here think workshops, bringing people like us  
22 in, are a good thing. I am struck with how frequently  
23 people in Europe, I think England, for instance, do  
24 sectoral studies. It's a different emphasis. We do more  
25 workshops. We do some, but it's much more of an emphasis

1           there. And we're not doing it nearly as much.

2                         And the next time we get together, we should  
3 probably talk about whether that would be a good thing,  
4 because it would help to look at a particular area of the  
5 economy, maybe looking at both competition and consumer  
6 protection, maybe doing some good, or maybe it would be a  
7 bad thing because there would be an internal pressure to  
8 announce some fix and define some problem. And, so,  
9 maybe it would be a bad thing. But when we're  
10 functioning differently than they are, we ought to look  
11 at it and think about whether that's good or that's bad.

12                         In terms of metrics, and I do think metrics  
13 matter, I said before we should be trying to figure out  
14 whether the competition advocacy makes a difference going  
15 out to government bodies. I think we also ought to be  
16 going back to all of the reports. I went to the website  
17 and printed out the number of reports the Commission has,  
18 and it just goes on page after page after page after  
19 page. And as part of Bill's retrospective looking back  
20 at the agency, somebody ought to be figuring out whether  
21 these have really made a difference and which ones have  
22 and which ones haven't.

23                         Some of them are easy. The IP report clearly  
24 made a difference because it's been cited in the Supreme  
25 Court. It's been cited in lots of articles. It's been

1 part of an important national dialogue or discussion and  
2 has really made a contribution. Other ones probably less  
3 so. And, so, the agency ought to be trying to think  
4 about that. And I'm not saying you just do a Lexis  
5 search, but you at least do a search on the various  
6 databases and find out how much people have paid  
7 attention to them. Because if nobody is paying attention  
8 to them, they surely are not making a difference. And,  
9 so, you need to be doing that, looking at data.

10 One of the things we didn't specifically talk  
11 about was amicus briefs and amicus appearances. When you  
12 went back to my numbers that I had up there, I only had  
13 government cases. You could have mentioned private cases  
14 where there was an amicus brief, I think Broadcast Music,  
15 which appears 21 times in my little index, one of the top  
16 five most cited cases on that one. And that case I  
17 actually wrote about as part of a foundation press book  
18

For

1 thoughts about your chief competitor?

2 MR. HEYER: Final thoughts. I applaud the  
3 introspection, although, as we have discussed and as  
4 I am pretty sure is going to happen in most other places,  
5 it may be difficult to come up with good metrics for some  
6 of these things, in measuring them and providing  
7 incentives.

8 If you can't come up with good ones, I would  
9 urge the Federal Trade Commission to resist the  
10 temptation to come up with bad ones just to say that they  
11 have some. Because as Steve just pointed out, these  
12 things have incentive effects. And if you create  
13 something just so you can have something to work towards,  
14 that doesn't make any sense if it's not a good thing to  
15 be working towards.

16 Because I applaud introspection, I will defer  
17 comment on whether or not it's an efficient use of tax  
18 dollars to have so many of these hearings in so many  
19 locations around the world.

20 A quick point on international. I think that  
21 it's important to try to have the focus as much, probably  
22 much more, on process issues than on analytical  
23 substance. Now, personally, I enjoy the analytical  
24 substance. And the times I've gone around the world,  
25 probably too many for the taxpayers' own good, I've liked

1 talking about economics and about what I think good  
2 policies are and what the effects of various things are.  
3 My own sense is that it's not quite so easy to persuade  
4 people as I thought it might be. They've got their  
5 priors, they've got their political sensitivities.  
6 Frankly, most of them don't even understand what you're  
7 saying.

8 I think that for the standpoint of business and  
9 antitrust generally, the most important thing is to try  
10 to harmonize the processes. You file one piece of paper  
11 with everybody. You've got similar deadlines.  
12 Information can be shared. I think that is a much better  
13 way of promoting efficiency worldwide than having  
14 lectures about bundled discounts, personally.

15 And then, finally, I would just applaud the  
16 FTC. I think it's undeniable they are one of the best  
17 federal competition agencies.

18 **(Laughter.)**

19 MR. CALKINS: Can I toss in a grumble real  
20 quick?

21 MR. HEIMERT: Steve, go ahead.

22 MR. CALKINS: A quick grumble. You look at the  
23 amicus briefs that the agencies have filed. You can come  
24 away deciding that none of them were bad or that most of  
25 them were good or that all of them were good.



1 time to get back through security if you're not an FTC  
2 employee.

3 (Session 2 concluded.)

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1           The FTC has a very broad set of  
2           responsibilities in consumer protection, from antifraud  
3           to various types of rules, from funerals to  
4           telemarketing, in the consumer credit area, consumer  
5           privacy. There's just a wide range of things we could  
6           do, and so it makes -- it would help the agency a lot to  
7           figure out what are the relative merits of the different  
8           areas and can we, in fact, do our job better by  
9           allocating our resources a little differently than we do  
10          now? And then another question is, are we absolutely  
11          missing something that we ought to be doing? And we'll  
12          talk about that a little bit.

13                 So, we have four panelists here today, each of  
14          whom have some substantial experience at the FTC, some  
15          in the recent past and some in the more distant past.  
16          We'll try to gain from their experience and insights  
17          into the FTC policy choices.

18                 Directly to my left is Jack Calfee. He's a  
19          resident scholar at the American Enterprise Institute,  
20          and he's worked on a range of issues, including  
21          regulatory policies. Most recently, he's done a lot of  
22          work on the manufacture and sale of pharmaceuticals. He  
23          taught at the University of Maryland as a marketing  
24          professor, and his connection to the FTC is that he  
25          worked in the Bureau of Economics in the late 1980s

1 doing advertising and marketing work, tort liability,  
2 and work on tobacco issues.

3 To his left is Bill MacLeod, who's a former  
4 bureau director at the Federal Trade Commission. He's  
5 currently in private practice working on the competition  
6 law and trade regulation. And Bill is one of the few  
7 people in Washington that seems to be equally  
8 comfortable on the competition and consumer protection  
9 sides of the work that the FTC does.

10 To his left is Lee Peeler, who is the president  
11 and CEO of the National Advertising Review Council.  
12 He's responsible for leading the advertising industry's  
13 self-regulatory efforts. And everybody knows him here,  
14 because he was at the FTC for 33 years and left a couple  
15 years ago to take on the BBB's work.

16 Paul Rubin, to his left, is Professor of  
17 Economics and Law at Emory University in Atlanta, and  
18 he's the chief editor of Managerial and Decision  
19 Economics. He has an extensive publication record, and  
20 Paul's connection to consumer protection is that he was  
21 the head of what we now call our Division of Consumer  
22 Protection in the Bureau of Economics for some time, and  
23 then he was also the chief economist at the Consumer  
24 Products Safety Commission.

25 For this panel, we're going to jump right into

1 some questions, although one thing I did want to do was  
2 to mention a little bit about -- since the segment is  
3 about how we might measure things, I wanted to talk a  
4 little bit about what the FTC has done so far to try to  
5 measure things in our Performance and Accountability  
6 Report, and that report does a lot of counting of what  
7 the Federal Trade Commission has done and what BCP has  
8 done and the other organizations that give input into  
9 the consumer protection function.

10 It counts items that we've done over time,  
11 within the last year, to try to get a notion of how well  
12 we're doing at protecting consumers. You can see a  
13 number of the categories up there. There's actually  
14 another page -- another third of the page to the  
15 strategic goal of protecting consumers.

16 And one thing we're going to talk about today  
17 is, in part, whether those are very good measures and  
18 how we might be able to do our evaluation somewhat  
19 better. Obviously, this is the best we've been able to  
20 do so far. Part of what we want to know is by 2014,  
21 when the FTC gets to be 100 years old, what should this  
22 set of things look like? Should we be measuring  
23 different things? Should we be measuring them  
24 differently? And should we be able to determine how to  
25 do our job better than we know today? And this panel's

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1 right now, everyone's kind of doing handsprings when  
2 they think about the Federal Reserve and the Department  
3 of Treasury and the mortgage industry, et cetera, et  
4 cetera, et cetera.

5 And then we talk about the FDA. We move on to  
6 the EPA, et cetera. And no one ever mentions the FTC,  
7 at least not in my presence. It's -- in fact, when I do  
8 mention it, people say, "Hmm," and they think a little  
9 bit. "Oh, yeah, advertising." And they say, "Well,  
10 yeah, they do do antitrust and so on." But on the stuff  
11 we're talking about, people are almost unaware.

12 I mean, that isn't true with the rest of this  
13 panel, because they're deeply involved in the things  
14 that the FTC deals with, but the people I talk to, who  
15 are -- tend to be regulatory economists, it's amazing  
16 how little attention they pay. And I don't think that's  
17 because the agency is doing a lousy job. I think it's  
18 because, on the whole, it may be one of the most  
19 successful regulatory agencies we have.

20 I'm not sure I thought that when I worked here,  
21 but having spent 15 or 20 years looking at other  
22 regulatory agencies, my views of the FTC are really  
23 quite elevated beyond what they once were.

24 And I think that the secret to the FTC's  
25 success is also the reason why it's virtually impossible

1 to measure the costs and benefits of what they do,  
2 because I think the secret to a success is that the FTC,  
3 on consumer protection, that what they relate to is very  
4 narrow. It's marketing, advertising, something to do  
5

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1 costs and benefits of advertising are, generally. For  
2 example, the automobile industry, which is gigantic, I  
3 am unaware of any studies -- at least not recently,  
4 maybe Paul knows of some -- that have actually tried to  
5 assess the impact of advertising on consumer welfare.  
6 And then, you'd have the more difficult task of trying  
7 to figure out what the impact is of the FTC's actions on  
8 whatever costs and benefits are associated with the  
9 advertising.

10 And so, again, what I see is an advertising  
11 market that seems to work quite well. I think the FTC  
12 deserves a lot of credit for that. I think there are a  
13 lot of benefits to what the FTC does, but a lot of those  
14 benefits arise from the things that the FTC forbears  
15 doing, the things it avoids doing. And then when they  
16 do do something, it's a fairly narrow action, and then,  
17 like Paul mentioned, most of the effects have to do with  
18 deterrents or look at Web commerce.

19 And this will be the end of my brief remarks.  
20 I'm sure that the FTC, in the early nineties, late  
21 nineties, on into 2000, there was a huge amount of  
22 discussion over whether or not we needed new rules, new  
23 regulations, a new approach to marketing in order rules, new

1 whole, the agencies said, "No, we think the old rules  
2 actually work in this new environment."

3 Now, sure, there are a lot of people who  
4 thought that we needed a new approach to regulation for  
5 this kind of commerce. I think the FTC did the right  
6 thing in saying, "No, Section 5 will work, unfairness,  
7 deception, et cetera, et cetera," and the benefits of  
8 the system right now really are quite large. I think  
9 the consumer welfare increases from Web commerce are  
10 gigantic, and I think the FTC's regulation is -- you  
11 know, accounts for a substantial portion of those  
12 benefits. But I'm unaware of any way to measure those  
13 benefits.

14 MR. PAUTLER: Lee, would you like --

15 MR. PEELER: So, first off, I just want to say  
16 how great it is to be back here at the FTC. I think  
17 this is my first official appearance at the FTC since I  
18 left. It's just terrific to be back, and I know Bill  
19 Kovacic said, you know, that you're not allowed to, you  
20 know, celebrate the agency at this forum, but I am in a  
21 nonprofit now, so he doesn't have jurisdiction over me,  
22 and I just want to say, you know, I continue to think  
23 this is, you know, the best place with the best people  
24 and the best government agency in town, and I think, you  
25 know, Jack's views are consistent with that, at least.





1                   So, do you want me to say what the three that I  
2 would add are? Are we ready to go there?

3                   MR. PAUTLER: Sounds good to me.

4                   MR. PEELER: Or, Bill, do you want to --

5                   MR. MacLEOD: I want to hear them, Lee.

6                   MR. PEELER: So, there has been a convention in  
7 the Bureau and I think from the Bureau of Economics and  
8 probably from the law itself that says we don't talk  
9 about the number of cases that we bring, because the  
10 number of cases we bring, you know, can mean anything.  
11 But, you know, if you look at the report that we submit  
12 to -- oh, my other disclaimer is during the course of  
13 this conversation, I will inevitably start talking about  
14 "we." I don't work at the FTC anymore. I'm working at  
15 the Better Business Bureau, but it's a hard habit to  
16 break.

17                   The first line of the report to the ABA talks  
18 about how many cases we brought, and I just think, you  
19 know, my experience is year-in and year-out, at the end  
20 of the year, people want to know how many cases you  
21 brought. The other measures we have are great proxies,  
22 how much you're recovering, and if there was a way to  
23 measure development of the law, that would be great,  
24 also, but how many cases seems that it's important.

25                   The second thing is, building on the question







1 yet -- that some people at Carnegie did looking at the  
2 effects of state disclosure laws, the notice to  
3 consumers when their identities are compromised, and it  
4 was a nice paper, because it used the 50 states or the  
5 30-some states that have actually adopted those laws,  
6 adopted them at different times, and the paper was able  
7 to look and see if that had any effect, found it had no  
8 effect. So, that would be something to consider when  
9 you're thinking do we want these sort of notice laws.

10 But a before-and-after study, whenever  
11 possible, and Jack's right, it wouldn't be possible for a  
12 broad effort, but for narrow efforts, for targeted  
13 efforts, it may sometimes be possible to do that, and the  
14 important thing is, then, to get data from before so that  
15 you have something to use after, and, of course, it's the  
16 economists who would get the data from before.

17 MR. PAUTLER: Well, I just wanted to follow up  
18 on that a little bit. Is there any good way to tell  
19 when we should go about gathering that information? I  
20 mean, there's a lot of -- there's a continuous change in  
21 policy at the FTC. Things get tweaked quite often.  
22 It's very seldom that we come in with -- I mean, we do,  
23 on occasion, have a brand new rule that gets put in  
24 place, and it really supplants what was there before,  
25 but normally, the process is a lot smoother than that.

1                   Is this going to be sort of just idiosyncratic,  
2                   that every once in a while we'll be able to figure out  
3                   how to measure one of our impacts, but we're not going  
4                   to be able to do it very often?

5                   MR. RUBIN: It may be. On the other hand,  
6                   presumably if you're changing a policy, there should be  
7                   some reason you have in mind for changing it. So, you  
8                   should know something about what's going on. You know,  
9                   one would like to think that, thaty32

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1 stop unfairness. A police chief would not get any  
2 credit at all for putting ten bank robbers into jail if  
3 100 banks had been robbed in the town in the period that  
4 they made ten arrests. There has to be a focus on  
5 compliance, a focus on the markets that the FTC is  
6 charged to protect. And I think the Commission has done  
7 that many times over the years.

8 I remember, going back into the 1980s, when the  
9 Commission first launched a survey of Truth in Lending  
10 compliance by automobile dealers and then brought cases  
11 against them, but only after they recognized that simply  
12 by surveying and warning, they were able to raise a  
13 level of compliance substantially. The Commission has  
14 done that over and over again, and the cases are then  
15 brought to give the street c0000eo be a focus on

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6 charged to protect. And I think the Commission has done

1           That first item that's on the screen right now,  
2 looking at the complaint database, that's a very  
3 important thing. If something's not appearing as an  
4 important source of complaints, that suggests that maybe  
5 the FTC doesn't have to do as much in that area as it  
6 does in the area where the complaints are high.

7           The last thing that I think I would mention in  
8 response to a point that Lee made is that I don't think  
9 I have ever, since I left the FTC, had a client complain  
10 that the FTC was moving too quickly when it was making  
11 an investigation. We do hear from the interest groups,  
12 and I think it's an important thing to recall, that the  
13 interest groups are not necessarily representing  
14 consumers generally. They're representing a particular  
15 interest. They might want to see something happen or  
16 something happen very quickly.

17           That something may not be consistent with the  
18 mission of the FTC in the first place, and constantly  
19 calibrating what that mission is and recognizing whether  
20 what is being requested of the Commission is consistent  
21 with stopping fraud, stopping deception, or stopping  
22 unfairness, that is a never-ending task, and especially

with stopping unfairness, generally. They're representing consumers.

1                   MR. PAUTLER: Well, one thing I think we'll get  
2 to later is the question of how well we've done using  
3 workshops to get to -- as guidance as part of the FTC's  
4 efforts.

5                   For now, I want to try to keep us focused on  
6 enforcement, and I'm going to ask each of the panel  
7 members to think about what were some of the more  
8 influential cases that were important in the consumer  
9 protection area. And the reason for thinking about that  
10 is to try to get some notion of what are the  
11 implications of the influential cases? Do they -- and  
12 for the cases that were influential, how do we repeat  
13 that? How do we make the cases we choose to bring --  
14 and this may not apply as much to our efforts to just  
15 stamp out frauds, but certainly in most of the other  
16 areas -- the cases we choose to bring, how do we target  
17 those that are going to be influential in the future so  
18 we spend our money on cases that really ought to matter?

19                   And I'll throw that open to the panel. I  
20 assume our attorneys on the panel will have a few things  
21 to say about that.

22                   MR. PEELER: Well, you know, again, going back  
23 to I think what the FTC's real mission is, which is to  
24 develop this market-oriented consumer protection, you  
25 know, I think if you look at the Pfizer case, you know,

1       it's a landmark case. It created a new legal doctrine,  
2       and the important thing about it is it created a new  
3       legal doctrine out of what was then an established  
4       industry self-regulatory approach. Internally, ad  
5       agencies used to review ad claims to see what support  
6       there was for the claims, but it wasn't a legal  
7       doctrine, and, you know, the development of that into a  
8       legal doctrine has basically changed the way advertising  
9       and consumer protection has been delivered --  
10      advertising regulation and consumer protection  
11      regulation has been delivered, you know, in modern  
12      times.

13                   And, again, because of what is -- because it  
14      was a legal doctrine that harnessed the forces of the  
15      marketplace, it's really much more like a natural sand  
16      dune than a sea wall. You know, it's something that's  
17      going to be long-standing effect. So, that's my top  
18      candidate.

19                   On the enforcement side, the first sets of 13-B  
20      cases -- I think it was Virginia Holmes was the first  
21      one, right, Alan? -- and the International Diamond case,  
22      I mean, that really changed the way the FTC thought  
23      about enforcement. So, that would be my next one.

24                   But almost any FTC litigation addressing new  
25      issues helps provide guidance. So, there was a case

1 that Joel and I were involved in with an endorser called  
2 Steve Garvey that we pursued up to the Court of Appeals,  
3 and we didn't get quite the decision that we wanted.  
4 That case is relied on by legal counsel in major  
5 corporations all over the country to try to give them  
6 some guidance about how to apply the FTC's endorsement  
7 guides. So, cases and decisions that provide guidance  
8 are all important.

9 MR. PAUTLER: Yeah. Go ahead, Jack.

10 MR. CALFEE: Can I add just one little thing to  
11 that? Which is there was a time when the FTC used to  
12 bring a lot of cases against advertisers when they would  
13 claim that they were selling a product on sale, 20  
14 percent off, 50 percent off, something like that, and  
15 they brought a lot of those cases in the forties,  
16 fifties -- all the way back to the twenties, thirties,  
17 forties, fifties, sixties.

18 And then at some point -- I've forgotten  
19 exactly how it happened -- the Commission saw the light  
20 and concluded that they had been so unnoticed that they  
21 were mainly suing the sellers that had the lower prices,  
22 and the beneficiaries were the sellers who had the higher  
23 prices, and so they made a conscious decision to stop  
24 bringing those cases. And you could argue that there  
25 was a very substantial benefit, but the benefit came

1 from making it clear that they were not going to bring  
2 those cases anymore. So, it was literally the end of  
3 bringing certain kinds of cases that had a big impact on  
4 the market.

5 MR. PEELER: And that's a great example. That  
6 decision was made actually in the Pertschuk  
7 Administration, and it was made as a result of a law  
8 review article that Robert Pitofsky published called  
9 "Beyond Nader: Advertising Regulation and Consumer  
10 Protection," which it was very unusual for the agency --  
11 I think Pitofsky had left the agency, but it was very  
12 unusual for someone who left the agency to sit down and  
13 sort of objectively comment on the pros and cons of  
14 different enforcement strategies.

15 So, you know, this law review article advocated  
16 very strongly that resale price maintenance cases had  
17 been used to attack discounters and that it was a bad  
18 use of taxpayer resources, and everybody in the  
19 Commission basically stood up and saluted.

20 What the Commission hasn't done is the second  
21 piece that you're talking about. The Commission hasn't  
22 been as transparent about that as they could have been.  
23 The guides are still in place -- and they're good  
24 guides -- but they're still in place and they're still  
25 followed by state and local consumer protection

1 agencies, and from time to time, the self-regulatory  
2 group has cases involving those issues.

3 MR. RUBIN: And also, if you -- I once searched  
4 those on the Web, and several trade associations very  
5 prominently feature those guides as, you know, attempts  
6 to keep their members by I assume cutting prices. So,  
7 they do still have that --

8 MR. CALFEE: And they will until BCP mounts an  
9 intervention against those particular organizations.

10 MR. PAUTLER: Well, I suppose that might be one  
11 candidate for our rolling review of guides and rules  
12 which we've been doing for a number of years, but maybe  
13 that's a candidate to bring up for the next -- the next  
14 set of reviews.

15 MR. MacLEOD: Well, Paul, let me weigh in with  
16 one that may be the grand daddy of them all, and that's,  
17 of course, the S&H case, where the Commission was told  
18 by the Supreme Court that unfairness meant what the  
19 Commission decided what unfairness would mean according  
20 to the various norms and laws of society. That almost  
21 got the Commission shut down in the 1970s when they  
22 started bringing their rulemaking.

23 But more importantly, it set out unfairness as  
24 a  
25 very vibrant part of the FTC, and that was part of the

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1           came out of the Commission, a combination competition  
2           and consumer protection case, at least judging by the  
3           pleadings.

4                       MR. PAUTLER: Does anyone else have any other  
5           candidates for great cases?

6                       MR. RUBIN: I would have said Pfizer, also,  
7           so...

8                       MR. PAUTLER: Okay. But one question, the  
9           follow-up question to that was, is there a way to  
10          tell -- a way to recreate the important cases? I mean,  
11          if we're trying to measure what we do well and we're  
12          trying to do what we do better, if there are  
13          particularly important cases, we'd like to be able to  
14          figure out, ex ante, what those might be and pursue  
15          those.

16                      Is it true -- is there any way to do that, or  
17          do all of these sort of fall out of a time trend that  
18          just makes them all sort of individually important but  
19          not replicable?

20                      MR. RUBIN: I think you can follow it with a  
21          specific litigation strategy of looking for something  
22          you'd like to change, finding a defendant who doesn't  
23          have much interest in that issue, and, you know, and  
24          bring the case. I mean, that's what people do. And the  
25          agency, of course, is in a good position to do that,

1 because you see all the possible cases in the world.  
2 You're not like a litigator or the Court who has to wait  
3 for something to come before it. So, I'm not sure I  
4 would recommend that. I mean, it would have to be --  
5 because I'm not sure I would agree with what might come  
6 out of it, but it is quite possible for something like  
7 the FTC to establish an explicit litigation strategy.  
8 "This is the result we want to see. We're going to find  
9 people and bring those cases." I imagine that was done  
10 with Pfizer.

11 MR. PAUTLER: I guess my question presupposed  
12 that the influential cases were considered to be good  
13 cases, but -- but that's definitely true.

14 MR. PEELER: And that goes to the difficulty of  
15 measuring the benefits of the enforcement program I  
16 think pretty dramatically, but in the data and security  
17 area, for example, where the FTC knew that data security  
18 was an issue, there was a very conscious decision to  
19 look and see how the FTC Act would apply to data  
20 security, and there were a series of decisions that  
21 followed each other that developed legal principles.

22 And, you know, going back to where I started,  
23 which is what's the role of the agency, that the  
24 importance of that development was it established the  
25 FTC as the leader in developing data security cases in

1 nonregulated industries, and -- you know, and the  
2 alternative to that is that somebody else is going to  
3 step in and do it, and they are not going to do as good  
4 a job.

5 But it's hard to measure the benefits -- the  
6 direct benefits that you get from that, but it's clearly  
7 a very important benefit of the way the FTC does  
8 business.

9 MR. MacLEOD: Lee, that's exactly an area where  
10 the Commission can and has measured a lot of benefits.  
11 I think, Paul, to me the answer to your question is not  
12 looking at what kind of case the Commission needs to  
13 bring, but looking at what area the Commission needs to  
14 police. I wasn't inside the Commission at the time, but  
15 I probably am not being terribly prescient in saying you  
16 could tell the Commission was going to go further than  
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1       there's mergers and there's vertical restraints," and  
2       then there's a few other things. On the consumer  
3       protection side, the set of areas for enforcement is  
4       pretty broad: spam, telemarketing, business  
5       opportunities, lots of financial fraud, a number of  
6       credit areas have become important now, privacy and data  
7       security obviously has become very important. There's a  
8       wide range of enforcement targets.

9                   And one thing the FTC would like to know I  
10       think in general is how should we allocate our resources  
11       across those various types of targets? Is there any way  
12       to really get at that that's systematic or what's the  
13       best way to think about the problem if there's no real  
14       systematic, database approach to getting at the  
15       question?

16                   Paul?

17                   MR. RUBIN: Well, I think my own belief is that  
18       the agency should focus those resources on fraud cases,  
19       on real fraud cases, rather than on deception or other  
20       kinds of cases. Fraud cases, there's no fear of  
21       overdeterrence. If somebody's engaged in fraud and  
22       you've stopped them, you've done a good thing.

23                   With advertising, for example, with deception,  
24       usually a message that's deceptive to some is beneficial  
25       to others. There's, you know, the cases we used to

1 bring, let's say the false uniqueness cases. There's  
2 lots of those cases where there's some harm to bringing  
3 the case. The legitimate firm is doing maybe something  
4 on the margin, but there's much more chance of harming  
5 commerce by attacking a legitimate firm, where if you're  
6 attacking a fraudster, there is no chance, because there  
7 is no possibility of overdeterrence.

8 And I want to come back to the privacy issue,  
9 where I think, you know, people have been congratulating  
10 the FTC, and I think they've got it all wrong, actually,  
11 to take an extreme statement. I think the whole focus  
12 on data security turns out not to be a very useful  
13 focus. Right now, according to Symantec -- not you,  
14 because you don't know where -- but crooks can buy  
15 online for 40 cents anybody's credit card number,  
16 information to use a credit card. Forty cents. That's  
17 essentially the transaction's cost of the transaction.  
18 I mean, essentially, it says that credit card numbers,  
19 at least, are free.

20 What determines how much fraud there is? Well,  
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1 engage in that fraud, maybe lobby the states to increase  
2 the criminal penalties for explicit fraud, and I think  
3 that would be a much more effective policy than -- and,  
4 again, there's real costs to targeting firms. I mean,  
5 the firms have costs of data security.

6 I tried to buy something online the other day  
7 -- I do it a lot -- but this particular time, there was  
8 some question of my PIN number, and it took me a half  
9 hour to answer questions about who lived with me in 1950  
10 or something of this sort to get through. All of these  
11 things are expensive. They make doing business more  
12 expensive.

13 And part of it is because of fears of security.  
14 Some of them are real, and some of them are the approach  
15 to stopping fraud once the credit card is out there, but  
16 I think we've gone probably too far. And I think the  
17 agency, by emphasizing -- warning people all the time  
18 about the dangers of fraud, may be making people more  
19 scared than they need to be.

20 Even if your card is -- even if the information  
21 is released, the best estimate is it's only 2 percent  
22 chance that you'll be the victim of anything, and the  
23 expected cost is not tremendously high. So, I'm not  
24 sure that we've done -- that you've done -- I'll say  
25 "you" now -- done consumers a service by putting out all

1 this information about, you know, the dangers of fraud  
2 and by forcing firms to perhaps be more careful than is  
3 optimal for these things. As I say, credit card numbers  
4 seem to be free. It's the use of them that's expensive.

5 So, it sounds like we have another measure,  
6 Paul, if credit card numbers go up to 60-80 cents  
7 apiece...

8 MR. PEELER: Although if you're really  
9 successful, they might go down, because you would reduce  
10 demand for them by putting the people who want them in  
11 jail, so that's hard to know.

12 MR. PAUTLER: Now, how did you get those  
13 numbers?

14 MR. RUBIN: It's a study of Symantec. Symantec  
15 actually, apparently, has studied some of the Web sites  
16 where the criminals -- criminals sell the -- only last a  
17 few days. I don't know how the criminals find them, but  
18 apparently there are semi-organized criminal exchanges  
19 where there are transactions in these things, and they  
20 have a report that's available on the Web where they  
21 quote those numbers.

22 MR. PEELER: Well, there's a lot there.

23 MR. PAUTLER: Yes. Does anyone else have  
24 thoughts on how we should allocate our resources or --

25 MR. PEELER: Sure.

1 MR. PAUTLER: Yes.

2 MR. PEELER: You know, first off, I think  
3 Paul's right. I think fraud's important, and I think,  
4 you know, one of the great success stories of the FTC, as  
5 you heard yesterday, is developing a fraud program, a  
6 strong fraud program, and it's particularly impressive  
7 to me, because when I started at the FTC, the -- it was  
8 black letter, you know, operating procedure, "The FTC  
9 doesn't do fraud." So, you know, the fact that the  
10 agency was able to get beyond that stereotype and move  
11

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1       doing some work on privacy with Tom Leonard from the  
2       Technology Policy Institute, and I promised him I'd give  
3       his new organization a plug.

4                    But when the tape falls off the truck and  
5       there's a story in the paper, you know, "This tape's  
6       fallen off the truck, 8 million names are exposed," and  
7       someone from the FTC says, "Yeah, that's a dangerous

8

1 That could be something they could do, and you don't see  
2 them doing it. You see them more -- you know, the  
3 institutional approach seems to be on the other side.

4 MR. PEELER: Actually, I think the ID theft  
5 reports that the FTC puts out do do that. You know,  
6 whether the press picks it up and writes it that way is  
7 a different issue, but I -- you know, and I hope we get  
8 to that. I mean, I think that the surveys the FTC does  
9 on ID theft and things like that are really extremely  
10 valuable.

11 MR. MacLEOD: Paul, I don't think you are going  
12 to get from this panel a general prescription, unless  
13 it's maybe disagreeing with Paul's observations, but --  
14 and one of the reasons why you're not going to get a  
15 general prescription is, how do we know? I think it has  
16 to come back to what's going on in the marketplace, what  
17 is the mission, and in the end, it has to be an internal  
18 deliberation.

19 My guess is that it. Yf00 0.1Tunf00000cption is, how do



1 number of sources, and that's some of the things that  
2 we've been talking about here.

3 MR. PEELER: But I think another, you know, big  
4 success, and it's reflected in the GPRA measures is the  
5 FTC's gotten much more sophisticated about the data  
6 collection, you know, the consumer complaint data that  
7 they get, the ID theft data, and backed up by the market  
8 surveys is a much better, much more systematic way of  
9 doing it than when I started.

10 When I -- my first day at the FTC, I asked the  
11 associate director I was working for where he got his  
12 cases, and he said, "Well, I saw one on a television  
13 show the other night," you know, and that's just not a  
14 good way to open cases.

15 MR. PAUTLER: But I bet it still works for us  
16 every once in a while.

17 MR. CALFEE: In principle, if you have one  
18 market segment in which there is actually frequent,  
19 wholesale deception, usually there's some way in which  
20 the purveyors in that segment compete to some extent  
21 with other segments nearby that don't have that kind of  
22 deception, in which case I would think the Commission  
23 would hear from the competitors who are losing out to  
24 the highly deceptive characters.

25 I'm sure you hear from competitors who are



1 plan each year, and there are lots of sources of data  
2 that go into that plan, but a big piece of the input in  
3 the Bureau of Consumer Protection is from the staff, who  
4 is working in the area and has access to all these  
5 different sources of information, and, you know, from  
6 that, you develop a plan that allows you to establish  
7 priorities for the year. And, you know, that might be  
8 changed the next year, but you need a plan each year,  
9 where you're going to spend your resources.

10 MR. RUBIN: Just a caveat on what Jack said,  
11 there is a risk, of course, that the competitors are  
12 complaining or the --

13 MR. CALFEE: They'll complain about competition  
14 as well.

15 MR. RUBIN: -- on competition rather than  
16 deception, so...

17 MR. PAUTLER: I'd like to move a little bit  
18 from the enforcement area into the other areas of  
19 consumer protection activity, and we touched on some of  
20 this already. There's several different avenues that we  
21 can use to try to have some impact on consumer  
22 protection. Research and workshops, self-regulatory  
23 efforts and rulemakings, consumer education, guidelines,  
24 and consumer protection advocacy work are all different  
25 avenues that the Commission uses. And I guess we'll go

1 over a few of these.

2 Lee had mentioned workshops before, so I  
3 suppose that we could begin with thinking about how  
4 workshops and what you might call -- well, I guess you  
5 could think about those, in part, as policy R&D efforts,  
6 but they've been a -- an innovation -- I guess they have  
7 been an innovation since 1995, probably, about that  
8 period, and I was wondering whether the panel had any  
9 thoughts on how workshops have aided us in our consumer  
10 protection efforts and whether we can do those better  
11 than we have been in the recent past.

12 MR. PEELER: In terms of whether they've aided  
13 in consumer protection, you know, the answer is just  
14 clearly yes, because they're a mechanism -- they're one  
15 mechanism of getting the information you need to  
16 establish priorities and also getting the information  
17 you need to figure out, you know, what will work. So --  
18 and they have immense value, both within the FTC in  
19 terms of establishing enforcement priorities, and also,  
20 making the FTC an informed commentator on legislative  
21 proposals.

22 I mean, and the best example of that is the  
23 Spam Legislation, where the FTC was really a leader in  
24 developing information about spam and spam fraud and was  
25 a major participant in fashioning a workable spam law.

1 So, you know, they're great.

2 MR. PAUTLER: Anyone else have any thoughts on  
3 workshops as a policy approach?

4 MR. MacLEOD: Well, Paul, I agree completely  
5 with Lee, and, as a matter of fact, you probably can  
6 identify some of the workshops that the Bureau has done  
7 over the last ten years as among the most influential  
8 things that have come out of the agency, including the  
9 biggest cases. A perfect example would be the workshop  
10 or the workshops now that the Commission has undertaken  
11 with respect to food advertising and childhood obesity.  
12 That is probably done more to influence advertising and  
13 the -- both the nature of advertising and the conscience  
14 of the advertisers, not only in the United States but  
15 around the world. No single case ever could have done  
16 with the Commission accomplished there.

17 And you can go from area to area to area where  
18 the Commission has held workshops, maybe not ever  
19 resulting in a case, but sometimes prestaging  
20 enforcement that comes later, and that has clearly made  
21 the Commission much more intelligent, but I think  
22 equally important, it has given a warning to the  
23 industry that this is an area in which the Commission is  
24 now extremely interested and one where compliance is  
25 likely to be at a premium.

1                   MR. PAUTLER: And I know the other day I went  
2 through the workshops and counted up how many of them  
3 were Internet-related, and I think it was over 25 over  
4 the course of the last 13 years, and that's one of the  
5 areas in which I think BCP has done a pretty good job of  
6 trying to keep ahead of the curve. I actually have to  
7 ask them how they managed to come up with the ideas for  
8 the workshops, but --

9                   MR. PEELER: And I think the point that Bill  
10 just made about the food marketing workshops is really  
11 establishing not just national but international  
12 leadership for the Commission in those ideas is a great  
13 example. The other one is a green marketing, and, you  
14 know, right now, that's the biggest issue among  
15 companies who are engaged in advertising of consumer  
16 products, and they really -- you know, the fact that the  
17 FTC was out in front and doing the workshops has really  
18 put the FTC in a leadership role, and people are really  
19 looking to the FTC rather than other entities to  
20 establish policy there.

21                   MR. PAUTLER: I'd like to move from workshops  
22 to the research efforts on the consumer protection  
23 mission and ask the panelists whether they have  
24 particular -- whether there are -- there's research work  
25 that we could do or should do or whether there's been

1 research work in the past in consumer protection that's  
2 been particularly influential that we should try to mimic  
3 in the future to get an idea of where we ought to go in  
4 the next few years.

5 Does anyone have sort of candidates for useful  
6 research or a research agenda?

7 Paul?

8 MR. RUBIN: In the past, of course, from my  
9 era, Pauline and Alan's -- Pauline Ippolito and Alan  
10 Mathios' research on food advertising and fiber was  
11 very important. Jack's research -- Jack Calfee's  
12 research on cigarettes was of great interest. Not to  
13 toot my own horn, I had a little paper with Allison  
14 Mason, Allison Keith on direct-to-consumer advertising  
15 that was cited.

16 MR. CALFEE: Of prescription drugs.

17 MR. RUBIN: Prescription drugs,  
18 direct-to-consumer prescription drugs. I'm sorry. So,  
19 those have been influential. I like to think mine has  
20 been, too.

21 One thing they had in common was they all dealt  
22 with the effects of other agencies, two or three, maybe  
23 all, one with the FTC, two the FDA. The FDA was not  
24 allowing DTC advertising of drugs. They were not  
25 allowing advertising of the health benefits of fiber.

1 And so in that sense the advertising -- the research was  
2 important, and it was important not for markets  
3 directly, but for behavior of other agencies. So, I  
4 think that's something that you may want to think about.  
5 What other policies are out there that other people are  
6 doing that may be harmful that you can get a research  
7 handle on?

8 At the state level, people mentioned the  
9 Pricing Guide to Advertising, you know, you could do  
10 research on the effects of that. I have a paper coming  
11 out looking at state requiring -- some states require  
12 item pricing laws on -- in stores, that turns out to be  
13 very expensive. You know, the research came from me and  
14 some colleagues, but I think it's the kind of thing the  
15 -- the FTC has done some work in that area, but I think  
16 it would have had -- even though I write my own research,  
17 I think it might have had more impact had it come out of  
18 something like the FTC or had the imprint of the FTC.

19 But looking at ways in which other governmental  
20 entities interfere with the market process one of the  
21 more important things that the research endeavor could  
22 do.

23 MR. MacLEOD: You know, that seems to raise an  
24 interesting, more general principle, because most of the  
25 research people talk about that's really influential,

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1        here are the prices of attorneys' services in states  
2        that prohibit advertising of pricing, and here are the  
3        prices of attorneys' services in states that allow the  
4

1                   MR. RUBIN: It's always the hardest question,  
2 where to get your research ideas. I think, frankly, a  
3 mix is the way to go. I mean, some questions, like  
4 Keith's work on privacy, the Commission's concerned  
5 about some topics, and so it's important that someone do  
6 that research on those topics.

7                   In other cases, a staff person may see a case,  
8 see an interesting issue that arises in a case, and that  
9 may lead them to think about it and come up with a

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1 figure out how reliable their information is.

2 But what are some of the areas that are  
3 incredibly important right now in the economy? Well,  
4 healthcare is one. Everybody is -- or perhaps not  
5 everybody, but it seems like most of the commentators  
6 are saying there is something not working right in the  
7 market for healthcare. There are proposals to transform  
8 this market dramatically. Those proposals will have  
9 competition implications, but they will also have  
10 consumer protection implications. There's a perfect  
11 example.

12 My recollection -- and Lee probably knows this  
13 better than I do -- is that it was, in fact, a study of  
14 the insurance industry that the Commission was  
15 undertaking back in the early seventies that got the  
16 Commission dealt an exclusion from studying the business  
17 of insurance. The --

18 MR. PEELER: From thinking about insurance.

19 MR. MacLEOD: And so there is an area, as an  
20 example, where for a long, long time the Commission has  
21 not been able to devote either enforcement or research  
22 and development resources, and I think you can identify  
23 that as a market that gets more commentary for not  
24 working as well as the markets where the Commission is  
25 exercising its jurisdiction.



1 protection side when you ignore competition principles.  
2 That's one of the things we do in the competition  
3 advocacy and the consumer protection advocacy that we  
4 talked about earlier.

5 MR. PAUTLER: Switching gears one more time to  
6 try to get at issues of the effectiveness of our  
7 research agenda -- and we may have covered some of this  
8 already implicitly -- but we know what some of the  
9 greatest hits of the consumer protection area research  
10 has been from some of the discussion before. If we were  
11 trying to figure out where the next new areas are, one  
12 whole set of research that's been burgeoning in economics  
13 that has consumer protection implications is behavioral  
14 economics. Obviously, that now manages to -- if you look  
15 at the American Economic Review, there will be 30 papers  
16 in there each issue, and now three or four of them in  
17 each issue will be about behavioral economics of one type  
18 or another.

19 And I was wondering whether anyone has views on  
20 the applicability of that, whether it's really new for  
21 the FTC, and whether it's one of those areas that we  
22 ought to be thinking about even more heavily than we are  
23 now.

24 MR. PEELER: Let me start on that. I think the  
25 FTC was sort of the leader in behavioral economics. The

1 way the FTC has always approached advertising has been,  
2 you know, sort of basic behavioral economics. When we're  
3 trying to figure out what an ad communicates to  
4 consumers, we go out and test -- see what consumers get,  
5 trying to figure out whether the particular disclosure  
6 works. You go out and test to see whether -- you know,  
7 whether it communicates to consumers. So, if you think  
8 about behavioral economics in the sense of, you know,  
9 consumers bring different things to the mix, and you  
10 need to know how different remedies or different  
11 campaigns affect those consumers, you know, we've been  
12 doing that since -- you know, again, the 19 -- late  
13 1970s and the early 1980s.

14 And I think this is an area where you go back  
15 to the basic questions that you're asking, which is how  
16 you allocate your resources, but it's an area where, you  
17 know, the Bureau of Economics probably could have taken  
18 more of a leadership role if it had more resources, to be  
19 more engaged in the debate, because, you know, the  
20 debate's gotten out a little bit in front of the agency,  
21 particularly at the international level.

22 So, at the international level especially, it's  
23 an example of how -- of why the consumer protection  
24 mission needs to have a strong profile and be engaged  
25 internationally. And just for people in the audience,

1 behavioral economics basically internationally is being  
2 used to argue that consumers make a lot of irrational  
3 choices or dumb choices, and so in certain instances,  
4 the Government should be making the choices for  
5 consumers rather than having consumers make them  
6 themselves. And that's a much different approach to  
7 thinking about consumer protection than we have  
8 traditionally followed. That doesn't mean there's not  
9 some truth to the fact that consumers make irrational  
10 choices. It's a question of how you address that in  
11 consumer protection policy, and that's an important  
12 question.

13 MR. CALFEE: You know, I would recommend very  
14 highly the article that Howard Beales, the former BCP  
15 director, recently published in Competition -- I think  
16 the journal is Competition Policy International, which  
17 is an international journal. It's one of the new free  
18

1 markets. When you do get into actual markets, it's  
2 still hard to translate what you find in general to one  
3 of the most important questions, which is what is the  
4 impact of a particular rule? What would be the impact  
5 of a particular rule?

6 And even on very basic things, like opt-in  
7 versus opt-out for things like savings plans, anchoring  
8 phenomenon, so forth and so on, what he pointed out with  
9 some nice examples is that often, when you try to use  
10 those findings to implement a policy, and when you look  
11 at what happens with the policy, often you end up with  
12 something that isn't nearly as good as you would have  
13 thought it would be, such as a cooling off rule, which  
14 you can think of as being an implementation of  
15 behavioral economics back before anyone talked about  
16 behavioral economics, and what he pointed out is that if  
17 consumers know they have a cooling-off period, they're  
18 going to make different decisions than they otherwise  
19 would, and they actually might not be as well off,  
20 because the sellers can actually exploit a cooling-off  
21 period to induce people to buy things they might  
22 otherwise not buy, et cetera.

23 I'm not sure there's any good data on how it  
24 comes out, but I do think that it is not clear that a  
25 cooling-off rule unambiguously improves consumer

1 decisions. I mean, at least not as a general rule. And  
2 so I think that there's a case to be -- that where we  
3 stand right now is we have some very interesting results  
4 in behavioral economics. It's not at all clear that  
5 they have a lot of implications for FTC policy. I think  
6 the FTC is to be applauded for the care with which it  
7 has looked at these results and the diffidence with  
8 which it has tried to implement them.

9           And I do think that they have one very  
10 interesting natural experiment, and that is the advent  
11 of Internet or Web commerce. I would think that the way  
12 the purchasing environment -- the marketing environment  
13 works through the Internet is so different from the  
14 traditional ways that this would have been a good  
15 situation in which we could have seen some of the  
16 adverse effects of the various consumer mental shortcuts  
17 and deficiencies that have been revealed by behavioral  
18 economics. We should have been able to see how those  
19 things worked through to the detriment of consumers in  
20 this very new situation, because it is so different from  
21 what happened before.

22

1 effects, and so again, I would applaud the FTC for  
2 looking at this, but being very careful about  
3 implementing these results, and they might pay a lot of  
4 attention to these ongoing natural experiments to see  
5 whether what has been feared in behavioral economics  
6 actually tends to occur.

7 MR. PAUTLER: Paul?

8 MR. RUBIN: Yeah, I think there's a real  
9 danger -- I know when I was at the FTC, it was a few  
10 years after Akerlof's lemons markets papers, and  
11 whenever an attorney in BCP wanted to bring a case, lo

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1 mistakes." There is some disagreement even in the  
2 experimental literature. Some psychologists say that  
3 you can get different results -- for example -- here's  
4 an example. If you ask people about probabilities and  
5 to make a decision based on probabilities, they usually  
6 get it wrong. If you ask them the same question based  
7 on relative frequencies, they do much, much better.  
8 Human -- natural humans think in terms of relative  
9 frequencies; they don't think in terms of numbers  
10 measuring probability. And so if you think -- if you  
11 look at the way people actually behave, it may turn out  
12 that the experimental results don't always go through.

13 What I think the FTC can do -- and I am not an  
14 experimental economist -- but I think that they can get  
15 involved perhaps in funding some outside research. I  
16 remember there was one paper that Charlie Plott and  
17 several others did. I don't remember the subject of it,  
18 but I know that it was -- I've cited it, but it's been a  
19 few years since I looked at it.

20 But the FTC has from time to time funded some  
21 research, and I think it might be a useful thing to do,  
22 either -- you know, it's probably hard for people to do  
23 here -- maybe it's not -- but to do some experimental  
24 research looking more at actual market behavior  
25 rather -- because what you have -- what you have in

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1 manages to have implications both for consumer  
2 protection and for our competition missions.

3 I wanted to get some idea from the panelists  
4 about whether they think we're doing enough in the area  
5 of self-regulation or too little. Are we fostering

0.00000 problem, not from supervising, or from fostering competition in the industry. I just don't know.

20

1 in the D.C. circuit, and that is the reversal of the  
2 District Court opinion in the Whole Foods case. It sets  
3 a very clear standard for what the competition attorneys  
4 must prove to get a preliminary injunction in a merger,  
5 and at the same time, Lydia and Mary Engle announced the  
6 FTC's report that dealt with, in large part, what  
7 companies are doing voluntarily and what systems are  
8 doing voluntarily to advertise food to children. Look  
9 at the report. On the business page of The Washington  
10 Post, the very lead story is, "Children Targets at 1.6  
11 Billion in Food Ads." The most important case the  
12 Bureau of Competition had this year gets two paragraphs  
13 in the digest, "Whole Foods Ruling Reversed."

14 Self-regulation is big business, and getting  
15 compliance with what the FTC does is big business,  
16 whether it's a case or not, and it can be much bigger  
17 business sometimes when it is not a case. But I think  
18 that this is a very good example of the Commission  
19 encouraging self-regulation and the self-regulation  
20 working.

21 Is there a competition concern there? Of  
22 course, there is. The last thing that we want to see is  
23 self-regulation leading to the elimination of  
24 advertising. We've talked a lot about that today.  
25 That's what the Commission, since the Bob Pitofsky

1 Bureau days, has tried to protect, and that's what this  
2 Commission has tried to protect as well, notwithstanding  
3 many activist groups who purport to speak to consumers  
4 who are saying, "Advertising is a bad thing that kids  
5 should not see." The Commission went down that path 30  
6 years ago. They're not likely to do it again, but it is  
7 still a debate that is never going to go away.

8 At the same time, there are going to be cases  
9 right on the margin. The Bureau of Competition brings  
10 them. The Bureau of Competition brought one a few years  
11 ago that didn't come out so well, and that was the  
12 California Dentists case, and I think one of the reasons  
13 why it didn't come out so well is the Bureau of  
14 Competition didn't handle the consumer protection issues  
15 as well as it could.

16 The defense, in most restraint-of-trade cases  
17 involving advertising, is almost inevitably consumer  
18 protection, from the classic Supreme Court case,  
19 National Society of Professional Engineers, who had  
20 rules against competitive bidding. Why did they have  
21 those rules? They did not want cheap bridges to be  
22 built that would then fall down. The Supreme Court said  
23 that that is not an adequate explanation for suppressing  
24 competition in bidding. We are not going to buy that.  
25 The California Dentists had rules that the FTC alleged

1        were inhibiting competition among dentists. The  
2        California Dental Association said that those rules were  
3        protecting consumers. The Commission lost. California  
4        Dentists won, and the reason why was because there was  
5        not an adequate explanation -- or let's put it this way:  
6        From the Commission's standpoint, the Commission failed  
7        to persuade the Court that the consumer protection  
8        rationale of the California Dental Association was a  
9        bogus rationale.

10                                So, there is always going to be the threat that

1           And, you know, the Commission, I think, has  
2 done a really good job -- I mean, you know, for a long  
3 time, but particularly after Jodie Bernstein was here, in  
4 trying to take self-regulatory programs and use those in  
5 ways that move consumer protection forward but don't tie  
6 up a lot of FTC resources, and particularly in areas  
7 where the Government -- where government probably  
8 wouldn't do a very good job of consumer protection  
9 because of the mechanisms that the Government has to  
10 use.

11           So, I think that's a huge advantage.  
12 I think the other advantage, though, and I'm -- and when  
13 we look at this chart, you know, we've skipped over a  
14 third of the chart, which is about the Commission's  
15 consumer education program. These organizations can also  
16 be important multipliers for the FTC's consumer education  
17 program, and, you know, when you look at the numbers that  
18 the FTC is cranking out in consumer education right now,  
19 I mean, you know, they were unimaginable when I was --  
20 started at the FTC, you know, that we would get -- that  
21 we would have 47 million messages out to consumers is  
22 just astounding.

23           You multiply that, and the FTC is good about  
24 multiplying that by going to other organizations, both  
25 self-regulatory organizations and consumer groups, to



1 MR. PAUTLER: Well, it could be an old thing.  
2 It could be something we've continued to do well, if  
3 anyone has any thoughts.

4 MR. CALFEE: I like Lee's little capsule  
5 summary of going back to the Pitofsky BCP days, et  
6 cetera, when the FTC transformed its advertising  
7 regulation into something that was really kind of a --  
8 kind of bizarre almost into what Lee describes as a  
9 market-based regulation, and it's been remarkably  
10 successful.

11 MR. PEELER: What I'd like to see  
12 in six years -- why I think the FTC should be able to  
13 celebrate in six years, and I think this symposium  
14 approach is a great start on that, it's going to be  
15 basically a transition in the leadership of the agency  
16 from, you know, the types of folks that you see sitting  
17 up here at this panel, the baby boomers, to a whole new  
18 group of managers, and hopefully, they'll be learning  
19 from everything we did and doing a better job than we  
20 ever did. It seems like if we're there in six years, it  
21 will be terrific.

22 MR. MacLEOD: That's setting a pretty easy  
23 standard, Lee.

24 MR. RUBIN: I suppose what I would measure as  
25 the thing most important to celebrate in six years is



1           **SESSION 4: HOW TO MEASURE THE WELFARE EFFECTS OF THE**  
2           **FTC'S COMPETITION AND CONSUMER PROTECTION EFFORTS**

3           MR. PAUTLER: Thank you for coming this  
4           afternoon to the session of FTC at 100. We're preparing  
5           for our next 100 years, so what we're going to be  
6           discussing today is how to measure the welfare effects  
7           of competition. The title of this session was how to  
8           measure the welfare effects of competition and consumer  
9           protection actions, but we actually aren't going to be  
10          doing consumer protection actions, so I guess this is a  
11          misleading title, and maybe I could get into trouble  
12          with our consumer protection group for that, but we'll  
13          be focusing on competition issues today.

14          And we're going to try to discuss how one might  
15          measure welfare impacts, and we will focus on our merger  
16          work, on single-firm conduct, perhaps discuss a little  
17          bit about some of the other approaches we take to doing  
18          competition policy, our consumer advocacy activity, for  
19          instance.

20          The other panels that have gone on yesterday  
21          and today were attempts to either define some of the  
22



1 mergers and joint ventures and horizontal and vertical  
2 market power, the same kinds of issues that a lot of our  
3 economists study. And he's working some on  
4 international competition policy now.

5 Tom Hazlett is the professor of law and  
6 economics and serves as the director of information --  
7 the information economy project at George Mason  
8 University. He was previously the chief economist at  
9 the FCC, and he's done a lot of work on a large number  
10 of regulatory issues.

11 And Greg Werden is the senior economic counsel  
12 at the Antitrust Division of the Department of Justice,  
13 and he's -- he works on a wide variety of policy --  
14 antitrust policy issues for the Antitrust Division and  
15 is one of their main inputs into their amicus work at  
16 the Supreme Court.

17 So, the panel today, we will start out by  
18 having brief statements from each of the panelists that  
19 will just cover the general area of the welfare effects  
20 of competition, and then we'll get into some questions.

21 Let's see, we might as well go in alphabetical  
22 order, I suppose. Bob, I don't know if you have a brief  
23 statement.

24 MR. CRANDALL: I do. I do, but the way you had  
25 organized this was each one of us would take on a

1 different area. Do you want us to continue in that  
2 fashion or how do you want us to proceed, because I was  
3 thinking we'd start with mergers.

4 MR. PAUTLER: Oh, okay. Okay. Okay. Well,  
5 let's just jump into the questions then, if that's the  
6 way we want to do it.

7 MR. CRANDALL: You want to jump into the  
8 questions? Okay. Go ahead.

9 MR. PAUTLER: Would anyone -- it's obvious  
10 we've had a little bit of a miscommunication here, so if  
11 anyone would like to start out with an overview  
12 statement, that would be fine.

13 MR. CRANDALL: I'll start anyway, but without  
14 getting into how you measure welfare, consumer and  
15 producer welfare.

16 MR. HAZLETT: It seems to me you ought to work  
17 on your collusive enterprise here just a little bit.  
18 This is a Trade Commission.

19 MR. CRANDALL: There is a difference between  
20 cooperation and collusion, Tom.

21 First of all, thanks for inviting me here, and  
22 as a result of some work we did a number of years ago,  
23 Cliff Winston and I have been eager to see DOJ and FTC  
24 to push for more retrospective analysis of how the  
25 policy has worked. And, of course, it's unusual for a

1 lot of government agencies to do this kind of work.

2 The premise here, I judge from the way this has  
3 proceeded, is that a lot of this research will either be  
4 undertaken, funded, coordinated, led by the agency  
5 itself. My own feeling is that what we need to do is to  
6 try to get academe interested in this and that it ought  
7 to be a joint effort between DOJ and FTC, since  
8 obviously you overlap enormously on merger policy and  
9 even to some extent on single-firm cases. One of you  
10 couldn't bring the Microsoft case; the other did.

11 But it seems to me that it is less important  
12 for us to sit around here and schmooze about how you  
13 would measure the welfare effects of a policy than to  
14 consider just more fundamentally, you know, what are the  
15 limitations to doing good research in this area? And it  
16 seems to me that the one that Cliff Winston and I  
17 identified some time ago are the deterrence effects.  
18 Whatever the effects of individual cases are and whether  
19 you can measure the difference between how industries  
20 have proceeded after a successful attack in a merger  
21 versus other industries in which you did not attack a  
22 merger, you or DOJ, may be even less important than the  
23 effect particularly of certain behavioral aspects. And  
24 I suppose this would turn, importantly, on Section 1,  
25 Sherman, which you are not responsible for, the

1           deterrence effects of antitrust. And it seems to me  
2           that is even more difficult to attempt to measure.

3                        So, this is not an easy task. What is  
4           surprising, and what was surprising to Cliff and me, was  
5           how long we have been -- after all, we're now, what, 118  
6           years and counting since the first antitrust statute,  
7           and there was common law antitrust before that. I mean,  
8           there are other agencies that have funded retrospective  
9           analyses. The one I came across that did a pretty  
10          darned good job years ago was the National Highway  
11          Traffic Safety Administration, surprisingly, and they  
12          contracted it out to John Delorean & Associates. You  
13          may remember him. If you saw Back to the Future, that  
14          gull-wing car that he couldn't sell on the market, he  
15          sold to Hollywood. That was his greatest success.

16                       But they actually did a pretty good job, and  
17          it's an interesting model. I never went back to see  
18          what it was that motivated NHTSA to do this or how they  
19          handled the process, but it wasn't a bad model. I'll  
20          just stop there.

21                       MR. PAUTLER: Thank you. Vivek, would you like  
22          to make an opening statement?

23                       MR. GHOSAL: I think I make sort of an opening  
24          statement versus some details. I think that there is no  
25          one strategy or metric that will yield answers in terms

1 of retrospectives. Each has its own limitations. So,  
2 we need to implement alternative methodologies to gain  
3 insights.

4 One of the things that I find useful to look at  
5 is understand firms' alternative business strategies.  
6 So, if you think of a vector which has mergers and the  
7 different types of mergers, you have single-firm  
8 conduct, different types of single-firm conduct, and  
9 then you have collusion. If antitrust blocks, for  
10 example, a certain merger, and assuming for the moment  
11 that these alternative business strategies, just for  
12 simplicity, let's say they are only rent-seeking, then  
13 new firms might rate to the alternative strategies to  
14 pursue their end-seeking objectives.

15 And then, if firms do migrate to alternative  
16 strategies, then that has implications for the conduct  
17 of antitrust. So, effectively what you're saying is  
18 these alternative rent-seeking business strategies and  
19 antitrust essentially become endogenous in the system.

20 What this does is to really make life much more  
21 complicated in terms of understanding -- I mean, or  
22 thinking through retrospectives, because if a  
23 retrospective looks like you've blocked a merger and  
24 then you evaluate what it did, but the firm that got the  
25 merger blocked migrated to this alternative strategy,

1 then, in effect, it is a -- did may or may not be a very  
2 meaningful thing to do.

3 So, what we need to do is to sort of develop a  
4 core set of variables that we track, potentially.

5 There's a lot of interest in prices for obvious reasons,  
6 and I'll talk later in terms of how price information  
7 can or cannot be used, but I find that in terms of  
8 retrospectives, one core set of variables that should be  
9 institutionalized in terms of tracking are issues  
10 related to product innovation, all elements about  
11 variety, quality, new products, process innovation, the  
12 standard variables, as well as looking at cost  
13 efficiency gains.

14 So, the reason why the second part is important  
15 is because since late seventies, eighties, evaluation of  
16 efficiencies has become very important, and whether or  
17 not the loan, specific things from these retrospectives,  
18 this this is an important part of what both DOJ and FTC  
19 will do in its competition mission.

20 The other advantage of looking at these  
21 alternative set of core variables is that a lot of these  
22 variables are actually available in the public domain.  
23 I will give examples later. Unlike price, which is very  
24 difficult to get a handle on, many prices are  
25 transactions prices which you don't get to observe,

1       so -- and if you look at Dennis Carlton's 2007 paper,  
2       one of the things he says is, "Well, we need this price  
3       data so the agency should seek authority to get the  
4       price information," I don't think that's happening. I  
5       think it's going to be nearly impossible to get the  
6       power to force companies to provide price information  
7       post decision.

8                So, I think there's a lot to be learned by  
9       developing a core set of variables, and I think looking  
10      forward and looking to gain metric, I think to develop  
11      this core set of variables and very important,  
12      institutionalize the process, that is, we will talk  
13      later about how to figure out which cases to follow in  
14      the future, and institutionalize this process so if a  
15      case falls in that framework, you automatically have a  
16      framework for tracking it.

17               And essentially if you look at these effects,  
18      whether it's prices or whether it's innovation and cost  
19      efficiency related effects, these -- some of them take  
20      quite a bit of time to materialize. So, actually  
21      following something for a year may or may not tell us a  
22      whole lot. So, in effect, if you look at something,  
23      like a three-year window, it provides a more substantive  
24      basis for understanding, in particular, about the  
25      innovation investment and other issues materializing

1           that the firms have followed.  So, I will just stop with  
2           that for the time being.

3                        So, I think what we need to do is to develop  
4           sort of a core set of variables, track that  
5           systematically once we have a case that falls in the  
6           framework that we should track, and then so we can talk  
7           later about that more.

8                        MR. PAUTLER:  Thank w1Eu, Vive0000 0.0000 cm0.00 0.00 0.00



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1 with such ex post analysis and the reason we don't see  
2 much of it at the antitrust agencies is that the product  
3 is a public good. The beneficiaries are not those who  
4 are influential in the process of forming antitrust  
5 policy. To the extent that there are private benefits,  
6 they're probably associated with the rents to experts in  
7 law and economics that would conduct those analyses, and  
8 I encourage folks in that sector to take leadership analyses, and

1 just read about the final -- the final -- you feel when  
2 it gets to the end, you have to explain to young people  
3 what satellite radio is.

4 But at any rate, the merger analysis I think  
5 benefited quite handsomely from the fact that a merger  
6 of two firms in the satellite radio industry to one firm  
7 in the satellite radio industry did not generate as much  
8 as zero excess return, even with a healthy merger  
9 premium involved. So, that kind of market data should  
10 be incorporated into the price effects -- I'm talking  
11 now about the retail price effects.

12 And finally, I would say that Professor Carlton  
13 strikes an interesting note at the end of his 20 --  
14 December 2007 paper. He says, "Strong opinions are not  
15 substitutes for quantitative analysis," and this point  
16 is clearly incorrect, okay? I don't think there's  
17 anything more commonly observed in Washington, in  
18 particular, than strong opinions substituting for  
19 quantitative analysis. And, in fact, I will make a  
20 stronger statement, and that is that even in a more  
21 perfect world, it would still be the case, that strong  
22 opinions would be substitutes for other kinds of  
23 analysis.

24 And, in fact, I would suggest that the role of  
25 quantitative and other analysis, scientific analysis in

1           general, in informing people's opinions is what we're  
2           after here. We will always be stuck with strong  
3           opinions. What the objective is here is to elevate the  
4           quality of those opinions through a much more rigorous  
5           and common level of ex post or retrospective economic  
6           analysis of antitrust.

7                       MR. PAUTLER: Thank you, Tom. Greg?

8                       MR. WERDEN: I think it's a good idea to step  
9           back and ponder what we know already and what we can  
10          figure out that would shed some light on whether the  
11          FTC's doing a good job, but I think we should be  
12          realistic from the start about what can and can't be  
13          done. The title of this session is how to measure the  
14          welfare effects of the FTC's competition and consumer  
15          protection actions. We've just stricken consumer  
16          protection from that, which makes the task a little  
17          easier, but it's still impossible.

18                      You can't measure -- not if you use the word  
19          literally -- any meaningful effect of any competition  
20          action, much less the welfare effects. Some important  
21          effects of some competition actions can be estimated,  
22          some can be inferred, but that's it. And all the  
23          limitations really add up.

24                      The greatest limitation is that the competition  
25          actions themselves are designed to block proposed



1 would actually want to rely on it. Suitable data can be  
2 really tough to come by, and even with the best data,  
3 constructing a benchmark for what would have happened  
4 but for the merger or the competition action or whatever  
5 is more challenging than people generally acknowledge.

6 So, my best advice to the FTC is to embark on a  
7 small number of case studies, selected mainly on two  
8 bases: One, they think they might actually be able to  
9 do them, and two, that the findings could be expected to  
10 have some practical significance for informing the FTC  
11 as it carries out its competition mission. A  
12 broader-based study I don't think is going to happen,  
13 and we'll get into a lot of reasons why it's unfeasible  
14 when we talk about more particular conduct. .

15 MR. FROEB: So, I want to thank Paul and the  
16 FTC for setting this up, and I do think, you know, self,  
17 you know, retrospectives are important and self-analysis  
18 is -- the unexamined life is not worth living, and it  
19 probably applies to agencies.

20 I just want to say kind of the three criteria  
21 that I would use in determining, you know, what to do is  
22 just to start, what do we want to use the info for? I  
23 mean, what are we going to really do with the  
24 information if we get it? And from my point of view, it  
25 would test our thinking about, you know, are we thinking

1 about mergers in the right way? Are we thinking about  
2 vertical restraints in the right way? Are we thinking  
3 about, you know, consumer protection, monopoly,  
4 exclusion in the right way? And is it going to really  
5 affect -- you know, let's look ahead and say, "Okay,  
6 suppose this experiment comes out this way, suppose it  
7 comes out the other way. What's it going to do to our  
8 thinking?" And if the answer is nothing, I would say  
9 that, you know, maybe -- maybe you ought to think about,  
10 you know, asking -- looking for information that would  
11 actually affect how you think about things.

12 And what I mean by that is that if we did a  
13 merger retrospective and it found no effect or it  
14 found -- you know, we let a merger go through and it had  
15 a positive effect, I mean, we had a pretty -- or  
16 relatively, I won't say absolutely, but a relatively  
17 well -- you know, kind of a relatively good  
18 understanding of, you know, the competitive effects of  
19 horizontal practices. And we have theory, we have  
20 natural experiments, we have -- we have retrospective  
21 studies on individual cases that inform our learning.  
22 And I honestly don't think that, you know, a few case  
23 studies in the horizontal area is really going to  
24 move -- you know, move thinking very much.

25 The second question I would ask is, what don't

1       we know?  Where is -- where are the biggest gaps in our  
2       knowledge?  And here, I would shy away from horizontal  
3       effects and go towards the big -- the big unknowns,  
4       which are effects that occur over time.

5                    I would say innovation, practices that might  
6       appear good in the short run, but in the long run, may

7

1                   And the third criteria is what can we learn,  
2           and  
3           again, I would look ahead and kind of look at a proposed  
4           study and say, "Okay, suppose it comes out this way.  
5           Suppose it comes out this way. You know, how is that  
6           going to affect our learning?" And then really try to  
7           look ahead, reason back, before we embark upon one of  
8           these studies.

9                   The last thing I want to say -- and I'll shut  
10          up -- is I want to -- I want to tell you a little story.  
11          When I first got here, I was really anxious to do a lot  
12          of retrospectives to see if I was right, and one of the  
13          cases that I worked on before I got to the FTC was the  
14          Chex/General Mills merger, and Chex -- Ralston basically  
15          sold the Chex brand to General Mills. General Mills had  
16          a lot of existing cereal brands. And the counterfactual  
17          that amounted to -- what they had claimed was that they  
18          had -- I mean, the reason -- the stated reason for the  
19          merger was that Chex was not -- was a generic  
20          manufacturer, they weren't very good at marketing





1 the behavior of participants. Issues that Carlton  
2 brings up. There's a variety of reasons -- I mean,  
3 looking at the before and after using price data is  
4 going to be very, very difficult. So -- and I think  
5 this is what I was trying to focus on when I said  
6 earlier that we need to develop a broader set of core  
7 variables that we will follow over time.

8           There is -- so, I think more than trying to --  
9 so, part of what Luke said as well -- if we get an  
10 answer, what do we do with it and what do we learn? I  
11 think there is some learning to be had in terms of  
12 understanding why firms do what they do, right? So, I  
13 think there is some gaps in understanding business  
14 strategies, and unless we have a proper sense of that,  
15 how the interventions work becomes more complicated.

16           So, I am going to give an example, which is not  
17 quite in the same ballpark, but I was doing a study for  
18 the Sloan Foundation on the global pulp and paper  
19 industry, and I visited a company in Finland, they let  
20 us in, and I think they were the world's third largest  
21 capitalized firm, and they had two important issues that  
22 confronted them. One was environmental standards, and  
23 the other was the European Commission had told them that  
24 basically no more mergers. You guys have acquired far  
25 too many, and this is it for a while. You don't get to

1 eat more lunch right now.

2 And so what they went about describing is a  
3 bunch of things that they did once they knew that  
4 answer.

5 Now, I was not at that point -- so, this was  
6 several years back. I was not at that point able to  
7 parse out the effects of the environmental regulations  
8 that was enforced on them versus what came out of this  
9 decision by the European Commission, but following this  
10 no merger said of guidance, effectively, they embarked  
11 on extensive investments in modernization, recontracting  
12 all kinds of input supplies, recontracting output  
13 supplies, so basically, in the management jargon, they  
14 revamped the entire supply chain, all the contracts, as  
15 well as the back-end, which is the output side.

16 There is some learning in here in the sense  
17 that if you -- so, this wasn't a blocked merger, but it  
18 was a signal that you can't do this anymore, what do  
19 firms do when you take action, right? So, if you block a  
20 merger, I think there is useful evidence -- I mean, if  
21 you can track certain variables, you try to go back and  
22 see what did they do after that.

23 So, price is very complicated for a variety of  
24 reasons, but this information about investments,  
25 information about many different things, like product

1 innovations, these are relatively easily available.  
2 They're not easy, but they're relatively more easily  
3 available compared to price information, and that's why  
4 I think if you develop a broader set of core variables  
5 to track -- and we don't necessarily have to study  
6 mergers where there was an action taken. You can look  
7 at close calls where the agency had concerns about price  
8 effects, the agency had to weigh that against efficiency  
9 effects, and at the margin, suppose nothing was done,  
10 you let the merger go. Internally, you understand what  
11 your concerns were, what the parameters were. If you  
12 were to track this market after the no decision, you try  
13 to see what do the parties do after that? In  
14 particular, I think getting a better handle on the  
15 scores of the variables to innovation, which is both  
16 product process, as well as things like economies of  
17

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1 types of mergers. This wasn't a close call, but the  
2 close calls should give us much more information. So, I  
3 think that could form a basis for analysis of mergers in  
4 terms of retrospectives.

5 MR. CRANDALL: I want to agree with, I guess,  
6 what Greg and Luke suggested, which is it's very  
7 difficult to do this kind of analysis that doesn't mean  
8 to say, after 118 years, we don't get started trying.  
9 It wasn't the end of the world when maybe Houthakker and  
10 Taylor didn't estimate consumer demand perfectly 40 years  
11 ago. I mean, there have been improvements in econometric  
12 techniques since then.

13 We can -- there are lots of ways, including  
14 cross-country comparisons, to try to estimate the  
15 effects of industry-specific events, mergers or  
16 whatever, but one of the -- and then to argue exactly  
17 the opposite. One of the things that makes analyzing  
18 antitrust today even more difficult is that the  
19 interesting markets and where antitrust has most effect,  
20 I suspect, though I haven't looked at this  
21 systematically, would be markets in which there is rapid  
22 technological change. We're not talking about the  
23 International Trade Commission's fundamental mission is  
24 to suppress competition in industrial commodities, which  
25 don't change very much, like steel and chemicals, and so

1       forth.

2                   We're talking about an activity which impinges  
3       upon the overall general economy, where industrial  
4       commodities and simple goods, simply a declining share  
5       of total output and rapidly changing services and  
6       high-tech products like medical equipment,  
7       telecommunications equipment, computer software, and so  
8       forth, are the areas of interest.

9                   And there, you've got to worry about what the

10



1 tell us if the drug was developed or whether it was  
2 slowed down.

3 MR. WERDEN: According to the Web site, it was  
4 developed. I followed up.

5 MR. FROEB: Oh, you did?

6 MR. WERDEN: Let me take this opportunity to  
7 disagree with Tom Hazlett on event studies, which I  
8 thought --

1 That's as much evidence as we have on this.

2 In addition, to the original motivation of such  
3 studies doesn't apply with unilateral effects, which has  
4 been the predominant basis for merger challenges for the  
5 last two decades. The 1980s studies, pretty much early  
6 eighties, were based on coordinated effects notions,  
7 which motivated the idea that if the merger was A-okay.  
8 There would be positive abnormal returns to the merging  
9 firms and to their close rivals, but this presumption  
10 isn't so right with unilateral effects, and with a  
11 homogenous product and Cournot competition, the merging  
12 parties may make less profits after the merger.

13 With differentiated products and Bertrand  
14 competition, effects on rivals tend to be insignificant  
15 and won't show up in the data. With oral auctions,  
16 mergers have no effects on the rivals of the merging  
17 bidders. With competition in multiple dimensions, the  
18 little work that we have, which Luke and I did with two  
19 co-authors, indicates that the rivals can easily be  
20 worse off after the merger than they were before. So,  
21 I'm a big fan of not doing event studies.

22 As for retrospectives, I guess I'm all for  
23 doing them, but I'm pretty pessimistic about how much we  
24



1 going to need a whole lot of data if we're going to do  
2 what Dennis has in mind. I don't think we're going to  
3 have it. And I think that unilateral effects are really  
4 easy compared to coordinated effects, where the theory  
5 seems to be that the merger, in fact, has a random  
6 effect, because the way the effect is always stated is  
7 it increases the likelihood of coordinated conduct or  
8 successful coordinated effort, which presupposes that  
9 sometimes it happens and sometimes it doesn't. So,  
10 whether it happens or not, you don't know did the merger  
11 have any effect. It just might have.

12 Well, with enough data, you could probably  
13 figure that out, but enough data might be thousands and  
14 thousands of data points, which we're not going to have.  
15 So, again, I favor a small number of intense case  
16 studies, focusing on unilateral effects. To the extent  
17 possible, try to compare ex ante predictions to actual  
18 results. And to the extent there is a difference, try  
19 to figure out why. What happened? Was the economic  
20 analysis wrong? How was it wrong? Or did unforeseen  
21 circumstances arise, in which case you can't really  
22 learn very much from that case?

23 What cases should we study? Well, at the top  
24 of my list, I would put consummated mergers that the FTC  
25 objected to. It's a short list, but it continues to

1 grow. Next, mergers the FTC took flak for not opposing.  
2 I think we know what they are. And I'd round out the  
3 list with any mergers that were allowed to proceed  
4 largely on the basis of efficiencies or entry, although  
5 I'm a little worried that that doesn't add anything.  
6 So, that's my suggestion.

7 MR. CRANDALL: Tom, you need to defend  
8 yourself. Come on.

9 MR. HAZLETT: You didn't take that seriously,  
10 did you?

11 I would like to say a couple of things. The  
12 first one is that the short run/long run problem  
13 obviously is a very, very large problem for antitrust,  
14 and it goes to a lot of what's been said here about the  
15 analytical framework and what -- you know, what's  
16 trackable and what's not. And I recall about 15 years  
17 ago, I had the pleasure of actually being a listed  
18 witness, I think, at the same moment on both sides of a  
19 merger in front of the Federal Trade Commission. I was  
20 told the attorney for the merging parties had put me  
21 forward and the Federal Trade Commission talked to me,  
22 so I was being put forward. So, I ended up not being a  
23 witness for either side, which is the standard outcome.

24 But the -- this was a merger in cable  
25 television, and at the time, head-to-head competition in



1 Federal Trade Commission lawyers, who, you know, I was  
2 talking to, and they were very frank about it. They  
3 said, "Look, you know, that's a great argument. We wish  
4 you well. You can write a paper on that. We can't do  
5 that. We can't look at that. That's out of the market.  
6 That's beyond the window."

7 And, you know, you folks who are antitrust  
8 professionals here know that you do have to draw these  
9 lines in fairly dramatic ways just to make the problems  
10 trackable and to be standard within the analysis and to  
11 comply with, you know, agency and legal precedent.

12 Well, you know, that certainly is a problem,  
13 and I -- you know, I think that, you know, at 100 years  
14 of age, there really should be more sophistication in  
15 trying to look at these things, knowing that

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1 Microsoft is constrained and the stock price movements  
2 react to the antitrust case, that instead of being  
3 helped, Microsoft's complementary suppliers are not  
4 helped. That's information.

5 Now, you can criticize the -- you know, the  
6

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1 fact is there's a lot of information there. You can get  
2 a lot out of that. In fact, you can get a lot more out  
3 of that than you can get out of a critical loss study,  
4 because there was nothing on the counterfactual in the  
5 record to really tell you what that critical loss study  
6 was going to look like if you threw out all the other  
7 stuff around it, including the financial market data,  
8 not all of which is event study, but how do you know  
9 that the facts changed in the market between the time  
10 that the merger was announced and the time that it was  
11 approved?

12 MR. WERDEN: Because we had access to mountains  
13 of confidential information.

14 MR. HAZLETT: And it's financial. That's what  
15 changed. The markets were going south on satellite  
16 radio all through the last several years, including this  
17 last 17 months or so for the merger period, and those  
18 data are not the ones that the DOJ will cite in its  
19 opinion. I think that's wrong. I think it ought to be  
20 explicit. I think those data ought to be evaluated, and  
21 I think this sort of sub rosa use of financial data,  
22 which is -- and use of lobbying interest -- interested  
23 party lobbying, which has to influence and should  
24 influence the analysis, I think that should be stated  
25 explicitly.

1 MR. PAUTLER: Well, I think it's pretty clear  
2 we are not going to have any agreement here on the issue  
3 of using stock event analysis.

4 MR. CRANDALL: I want to put this in some  
5 perspective. As I look around the room, there's a great  
6 distribution in age here, and for those of you that want  
7 to make a career in antitrust, I would worry that one of  
8 the senior proponents and practitioners of antitrust at  
9 the Department of Justice takes such a nihilistic  
10 approach about being able to measure what he's doing.  
11 Remember that the antitrust authorities aren't working  
12 for the Dalai Lama or for the Catholic church and the  
13 Vatican. They're working in a institutional setting  
14 where everything you do is reviewable in court.

15 And as I look back over the last 30-40 years,  
16 the courts have taken a very different view of  
17 antitrust. I can remember Potter Stewart opining that  
18 the only sense he could make of Section 7 was that the  
19 Government always wins. I would think that the  
20 Solicitor General today, giving a speech, would say that  
21 the only sense he could make of it is that the  
22 Government always loses. And that the courts look very  
23 seriously for empirical evidence. And if the principal  
24 antitrust authority, the Department of Justice, is  
25 saying that there's no way they can measure the effects



1 know, the natural experiment in --

2 MR. CRANDALL: It depends which empirical  
3 evidence you --

4 MR. FROEB: Now, has that changed your thinking  
5 about the effects of the minimum wage?

6 MR. CRANDALL: Well, I mean, the --

7 MR. FROEB: Does everybody know what I'm  
8 talking about? They did a natural experiment. They  
9 looked at the imposition of minimum wage in Delaware and  
10 Pennsylvania, and they found no difference between the  
11 two things. Now -- but we have very strong, kind of  
12 theoretical priors that if you put in price controls in  
13 markets, you're going to have an effect, and has that  
14 upset your -- your -- has that changed your feeling?

15 MR. CRANDALL: Well, it was difficult for me to  
16 believe --

17 MR. FROEB: Come on, answer the question.

18 MR. CRANDALL: No --

19 MR. FROEB: Okay, no, there you go. I rest my  
20 case.

21 MR. CRANDALL: -- but I don't --

22 MR. WERDEN: In 1971 when I took a labor  
23 economics course, a professor brought in a stack of  
24 studies this high, in 1971, put them on the table and  
25 said, "This is what we know about the effects of minimum

1 wage. Half of these studies say there was effect, half  
2 of them say there wasn't effect. We don't know  
3 anything."

4 MR. PAUTLER: It's clearly going to be  
5 difficult to figure out what we do and don't know. I  
6 think we're having an argument here that -- it's a matter  
7 of how you weigh different methods of getting at the  
8 questions, and clearly we don't have agreement about  
9 exactly what sets of weights we'd use. I think part of  
10 what we're trying to get at today is figuring out, going  
11 forward, what's the best set of information we can look  
12 at to try to figure out what our effect is. I don't  
13 think we want to be in a position, for instance, in 2014  
14 to tell the world that, yeah, we don't have any idea what  
15 we're doing. I don't think that's where we want to be.

16 I think everybody sitting up here actually  
17 wants to be somewhere else in 2014, at a position where  
18 we can say something. We've clearly got a difference of  
19 opinion about what sets of information are going to allow  
20 us to make inferences about the effects of mergers, and I  
21 think we're going to have to leave the difference of  
22 opinion probably sitting here for the moment.

23 Vivek, you wanted to add to --

24 MR. GHOSAL: If I could jump on the stock  
25 price, I think in terms of retrospectives, I brought up

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1 ways and look at specific sectors that you're interested  
2 in, and I think that can yield meaningful results.

3 And I think that the discussion about stock  
4 price, there is no one methodology that's going to yield  
5 answers, and that is absolutely clearly, but is looking  
6 at price data or stock price data or innovation data, it  
7 is not -- there is no one variable that's going to be  
8 the determining factor. So, I think in terms of the  
9 short run/long run stuff, I mean, the innovation stuff  
10 is going to play out in the longer run, and I think that  
11 is central to the objectives of what we're trying to do.  
12 Price is also central. Price is much more difficult to  
13 get a handle on. So, I think this can be used as a good  
14 template for the other side of it, which are the  
15 nonprice elements.

16 MR. HAZLETT: I think that's absolutely right.  
17 I mean, I really don't understand a categorical  
18 rejection of financial market data as being an  
19 improvement in antitrust analysis, and I think we want,  
20 you know, at the margin to pull in stuff that's valuable  
21 and relatively valuable to what else we have in a lot of  
22 cases. For example, let's go to the XM/Sirius again.  
23 You know, market power of XM and Sirius, how are you  
24 going to evaluate that claim? Totally on pricing data?  
25 Very hard to do. In fact, close to impossible given

1 your comments, I think, and, you know, I obviously agree  
2 with a lot of what you said.

3 The place you want to look, in addition to  
4 everything else, is financial market valuation data on  
5 capital values of the firms, cost of capital of the  
6 firms, and that's probative, and it tells you something  
7 about what kind of market power is there, because yes,  
8 super-competitive profits should be in evidence if they  
9 have duopoly market power and are going to monopoly  
10 market power. So, that's an empirical inquiry that is  
11 implied by the subject matter, and a categorical  
12 assumption that financial markets really don't have the  
13 full story or don't have anything to contribute is  
14 inexplicable to me.

15 MR. WERDEN: Well, I didn't categorically  
16 reject use of financial data, but rather, only stock  
17 market event studies, but I do categorically reject the  
18 suggestion you just made, because I don't think it's  
19 right that we're looking for evidence of monopoly power  
20 in satellite radio.

21 Let us suppose -- and it seems plausible to  
22 me -- that this was a really dumb idea, but two guys had  
23 it. They threw a lot of money at it. They're hoping  
24 some day -- you know, there's 20 times as many  
25 customers, and at that point, it pays. They may be

1 right; they may be wrong. The market makes a judgment  
2 about whether they're right or wrong. The market may be  
3 right; the market may be wrong. Let's suppose the  
4 market's smart, and they were wrong. This is a bad  
5 business to be in. So, the stock market will be telling  
6 you it's a bad business to be in. That doesn't mean the  
7 merger isn't A-okay. It still may be.

8 MR. HAZLETT: Well, if -- okay. Okay. So, you  
9 are going to make the assumption that these guys are  
10 just nutty, and the actual data on what their costs  
11 happen to be has nothing to do with efficiency. Well,  
12 that means --

13 MR. WERDEN: Not --

14





1 effects of the cases are good or whether they're bad,  
2 we're not going to see them in those data.

3 We're going to have to follow these industries  
4 longer run. We're going to have to look at more subtle  
5 cues for what effects these cases have had on  
6 investment, not an easy thing to do and probably not an  
7 econometric thing at all.

8 I'm prepared to rely on all kinds of  
9 information for this task. I think that Bob suggested  
10 cross-country comparisons might be an interesting thing.  
11 Here, I think that might be the best bet. Certainly we  
12 have different policies in different countries in this  
13 regard. I expect that they've had different effects.  
14 I'm not real optimistic of being able to measure them,  
15 but it might be worth a try.

16 And I -- again, as I've said before, I favor  
17 the case study approach. We have some published case  
18 studies of the effects of past monopolization cases. I  
19 think generating new case studies is a very good idea.  
20 I think an extensive, in-depth, long-term study of the  
21 effects on a case of an industry over a period of time  
22 is typically the best way to go with these things.

23 I think we might be able to learn a lot. Maybe  
24 we can't fine-tune policy all that much, but there will  
25 be feedback effects on how we implement antitrust law



1 test -- you know, there's -- it's harder to test  
2 overidentifying restrictions, hey, write down a theory,  
3 and does the theory at least match what we -- explain  
4 what we can observe? And then there's the problem of  
5 time. You know, you're estimating stuff over time. A  
6 lot more stuff happens.

7 I want to just tell an anecdote. I started out  
8 my professional life as a macroeconometrician, and I  
9 remember very -- you know, I started out estimating  
10 these quadratic smoothing models. You know, people, if  
11 your costs are convex, then it pays to smooth your  
12 production so you're not bouncing between high-cost  
13 areas. You hold the inventories to smooth production.  
14 And they estimated these quadratic inventory models with  
15 aggregate data and tried to figure out whether the costs  
16 were convex, and the point was that if they were, then  
17 there was an inventory smoothing, and Keynesian  
18 macroeconomics works. I mean, that was this whole  
19 literature.

20 Then I think it was Ken West, an econometrician  
21 at Wisconsin, did a Monte Carlo study, wrote down one of  
22 these models, and tried to back out the parameter of  
23 interest, which was the curvature of the cost function,  
24 to see if it was concave or convex, and he showed that  
25 you could identify it with only 10,000 years of data, of

1 monthly data. And it stopped this whole line of  
2 inquiry.

3 And that's what I mean by kind of look ahead,  
4 reason back, and let's not go down a road where we're  
5 not going to be able to get an answer.

6 MR. PAUTLER: Well, I think in an earlier  
7 panel, there was some discussion of what you might learn  
8 from retrospectives before we started this discussion,  
9 and people were saying, "Well, if you have five of them,  
10 you are not going to really know any -- there is no way  
11 you can know anything generalizable about them."

12 With regard to single-firm conduct studies,  
13 while I think they would be very interesting to read  
14 after the fact, how many of them would we -- how many  
15 would you have to have to really know much of anything?  
16 I don't know what --

17 MR. HAZLETT: Microsoft.

18 MR. PAUTLER: -- the right number is.

19 MR. HAZLETT: Microsoft. But I would like to  
20 ask Greg, okay, so we have been ten years now since U.S.  
21 v. Microsoft --

22 MR. WERDEN: It was a smashing success. Next  
23 question.

24 MR. HAZLETT: Smashing, yes.

25 MR. CRANDALL: Do you use Microsoft Office



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1 antitrust agencies," outside of Europe, I guess. He  
2 says, "This piece argues that the main conventional  
3 explanation for its rare usage, availability of private  
4 damage remedies, is often unconvincing given obstacles  
5 to such suits," et cetera. He says, "Further, because  
6 the behavioral and structural remedies otherwise sought  
7 by the Government are often ineffective in  
8 monopolization cases, disgorgement might often be a  
9 preferable government remedy."

10                   What I worry about is that the direction we're  
11 heading is for antitrust authorities to become tax  
12 authorities, and I think that's a very dangerous  
13 direction for us to be heading. So, we really need more  
14 information about how these remedies work.

15

1 information. In some cases, they might, but I've  
2 recently done a lot of work for the OECD looking at  
3 rules and regulations across countries, different  
4 markets, whether they are local, whether they are  
5 national, regional, et cetera, and I think one of the  
6 things that bothers me is that across countries, there  
7 are far too much heterogeneity of underlying rules and  
8 regulations that govern the behavior of participants.

9 So, looking at just industries in the U.S.,  
10 looking at industry in France and Australia, unless you  
11 appropriately control for the underlying rules and  
12 regulations, I don't think you can say a whole lot, and  
13 this OECD work just came out. I mean, it's just, like,  
14 staggering disparity across countries in terms of those  
15 underlying rules and regulations. So, I'm not sure  
16 about the cross-country evidence. In some cases, they  
17 might, but in a bunch of other cases, they say basically  
18 they learned nothing.

19 MR. FROEB: There is cross-country -- I mean,  
20 there is cross-state variation in laws within the United  
21 States, say, in liquor laws, and it's tremendous across  
22 states, you know, on single-firm conduct. For example,  
23 you know, Tennessee doesn't -- gives property rights to  
24 distributors.

25 MR. GHOSAL: And my comment is the same, then,



1 area of vertical restraints and whether there might be  
2 some ability -- if we can't -- if we can't agree whether  
3 we can measure anything much about mergers, we aren't  
4 sure whether we can measure anything about single-firm  
5 conduct, now I've got the question, well, gee, what can  
6 we know about vertical restraints? And we've got somebody  
7 who wants to take that on.

8 MR. FROEB: Actually, one of the things I did  
9 when I was at the Bureau was I did a review of the  
10 empirical literature on vertical restraints, and both  
11 voluntary vertical restraints, you know, and, you know,  
12 legal, exogenously imposed vertical restraints, and  
13 basically it all says the same thing, that when you --  
14 when you restrict people's ability to contract or  
15 firms' ability to contract upstream and downstream --  
16 there's a couple of studies, but it's almost all on one  
17 side of the literature -- that good things happen, that  
18 output goes up, price goes down, and they interpret it as  
19 alignment of incentives, of retailers and manufacturers,  
20 or elimination of double marginalization, but again, it's  
21 all looking at the short-run behavior.

22 So, you know, the joke of the drunk looking  
23 under the lamp post, you know, you're going to look where  
24 the light is but you're not going to see where the real  
25 pay-off is, which is in the long-run behavior. So, it's



1 ought to do. Look for these rare, natural events or  
2 experiments that we can actually back out the results to  
3 get at the questions of interest.

4 MR. HAZLETT: Not to fuel our cynicism, but in  
5 1997, when the -- those must-carry rules came to the  
6 Supreme Court, the Supreme Court totally ignored that  
7 great piece of work by the expert agency and it had no  
8 impact whatever. I don't even think the paper was cited  
9 by the Supreme Court, which was a terrible, terrible  
10 loss.

11 MR. CRANDALL: And I think the decision --  
12 wasn't the opinion written by Steve Breyer, who's a  
13 student of -- wasn't it?

14 UNIDENTIFIED SPEAKER: Kennedy.

15 MR. CRANDALL: Was it? But he wrote a  
16 concurring opinion. I remember talking about it.

17 MR. HAZLETT: Yes, it was concurring.

18 MR. WERDEN: I'll add a few comments. First,  
19 vertical restraints are tricky because the  
20 pro-competitive effects and the anti-competitive effects  
21 look almost identical. In fact, they're probably the  
22 same thing exactly, just depending on your perspective.  
23 So, that's tricky.

24 Secondly, there is, in fact, a vertical  
25 restraint on which we have a mountain of empirical

1 evidence, resale price maintenance. We have  
2 cross-section, lots of it. We have some time series.  
3 But do we really know anything? I'm not so sure.  
4 Mostly, these are really old, low-quality studies, so  
5 that's part of the problem.

6 But there are some more interesting issues  
7 here, one of which is there was an interesting suggestion  
8 made by Howard Marvel that the cross-sectional  
9 comparisons are useless, because all the efficiencies  
10 from RPM go out the window when you have a patchwork of  
11 different rules in different states and you can't really  
12 achieve the efficiencies. Maybe that's right. I don't  
13 know.

14 My favorite little vignette on this subject  
15 comes from the hearings on the Consumer Goods Pricing  
16 Act of 1975, and one of the very few witnesses that  
17 testified that RPM was a pretty good thing and we  
18 shouldn't get rid of it had a very interesting response  
19 to Senator Brooks' little empirical study that he did.

20 Senator Brooks sent somebody out to the  
21 drugstores in Virginia, the drugstores in the District  
22 of Columbia, and compared a whole bunch of prices. One  
23 of them was a fair trade state; one of them wasn't. He  
24 said, "Okay, now we have an estimate for what the effect  
25 of fair trade was."

1                   The witness says, "Just one problem with that  
2 study. Not a single one of those products that you  
3 looked at was a fair trade product. They weren't  
4 actually under fair trade contracts in Virginia."

5                   How did any academic researcher actually know  
6 which products were subject to RPM contracts? Now, I'm  
7 wondering, how did they know? They probably didn't.  
8 They guessed. They guessed wrong some of the time. So,  
9 these things are tricky.

10                   Even when we have a lot of empirical evidence,  
11 I'm not sure we know very much, and I think if we had it  
12 to do over again, we could probably do it a lot better,  
13 because now we know all these things that you could do  
14 wrong.

15                   MR. FROEB: I just want to just make a little  
16 bit of a pitch that when you write down these theories  
17 and you have specific pro-competitive or  
18 anti-competitive theories, a lot of times you can test,  
19 a restriction of the theory and that may get you part of  
20 the way there, reduce some of the uncertainty that you  
21 face.

22                   So, it's not -- you know, and we've been  
23 talking as if there's just one way of drawing inference  
24 about all of these -- all of these events, is do an --  
25 you know, just do a post mortem and follow up, but

1       there's other ways that economists have of drawing  
2       inference, and that's -- you know, we use models and look  
3       for overidentifying restrictions, and I think that is a  
4       -- there's a lot of evidence out there about -- you know,  
5       that allows us to accept or reject certain models, and I

1 estimation to the effects of antitrust to decision  
2 theory guiding antitrust. That's a slightly different  
3 topic. I don't claim any expertise at all in that.

4 MR. GHOSAL: Would sectorial studies help us?  
5 I mean, if some -- I don't have an answer. I'm just  
6 asking a question. I mean, if you -- based on  
7 retrospectives and other things that you may have done  
8 in the past, I think retrospectives may play a much  
9 larger role in sector-specific -- understanding  
10 sector-specific behavior and business strategy.

11 So, presumably -- so, it's not theory that I'm  
12 talking about. I'm still talking about a data world.  
13 Maybe that can provide some guidance into choosing  
14 targets. That is, if you identified industries where  
15 certain types of violations are cropping up repeatedly  
16 and certain types of behaviors are cropping up, then,  
17 effectively, that industry becomes more of a focal  
18 point.

19 MR. PAUTLER: Well, that would be basically  
20 using some research methodology to target industries, I  
21 guess, and we would have to do that across, I suppose, a  
22 very large number of industries to have any hope picking  
23 the best set of candidates.

24 MR. GHOSAL: I don't think I'm talking about  
25 cross-industry studies. I mean, this is -- there has to

1 be input that goes into this before this. So, if you  
2 think of retrospectives and if you think of  
3 institutionalizing retrospectives of some form or  
4 another with alternative methodologies, and if it turns  
5 out that a bunch of these studies point to certain  
6 industries as being usual suspects in terms of  
7 violations, certain types of violations, then that base  
8 information could be used to select industries and  
9 specific targets within an industry.

10 So, I'm not talking about examining 200  
11 industries in a cross-section. That's not what I'm  
12 suggesting.

13 MR. HAZLETT: But you have to understand the  
14 reason why they keep coming up. I mean, it may be that  
15 there's an efficiency driving it and the regulator has  
16 that wrong. I mean, the idea that if you prosecute a  
17 monopolization case that is supposed to deter behavior in  
18 that sector or industry, that other firms will see that  
19 that are adjacent to the firm you're prosecuting. If you  
20 get - if you get persistence, I mean, maybe dedicated  
21 monopolists or these may be dedicated folks who are, you  
22 know, for efficiency pushed in the same direction.

23 You may also get rent-seeking that pushes you  
24 in the same direction, because you've got exactly the  
25 same thing going on period after period, where, you know,

1 in the communications world, the hot vertical topic, of  
2 course, is net neutrality, and, you know, there's a lot  
3 of rent-seeking to go around on all sides of that. To  
4 say -- you know, to say that you're getting some -- some  
5 positives on anti-competitive conduct because you've  
6 gotten a regulator to take a look at it, I mean, this is  
7 not the antitrust regulator, although, you know, yes,  
8 the Federal Trade Commission had a proceeding on net  
9 neutrality, but I'm talking specifically now about the  
10 FCC.

11 The FCC is moving. On this, they -- you know,  
12 they moved before on certain firms. They will move  
13 again in the future. My take is that they don't  
14 understand the efficiencies that are embedded throughout  
15 the Internet, and if they really want to push  
16 nondiscrimination rules, economic nondiscrimination,  
17 they're going to be prosecuting a lot of cases.

18 So, I don't think that's a -- I think that's  
19 sort of an extension of what you're saying, because, I  
20 mean, yes, you want to look at these incidences, but you  
21 have to certainly evaluate them for what they are and  
22 make sure that your theory is correct about why you're  
23 getting repeat instances.

24 MR. GHOSAL: Absolutely. I did not mean that  
25 retrospectives necessarily go in one direction.

1       Retrospectives could go in either direction.  If you  
2       learn from the past, there is a lot of stuff coming out  
3       later where there is innovation in some instances and not  
4       in others, then you are obviously not going in a single  
5       direction.  So, retrospectives don't point to one  
6       direction, as I said.  This is what I was talking about.

7

1 know very much about that. I can write down a model in  
2 which you can engage in bundled pricing and exclude  
3 competitors without lowering price to any consumers. But  
4 has anybody ever really accomplished that? I would like  
5 to know.

6 Firms have instituted bundled pricing schemes.  
7 Did consumers pay more or did they pay less? That  
8 presumably we could figure out. I want to know.

9 MR. GHOSAL: Here, also, I think private  
10 litigation in the private markets would be very important  
11 to track. Because if you are trying to build a database  
12 effectively on where to focus your energies on, it is not  
13 just public investigation and public enforcement because  
14 in the area of single firm conduct, I mean, private  
15 litigation is very important. So, to build up the  
16 database, that would be essential.

17 MR. PAUTLER: Well, I wanted to just ask one  
18 final -- give everybody a shot at one final question if  
19 they are interested. Greg just mentioned a research  
20 agenda for bundled pricing as the next item we should  
21 look at. I was wondering if anybody had any thoughts on  
22 a research agenda for the FTC going forward.

23 We have obviously talked about this a lot  
24 implicitly in everything that has been discussed today.  
25 Is there something that moving forward we might be able

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1 antitrust looks comparatively better. Indeed for over  
2 100 years there have been models, frameworks and  
3 precedents developed that do give you some ability to  
4 talk rationally about efficiency. Some of those things  
5 are off and missing in other places. So, I think that  
6 that needs to be said.

7 MR. CRANDALL: To put it another way, we do  
8 have empirical evidence of the failure of the FCC if we  
9 don't have empirical evidence on the effects of antitrust  
10 policy. I think I would just conclude by saying that the  
11 way you formulated the question suggested that this is  
12 sort of an internal research agenda. I think it's very  
13 important if we could somehow stimulate young empirical  
14 academics to get involved in this. I don't know it's  
15 possible in the current world to do so. I am so far  
16 removed from that. But it would be useful to try to get  
17 more research going elsewhere not just within two rather  
18 well-funded and competent regulatory agencies.

19

1 people doing the work. But I think it would be  
2 interesting to try to get academics involved, but I  
3 wouldn't get involved by paying them, which probably is  
4 the only way to get them involved, by the way.

5 **(Laughter.)**

6 MR. WERDEN: People are suspect if the work  
7 coming out of the FTC --

8 MR. CRANDALL: Do you work for nothing?

9 **(Laughter.)**

10 MR. WERDEN: Even more suspect of work for  
11 hire. Nobody believes the stuff hired guns say on behalf  
12 of a company.

13 The other thing I would suggest is that if you  
14 are going to go outside, have at least two researchers  
15 tackle every problem and see if they get the same answer.  
16 One draw out of the urn doesn't do much for me, but if  
17 two guys agree then maybe they're right.

18 MR. CRANDALL: As long as you get both Kruger  
19 and Card (phonetic) doing it, it's okay.

20 **(Laughter.)**

21 MR. WERDEN: Yeah. And I would hope that the  
22 reward is publication. If that is not enough, then maybe  
23 there's something wrong with the journals.

24 MR. GHOSAL: The brief point I would make is  
25 that I think in terms of internal assessments, a point I



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