

1 **This transcript has been lightly edited for clarity**

2 PANEL ENTITLED: "THE FIRST 90 YEARS: PROMISE AND
3 PERFORMANCE"

4

5 SPEAKERS: WILLIAM E. KOVACIC

6 MARC WINERMAN

7 EDWARD F. COX

8

9 MODERATOR: ERNEST GELLHORN

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11 MR. GELLHORN: Good morning, I'm Ernie Gellhorn,
12 I teach at George Mason Law School, and I'm delighted to
13 be the moderator of the first program. We begin with a
14 program that seeks to take a critical, honest and we
15 hope helpful evaluation of a 90-year, I would say,
16 roller coaster ride, some highs, some lows. And it
17 certainly is appropriate to celebrate the 90th
18 Anniversary of the FTC founding in the midst of a
19 presidential campaign.

20 You recall, of course -- well maybe we don't
21 quite recall, but we know that the Federal Trade
22 Commission really grew out of the Supreme Court's
23 decision in 1911 and the furor it created of committing
24 to a conservative federal judiciary, a decision on
25 antitrust in connection with how the rule of reason

1 should be evaluated and applied.

2 The candidates at the time: Roosevelt, the
3 progressive; Wilson, the Democrat; Taft, the
4 conservative Republican incumbent, all put the creation
5 or discussion of antitrust policy at the center of their
6 campaigns. Roosevelt, who had once made control of the
7 trust a major focus of his administration, now promised
8 a new nationalism that would, per Marc Winerman's
9 comments, rationalize the economy, tame but not dissolve
10 the trust and accommodate rather than challenge
11 concentration and inter-firm cooperation.

12 Taft, on the other hand, was committed to a
13 judiciary or judicially applied rule of reason, and yet
14 he promised, and alone, strict de-concentration under
15 that rule.

16 Wilson's New Freedom, on the other hand,
17 straddled it by attempting to satisfy his parties'
18 agrarian base yet appeal to business interests. He
19 urged the Congress to set forth precise standards backed
20 by criminal sanctions and also urged the creation of an
21 interstate trade commission to promote fair competition
22 by investigating and publicizing, but not otherwise
23 prosecuting trade abuses.

24 Wilson assailed Roosevelt's proposal of a
25 federal commission with power to investigate any

1 business activity and Roosevelt's other unmentioned
2 proposal to set maximum prices for goods produced by
3 monopolists.

4 To quote Wilson, "If the government is to tell
5 big businessmen how to run their business, then don't
6 you see that big businessmen have to get closer to the
7 government, even than they are now. Don't you see that
8 they must capture the government in order not to be
9 restrained too much by it?" Interesting words.

10 The happy end of the story, of course, is that
11 Wilson won the campaign, and then implemented
12 Roosevelt's proposals with Taft's idea.

13 The Federal Trade Commission is perhaps the most
14 studied, reported upon and evaluated independent Agency.
15 I know of no other that has been reviewed and studied so
16 frequently. They begin with the reports of Henderson
17 and Rublee in 1924 and '26, to the Nader and ABA
18 Commission reports in 1969, to the most recent, I
19 believe, 1989 study, again, by the American Bar
20 Association.

21 Interestingly enough, I believe there are no
22 studies in the last 15 years, at least major studies.
23 What does that tell us?

24 Now, the Commission has been subject to
25 withering criticism, indeed public scorn, in the past,

1 the 1969 studies, of course, are one, but the Washington
2 Post, not a necessarily restrained animal at all points,
3 called it a national nanny, as we all recall from 1979.
4 And yet if you look at the reports, virtually every one
5 of them ends up on an optimistic note, says we got to
6 keep the Commission and it can, in fact, improve and
7 perform better.

8 Indeed it was the 1969 ABA committee report that
9 said, however, if they don't take our guidance and don't
10 improve their performance, they ought to be terminated.
11 Today we get three perspectives on this 90-year history.
12 First, Marc Winerman, and I'm not going to give
13 biographies, it's in your book, you know these people
14 too well for me to go through the litany.

15 Marc Winerman, the unofficial historian of the
16 FTC has, of course, the seminal article last year in the
17 Antitrust Law Journal, it's only 97 pages, and it gets
18 you to Wilson's first appointees. So, he still has more
19 to do.

20 (Laughter.)

21 MR. GELLHORN: But it's nothing if not thorough.
22 He will provide a distinctive evaluation, at least if he
23 says what he told me he was going to say, of the
24 development and the record of the Federal Trade
25 Commission and its legislative origins to its early

1 struggles to its modern era in identifying differences
2 in public opinion of public attention given to the
3 Federal Trade Commission.

4 Edward Cox, widely recognized and highly
5 respected New York corporate lawyer, will go back to his
6 roots, 36 years ago when he was one of the original of
7 Nader's Raiders, and also talk about the politics of
8 regulatory reform from his unique perspective, both as a
9 confidant and worker for Ralph Nader, and one who also
10 knew Richard Nixon close at hand.

11 Bill Kovacic, our third and final panelist, is
12 really a true antitrust superstar in the tradition, in
13 my view, of Phil Areeda. A brilliant teacher, an erudite
14 scholar and a bent for practical wisdom. His antitrust
15 norms article last year beats Marc by four pages. But
16 it is a tour de force of antitrust policy and progress.

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2 Bill Kovacfuture(16)Tj5.7108 -2

1 participant, he notes, in two other FTC symposiums,
2 starting first 50 years ago. He was, of course, the
3 chief economist for the Federal Trade Commission in 1953
4 through 1954, and he's going to look at the leading role
5 that economic analysis has played in the Commission,
6 really from his appointment and forward, and he
7 describes it interestingly enough, as first a shotgun
8 marriage that has matured and evolved into the golden
9 years.

10 With that, we will start with Marc Winerman.

11 MR. WINERMAN: Hello. The standard disclaimers
12 having been made, I'll start. Ninety years ago,
13 President Woodrow Wilson signed the FTC and Clayton Acts
14 -- his New Freedom antitrust Program. The Commission
15 absorbed the Bureau of Corporations. The FTC Act
16 transformed the Bureau into an independent agency,
17 replaced its single commissioner with five, and gave it
18 new powers. Most importantly, Section 5 authorized the
19 Commission to challenge unfair methods of competition.
20 The Commission soon used this authority to challenge not
21 only antitrust violations, but deception as well. The
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1 efficiency. Antitrust undermined America's global
2 competitiveness and the court's couldn't be trusted
3 to develop competition policy. Progress required
4 concentration and control, and they required a
5 Commission. Roosevelt secured a litigating antitrust
6 division in 1903, but simultaneously created the Bureau of
7 Corporations. He then worked to expand its powers. In
8 1908 he sought authority for it to pre-clear combinations
9 and contracts. In 1911, he argued that it should
10 protect consumers, competitors, shareholders and labor.
11 He had a pretty broad mandate for the Commission.

12 He contrasted America's flawed antitrust with
13 German law that regulated a cartel's output, maximum
14 pricing and labor conditions. He said, "Where under
15 modern conditions competition has been eliminated and
16 cannot be restored," the government should provide
17 control. It should stop unfair competition, but
18 efficient firms would still grow too large for the
19 market to tame. A commission should tell business in
20 advance when proposed conduct was fair. If necessary,
21 it should resort to price regulation and receiverships.

22 In contrast, Taft, as we've heard, favored
23 judicial exposition of antitrust. He gave ambiguous
24 support to a commission, but the courts, he said, typified
25 "what we shall meet in heaven under a just God."

1 Woodrow Wilson, agreed with these agrarians in part. He
2 acknowledged that industrialization required increased
3 scale, but thought business had grown larger than economic
4 and what he called "social" efficiency warranted. He argued
5 that size blunted innovation. To protect smaller enterprise,
6 he would construe, bias, and supplement antitrust law.
7 For example, he wouldn't make size per se unlawful, but he
8 would establish a presumption that a restraint of trade
9 affecting over 40 percent of a market was unlawful.

10 He also anticipated a coming trend. Brandeis
11 advocated collective activity through associations,
12 albeit with an eye, which many of these so-called
13 associationalists lacked, to antitrust.

14 Woodrow Wilson also wanted Congress to establish
15 clear antitrust standards. Like the agrarians, he
16 distrusted a commission. Though he grappled to define
17 a limited role for a commission, he was far more articulate
18 when he said he didn't want to be governed by a smug lot of
19 experts playing providence to him.

20 Substantively, Wilson said that trust produced
21 vast wealth if you cared
22 about vast wealth no matter how distributed. He even spoke
23 of giants gripping the throats of working men, blood
24 dripping through their fingers -- but Wilson also said
25 that large enterprise did not necessarily endanger

1 economic liberties. As a candidate, he opposed
2 corporate dissolution, but not because, like Roosevelt,
3 he welcomed growth. Rather Wilson trusted competition
4 -- potential competition. Once the giants were stopped
5 from competing unfairly, then in his words, the pygmies
6 would triumph.

7 After the election, Wilson quickly changed course
8 on the question of dissolutions. Perhaps he was persuaded
9 by a letter sent on behalf of his friend, John Bates
10 Clark, an economist who had recently lost faith in
11 potential competition. But his grounds for opposing a
12 commission went deeper and he held to them longer. When
13 he introduced his antitrust program in 1914, the
14 centerpiece was a definitions bill, the future Clayton
15 Act. Reaching out to Roosevelt Progressives and
16 businessmen (two groups that overlapped) Wilson promised
17 in soaring rhetoric to create a commission as "an
18 indispensable instrument for doing justice" when
19 judicial progress was inadequate. Also, he said it
20 would be an aid to business through advice and definite
21 guidance. But all he actually proposed was to remove the
22 Bureau of Corporations from the Commerce Department and
23 replace its single Commissioner with multiple Commissioners.

24 What happened then was that the House, which
25 first debated the antitrust package, couldn't produce

1 the clear legislative standards Wilson anticipated. Not
2 surprisingly, it couldn't develop a clear formula to
3 distinguish illegal from pro-competitive price-cutting.
4 When the House debates were winding down, George Rublee,
5 who straddled the field -- he had been a Roosevelt
6 speech writer and a Brandeis ally -- persuaded Brandeis
7 and then Wilson to back Section 5. It appears that they
8 originally intended to substitute Section 5 for all the
9 substantive provisions of the Clayton Act, although
10 ultimately the Clayton Act had substantive prohibitions,
11 enforceable through civil and administrative
12 proceedings, but not through criminal proceedings.

13 The expanded commission bill drew bipartisan
14 support in the Senate, although its advocates, including
15 its principal spokesman, differed significantly among
16 themselves. Francis Newlands, the Democratic spokesman,
17 was curious. He actually tracked Roosevelt's ideas more
18 closely. He argued that a commission could prevent
19 monopoly at its incipiency, but also suggested that
20 Roosevelt's style of regulation might later be
21 warranted. He wanted to take all antitrust enforcement
22 away from the Justice Department and give it to the
23 commission if he could have had his way.

24 On the Republican side, Albert Cummins
25 had an agrarian distrust for size. In 1913, he argued

1 that a special tax on firms with a more than 25 of a
2 percent national market would target "so much dishonest
3 wealth." For Cummins, the commission should be part of
4 an broader antitrust package. For example, he opposed
5 specific limits on corporate size, but championed a flexible
6 ban against firms that grew so large that they prevented
7 substantial competitive conditions.

8 The commission drew support, albeit sometimes
9 reluctant support, from agrarian antimonopolists,
10 from Roosevelt-style progressives and from businessmen who
11 sought clear advice which many hoped would broadly
12 permit collective activity. In his study of the New Deal,
13 Ellis Hawley identifies three competing traditions with roots
14 in the Progressive Era: National planning, industrial
15 self-government, and antitrust. There were variations
16 in each. Brandeis, for example, was an associationalist
17 who supported antitrust. But each was present, in some
18 form, among commission's advocates.

19 Wilson's initial Commissioners internalized some
20 of the ambiguities in the agency's creation, and they
21 fought over more parochial matters as well. Brandeis
22 refused a seat, so none of the original Commissioners
23 had true national stature. In order of their term's
24 length, they were Democrat Joseph E. Davies,
25 Wilson's Commissioner of Corporations; Edward N. Hurley,

1 a self-made businessman;and William Harris, formerly (with

1 insisted on litigating, but when DOJ settled, the
2 settlement order provided that the FTC would be the
3 pricesetter for newsprint.

4 During Davies' tenure, the Progressive and
5 associational strands got another boost. When the U.S.
6 entered World War I in April of 1917, wartime
7 imperatives drove further government intervention in the
8 economy. And though the Commission played mostly a
9 supporting role once the transition was made -- the Agency
10 primarily served as a cost-finding agency to help others
11 set prices for government purchases -- it was at the center
12 of the initial decision to adopt these policies. In April
13 of 1917, Wilson conferred with the Commissioners four
14 times.

15 Another important development during the
16 Commission's first months was the decision to challenge
17 deceptive representations. During the Congressional debates,
18 Cummins, Newlands and the other Commission advocates hadn't
19 encouraged regulation of deception. In fact, it was the
20 opponents of the FTC who said Section 5 is so broad,
21 you can get to deception -- and, therefore, we shouldn't
22 pass it.

23 But the bill passed, of course. And on November
24 23rd, 1915, the Commission heard the Associated
25 Advertising Clubs of the World. They were a

1 self-regulatory body with "vigilance committees" that
2 were precursors to the Better Business Bureaus. The
3 AACW had drafted an anti-deception law and secured its
4 passage by two-thirds of the states, so it could turn to
5 state regulators when self-regulation failed.

6 But the president of the clubs told the
7 Commission that they had faced such new challenges like
8 direct mail appeal, "the greatest offender against honest
9 advertising." The post office could get some fraud
10 orders but that wasn't enough. The Commission accepted
11 the argument and its first three complaints challenged
12 deceptive claims.

13 Internally, though, the Commission was in
14 disarray, for reasons that went to core issues of
15 antitrust policy, the FTC's role in implementing that
16 policy, and personalities. The first disputants were
17 Rublee and Davies. Rublee served only a recess
18 appointment, the Republicans weren't happy about not
19 getting a commissioner, and he left in September 1916.
20 He suspected that Davies actively opposed his
21 confirmation. Meanwhile, Davies had engineered a vote
22 at the first Commission meeting naming himself Chairman
23 for seven years, and Rublee then turned around and
24 organized a coup to depose him.

25 After that, the commissionership rotated

1 annually and the Chairman had no special powers. This
2 created some problems then as the years went on. Each
3 commissioner took administrative responsibility for
4 certain units within the Agency. In 1947, they even
5 decided to trade units every year. Commissioners voted
6 on promotions and performance ratings at meetings. And
7 the situation stayed that way until 1950 when we've
8 heard it changed.

9 Rublee and Davies also clashed on substance.
10 Speaking in 1926, Rublee outlined three bones of
11 contention. He didn't want deception cases. He didn't
12 think Section 5 reached horizontal restraints, a
13 voluntary combination or contract putting an end to
14 competition. That would have eliminated a lot from our
15 jurisdiction. Further, he didn't want to give advance
16 advice to business, which Hurley and Davies did want to
17 do. And Wilson had pushed very hard on this notion of
18 helping business, at one point inviting businessmen to
19 turn to the men of the Federal Trade Commission who would
20 tell them to go on rather than the lawyers at the Justice
21 Department who would tell them to stop.

22 Hurley assumed the chairmanship when Davies lost
23 it. But Hurley told a business conference when he was
24 offered a spot on the Commission, "I told the President
25 that all I knew was business, that I knew nothing about

1 the new laws nor the old ones and that I would apply all
2 the force that I had in the name of business." He added
3 that German industry became safe when the government
4 sanctioned cartels.

5 Hurley pressed for uniform cost accounting, so
6 that businessmen could better understand the workings of
7 their own operations. The Commissioners approved this
8 basic program, but they were shocked when they learned
9 in December 1916 that he approved specific cost
10 accounting plans that facilitated industry coordination.
11 Davies also learned that Hurley held discussions to make
12 the Secretary of Commerce permanent FTC Chairman. In
13 any event, Hurley soon resigned.

14 Wilson's later appointees worked better together
15 than his initial selections. Indeed, they worked
16 together through most of the next administration. They
17 included Victor Murdock, who had headed the Progressive
18 contingent in Congress for two years after ten years as
19 a Republican representative. They included two
20 Democrats, Huston Thompson, a Justice Department
21 litigator, and John Nugent, who had been elected to a
22 short Senate seat in 1918 and defeated in 1920, and when
23 Wilson nominated him in 1921, he was confirmed, even
24 though Wilson and he were both lame ducks, through
25 Senatorial courtesy. Nugent later ran for his old Senate

1 seat. Without resigning from the Commission, he conducted a
2 Senate campaign. He lost.

3 Wilson appointees dominated the Commission until
4 1925 and that was part of his problem in the 1920s.
5 They were out of sync with the rest of the government.
6 But the balance shifted dramatically in 1925 when
7 William Humphrey arrived. Humphrey was confrontational.
8 He had an unusual approach to Congressional relations.
9 For example, he wrote a Congressman a letter in which
10 identified his the Congressman's favored weapon as
11 the jawbone made famous by Samson. He was also
12 gratuitously offensive at Commission meetings. In 1926,
13 the Commission and Justice Department both sued
14 Continental Baking over a series of acquisitions. The
15 Department settled, but a condition was that the
16 Commission dismiss its case. Humphrey demanded an
17 immediate vote, denying Nugent a day to study the
18 papers. Humphrey also tried to stop investigations
19 directed by the Senate, arguing that the Commission
20 should not respond to resolutions by a single house of
21 Congress.

22 Humphrey did have an affirmative agenda. He
23 aggressively backed challenge to fraud, for example,
24 and pressed the Cm mission to name magazine publishers
25 as respondents. He also expanded the trade practice

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1 on, in particular. First of all, the Commission's press
2 coverage dropped substantially for nearly two decades.
3 I'm sorry about bypassing the '30s. In contrast to
4 substantial coverage during World War I, only two first-page
5 stories covered the Commission in World War II: During
6 a cigarette shortage, the Commission acted to ensure an
7 adequate supply for soldiers.

8 Coverage picked up after the war, though. The 1952
9 oil cartel report drew some attention. But the real key to
10 the 1950s was television. For the first time, with television
11 advertising, consumer protection became important.

12 Finally, to lead into Ed's discussion, things
13 pick up in the '60s, there are a lot of strong
14 initiatives that develop despite the criticisms that
15 were made at the time. But after the next
16 administration, during the Nixon and Ford
17 administrations, it stepped up even more dramatically in
18 part because of the work Ed and others did.

19 Thank you.

20 (Applause.)

21 MR. COX: You saw that peak up there?

22 (Laughter.)

23 MR. COX: That was us. I think it was Adlai
24 Stephenson who said that every speaker gives three
25 speeches. The first speech is the one that he prepares,

1 the second speech is the one that he gives, and the
2 third speech is the one that he wished he had given
3 afterwards.

4 And as I was thinking about what I would do
5 here, because we were going -- I was going back 36
6 years, I didn't want to rely just on memory, so I've
7 done a prepared speech here, and I generally don't like
8 to do that.

9 There's a story of a President of the United
10 States who had an event coming up. He wanted a
11 15-minute speech for it and he called his speechwriter
12 and said, I would like to have a 15-minute speech for
13 this event and here's what I need, and came the day of
14 the event and the President of the United States walked
15 out of the Oval Office, got in his car, as he went in
16 and the speech writer handed him the speech, went to the
17 event and he started speaking. At the end of 15
18 minutes, he still had more to go; at then end of 20
19 minutes, he was still going; half an hour, people
20 started leaving, started walking out of the room on the
21 President of the United States.

22 And 45 minutes later, the speech was over to a
23 small smattering of applause and the room was half
24 empty. Well, he didn't take that too well and went back
25 to the White House and called in the speechwriter and

1 said, look, I wanted a 15-minute speech, you gave me a
2 45-minute speech. The speechwriter responded,
3 Mr. President, I gave you a 15-minute speech and two
4 copies. Well, although this is prepared and I do have
5 some copies, I hope it won't go that way.

6 (Laughter.)

7 MR. COX: But it was 36 years ago, the year was
8 1968, and there was a whiff of revolution in the air.
9 This was the year of the TET offensives by the Vietcong,
10 in a war fought by a draftee Army, a war that had gone
11 on too long, a year President Johnson declined to run
12 for another term, the year of the tragic assassinations
13 of Bobby Kennedy and Martin Luther King, the year race
14 riots in our major cities and riots within and without
15 the Democratic Convention in Chicago, as new political
16 forces jostled with the old.

17 And more relevant to this 90th Anniversary
18 Symposium, 1968 was the year that Ralph Nader assembled
19 a group of seven students to do a summer study of the
20 Federal Trade Commission, a study which resulted in a
21 self-styled student task force report which received
22 extensive press coverage when the report was issued in
23 January 1969. All the student volunteers had just
24 graduated from or were attending either Yale or Harvard
25 Law School with the exception of myself, who had just

1 graduated from Princeton. Judy said that this was
2 college students, I was the only one I guess who could
3 qualify since I had just graduated from college. All
4 the others were really very high-powered graduates of
5 law schools or who were about to graduate from law
6 school.

7 I enrolled in Nader's seminar the prior year at
8 Princeton, had been impressed by his insights and the
9 workings of our political processes and had used him as
10 the informal advisor for my senior thesis. While the
11 most junior member of this team that he assembled, I had
12 by far the most working experience with Nader and in the
13 end was one of three of the students who saw the project
14 through to the end and one of two who continued to work
15 with Nader as he organized the hundreds of students who
16 came to Washington the next summer to replicate what we
17 had done with the FTC in task force reports on other
18 federal agencies.

19 In the fall of 1969, I entered law school and
20 went on to other things. I did not give any significant
21 thought to or interact in any significant way with
22 either the FTC or Nader until I was invited to
23 participate in this symposium. I can only liken my
24 preparation for this as the opening of a time capsule, a
25 time capsule full of things that I knew intimately at

1 the time and now have the opportunity to measure in
2 light of 35 years of subsequent FTC history and my own
3 personal experiences.

4 For the subsequent FTC history, I am very
5 indebted to Marc for his patient tutoring over the phone
6 and source references, and to the thoughtful writings of
7 Richard Harris and Sid Milkis, among others, on the
8 subject.

9 So, in this context, what is the significance of
10 the Nader report? I will let others speak, others with
11 a more measured and experienced perspective than mine.
12 Harris and Milkis in their book, the Politics of
13 Regulatory Change, make this observation, and I quote,
14 "The Nader Report's criticism of the FTC was not
15 especially radical or novel. The direct impact,
16 however, was surprising. It sparked a series of
17 political actions that eventually revitalized the
18 Agency."

19 Justin Martin, in his more sort of colloquial
20 book on Nader, published in 2002 wrote, "Nader's FTC
21 raid really did accomplish something, his seven children

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1 still has that constituency of the consumer movement.

2 Lastly, and this is predicting the future, and
3 this doesn't necessarily concern the FTC, but it's
4 interesting. "During the summer of 1969," he concludes,

1 criticism. This is a person who was looking into the
2 future and built something and we, the students who
3 worked with him on the Federal Trade Commission report,
4 were part of that. Were his instruments, I could say,
5 in doing that.

6 So, what did we actually do? Well, we read
ents who

1 One early turning point, before that incident,
2 which no doubt initiated and irritated Chairman Dixon
3 very much, was an article in the Wall Street Journal
4 which I generated by finding in a search of the
5 personnel files, and that -- what we discovered, there
6 was a purely patronage office in Oak Ridge, Tennessee,
7 which was manned by a friend of Chairman Dixon's, a
8 certain Judge Castro C. Gear.

9 Nader told me to take the information to Jerry
10 Landauer. I don't know if many of you remember Jerry
11 Landauer, he was one of the great muckraking reporters
12 on the Wall Street Journal at the time. I will never
13 forget the scene, Landauer, cigarette in his mouth, on
14 the telephone, calling various sources to confirm and
15 supplement the information which I had given him and
16 pounding out the story on his typewriter, and all the
17 time while he was doing this saying, oh, that poor
18 fellow, talking about Judge Gear.

19 Let me just read to you the way that interview
20 between Landauer and Judge Gear on the telephone went.
21 He started off, let me just say, by calling Judge Gear's
22 boss, who could not say precisely what kind of work
23 occupied Judge Gear, but adding parenthetically, but I
24 understand there's a good deal of work down there in Oak
25 Ridge, Tennessee.

1 The telephone interview with the Judge himself
2 proceeded as follows. Landauer: What date was the Oak
3 Ridge office open? Judge Gear: You will have to get
4 that information from the central office. Landauer:
5 What type of work primarily occupies you? Judge Gear:
6 You will have to get that information from the central
7 office. Landauer: You mean to say that they know more
8 about your work in Washington than you do in Oak Ridge?
9 Judge Gear: Well, they have the first hand information
10 there.

11 Long pause.

12 Landauer: Is it an FTC policy to release all
13 information only through the central office? Judge
14 Gear: Pause. I don't know if it is or not. Landauer:
15 On what grounds, then, do you refuse to give even the
16 most innocuous information? Judge Gear: You'll have to
17 get that information from the central office.

18 (Laughter.)

19 MR. COX: So, that gives you a flavor of what we
20 did. What resulted was what I guess they would call
21 these days in campaigns a lot of earned media, which was
22 priceless to our cause. And Dixon didn't help himself
23 by noisily trying to shut us down. It didn't work
24 either. Phil Elman opened all his files to us,
25 regardless of what the Chairman said. And right down

1 through the staff, there were lots of good people then,
2 who were willing to talk to us, who wanted to help us,
3 they wanted the Commission to become what it could be,
4 what its basic powers and the way it was meant to be,
5 would come to fruition.

6 We finished our interviews and our work, being
7 students we had to go back to school. September came.
8 And although we had -- there was a spate of articles
9 talking about it and then it was Nader's Neophytes, they
10 hadn't quite gotten to Nader's Raiders, but we had a
11 Christmas vacation and we came back then to produce the
12 report, and I'll never forget, it was a very intensive
13 time. I slept four hours a night in the basement of my
14 brother's -- he was here working at systems analysis at
15 the Pentagon, and we just worked around the clock and
16 produced a nearly two-hundred page report that Nader
17 whipped up the interest of the press in it and they
18 eagerly awaited it.

19 I remember driving around at 3:00 in the
20 morning, driving a Volkswagen, I didn't know how to use
21 the stick shift really, going through red lights, with
22 Ralph Nader seated next to me without a seat belt on.

23 (Laughter.)

24 MR. COX: The thought that went through my mind,
25 it could all be over in a minute. And then after we

1 released our report, later on there were, of course,
2 extensive news articles and then hearings before a
3 Senate committee, which really was very congratulatory,
4 Ribicoff and others saying what wonderful kids we are to
5 volunteer this time and do all this great work.

6 And Willie Taft, with a wonderful sense of
7 humor, raised his hand and said, Senator, I would like
8 to make a comment. Pause, silence in the hearing room.
9 I would like to thank my parents who supported me during
10 this time.

11 In the next month, in April 1969, pursuant to
12 the request, this is -- the hearing was in March of '69,
13 in April '69, pursuant to a request of the recently
14 elected President Nixon, the American Bar Association
15 appointed a Blue Ribbon Commission to study the FTC and
16 produce a report. The findings of the ABA report, which
17 was delivered by the ABA to President Nixon on time in
18 December of 1969, largely confirmed our findings,
19 although as I quoted before, from a historian in more
20 temperate language.

21 Now, President Nixon's foreign policy
22 initiatives are well known, but Richard Nixon is also
23 the President who much to the consternation of his
24 political base, not only went to China, but also
25 established the EPA, signed OSHA and Title IX with

1 respect to equality for women in athletics on campuses,
2 signed those two acts into law, established the Consumer
3 Product Safety Commission, and reduced the percentage of
4 segregated schools in the south from 90 percent to 10
5 percent, quietly, but got it done, the only way to do
6 it, thereby recognizing respectively the environmental
7 movement, with the EPA, the workers safety movement,
8 with OSHA, the women's rights movement, Title IX, the
9 product safety movement, with respect to the Consumer
10 Product Safety Commission, and the civil rights
11 movement. It was only logical that President Nixon's
12 administration would pick up on the imperativeness of
13 the consumer group, when the noise made by Nader report
14 on the FTC, put the FTC on the front burner.

15 According to Harris and Milkis, after seeing the
16 ABA report in September of 1969, President Nixon, in his
17 October 30, 1969 special message to Congress on consumer
18 protection, in a remarkable demonstration of bipartisan
19 support for consumers, the President called for the
20 adoption of a buyer's bill of rights, called for the --
21 and unlike the Kennedy and Johnson presidencies, Nixon
22 took direct action, according to Harris and Milkis, to
23 strengthen the commitment to consumer protection at the
24 FTC.

25 Endorsing the recommendations of the ABA report,

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1 most importantly, attracting very capable young
2 attorneys with a strong commitment to consumer
3 protection.

4 In the summer of 1970, Weinberger moved out to
5 be Deputy Director of the budget and Miles Kirkpatrick,
6 who had chaired the ABA Commission on the Federal Trade
7 Commission, succeeded Weinberger as Chairman and
8 continued the reforms. The rerigging, remanning and
9 redirection of the FTC ship by these Republican
10 appointed Chairmen was accomplished against the backdrop
11 of what Harris and Milkis describe as a loosely
12 organized, but influential coalition of consumer
13 advocates among House and Senate members, a talented and
14 programmatically ambitious Congressional staff, an
15 aggressive core of investigative and advocacy
16 journalists, an elaborate network of consumer public
17 interest groups.

18 It was this coalition that in the '73 to '76
19 period passed the Alaska Pipeline Act and the Magnusson
20 Moss Act, both of which gave the FTC new enforcement
21 powers, as well as such consumer advocacy programs as
22 the Intervener Funding Program.

23 While Nader gave great kudos to we students who
24 produced the Nader Report, Nader received the credit
25 generally, and properly, for the report. It was a

1 political force and specific assistance of this
2 coalition that made our report and its ultimate impacts
3 possible. It was also this coalition that put an
4 increasingly strong consumer movement wind behind the
5 FTC's sails, culminating in Mike Pertschuk's
6 administration under President Carter.

7 For the better part of two years, in which I did
8 my thesis for Nader, did the FTC report and then worked
9 as a journalist at the New Republic and organized the
10 1969 summer of Nader's student task force, I was right
11 in the middle, although not always a part of this
12 coalition of consumer advocates. The very success of
13 this coalition during President Carter's administration
14 resulted in squabbles in overreaching from unseemingly
15 impregnable positions of power. The coalition lost most
16 of its momentum and the FTC was ready for new
17 leadership.

18 With the election of Reagan in 1980, the
19 consumer movement and the FTC were subject to a whole
20 new set of forces, which go beyond my experience and
21 competency to comment on.

22 In conclusion, I see three basic views of the
23 Federal Trade Commission. One holds that the free
24 market can sort out the problems which the FTC was
25 designed to solve, and therefore, it should be

1 Not Call success.

2 The FTC came into being in 1914, under President
3 Wilson's New Freedom administration, as Marc pointed
4 out, but its legislative design, giving it broad
5 regulatory authority over the entire economy smacks more
6 of Teddy Roosevelt's New Nationalism. The result is
7 that those of you who are privileged to staff it have
8 front row seats to view and be potential actors in the
9 great drama and success story of our ever-evolving
10 American economy.

11 And I have to say that it was a privilege for me
12 to have played a small role in the re-invigoration of
13 the Federal Trade Commission and in this great and
14 fascinating drama 36 years ago. Thank you.

15 (Applause.)

16 MR. KOVACIC: I want to start today by
17 recognizing three intellectual debts. The first is that

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1 Federal Trade Commission and a very informative one.

2 Second, my debt to Ernie Gellhorn, whose work on
3 this subject really set me in the motion of looking both
4 at quantitative measures of performance and really as
5 the inspiration for much of the work that I have done in
6 the area and the person who in many ways taught me to be
7 a teacher.

8 And third, Marc Winerman. Marc recently has
9 been named Counsel for Special and Historical Studies at
10 the FTC. Marc is both special and an expert in
11 historical studies and after this symposium will be
12 beginning his year as a Victor Kramer Fellow, which is
13 one of the most distinguished honors that a career staff
14 person of the FTC or the Department of Justice can hold.
15 And the daily seminar in the hallways that Marc has
16 provided me over time is, in many ways, a source of
17 insight for my presentation today.

18 What I would like to look at is the basic
19 question of how we evaluate performance over time. And
20 I would like to look, as Ernie mentioned before, at the
21 vast literature on the Commission. It's fair to say
22 that the academic literature that looks at the Federal
23 Trade Commission easily exceeds the literature on any
24 other federal government regulatory body. It's
25 unmistakably voluminous and has been, literally over

1 decades from the very time of the Agency's creation, an
2 extraordinarily powerful source of attraction for
3 commentators.

4 But an issue that all of this literature begs
5 is, how do we measure the performance of public
6 institutions? The commonly used test that shows up in
7 many instances, both more serious and scholarly and
8 popular, is that it is the big case that really matters.
9 Discreet enforcement events. But this neglects -- and
10 this is really the theme of my talk today -- crucial

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1 students become completely somnolent. Audiences at
2 conferences start flipping through the program to see if
3 there are concurrent sessions they can attend, start
4 making lunch plans, but in so many ways, this is the
5 vital infrastructure that determines the success of an
6 institution over time.

7 I want to suggest the importance, distilling
8 this literature, of developing a norm, a standard that
9 applauds officials for making capital investments in
10 institutional capability that is truly to plant the
11 trees rather than to simply grab the low-hanging fruit.
12 That's an idiot bit of advice to policymakers. If you
13 don't plant trees, you starve after a generation or so.

14 And last, to improve the role of historical
15 understanding, which is a crucial -- has a crucial role
16 to play in formulating policy over time and, indeed, is
17 a key theme of this entire symposium.

18 By way of overview, I want to give you a quick
19 summary of the key commentaries spanning nine decades to
20 identify key institutional lessons and to offer my own
21 report card that comes out of this body of commentary

1 three baskets, the first are large blue ribbon panels of
2 the kind assembled at President Nixon's request in 1969
3 by the ABA; the 1949 report of the Hoover Commission,
4 being perhaps second in importance in this category.

5 A second being non-government organizations,
6 Ralph Nader's group in '69, the 1989 report of the ABA
7 called Kirkpatrick II, sometimes reports that are not
8 published, which set in motion the Kirkpatrick Report in
9 1989, was a separate report that the antitrust section
10 had commissioned in 1987 and '88. What resulted, and
11 this is for a group of us who are basically alumni from
12 the late 1970s and the early 1980s, working on a variety
13 of matters and then independently putting together
14 different pieces, it was a scathing assessment of what
15 the Commission had done. So scathing that the ABA
16 decided not to publish it on its own, but instead set in
17 motion the 1989 Kirkpatrick II report.

18 Last have been individual contributions.
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1 Nader's introduction in the Nader Report is a single
2 sentence that says, we're not talking about competition
3 policy here. It was focused on consumer protection,
4 although its institutional concerns spread well beyond
5 the boundaries of the consumer protection mission.

6 What are the main recurring themes in these
7 reports? Let me simply summarize some of the principal
8 observations they've made over time. The first is that
9 the Commission was afflicted with inadequate planning.
10 And I think the basic core of the criticism here is one
11 that policymakers have to continue to take into account.
12 Indeed, it comes from even the earliest works, and
13 Henderson's work gets this very well.

14 When I worked with transition economies, I
15 encourage them to read Henderson's book. It's written
16 in 1924, it's a decade after the adoption of the statute
17 and it's a marvelous account of what a new institution,
18 even with favorable initial conditions, good judicial
19 system, respect for the rule of law, administrative
20 propriety standards that ensure that individual
21 government officials, for the most part, are going to
22 act in an honest way, despite those initial conditions,
23 Henderson documents what a new institution of this type
24 is likely to face.

25 And one of the key points that came out of his

1 volume and is emphasized in subsequent work is that if
2 you don't have a metric, a process, a strategy, for
3 deciding what you're going to do, you will be buried
4 over time by what simply comes into the door. You will
5 be completely reactive, you will have no capacity to
6 sort out the trivial from the important, you will be
7 utterly ineffective.

8 And sadly, it's only in the comparatively modern
9 era that the Commission gets ahead of this flow of work
10 and starts to put in place a conscious process for
11 deciding what it will do and how it will do it.

12 A second basic theme deals with the
13 cumbersomeness of the procedures for administrative
14 adjudication and for the routine execution of work. And
15 I have to admit, this remains still a sore spot. Why?
16 A key assumption in the formation of the Commission is
17 that it would have a comparative advantage, not simply
18 with respect to substantive analysis, but with respect
19 to speed in the treatment of competition and consumer
20 protection matters, and a continuing battle and a
21 continuing area for improvement which is identified
22 throughout the commentary and I think quite rightly, is
23 that conceptual general ambition in many respects still
24 hasn't been realized and practiced, although there's
25 been dramatic, dramatic progress in that respect.

1 Steve Calkins, who will wrap up this session,
2 played an enormous role in setting in motion internal
3 administrative reforms and adjustment in procedures.
4 Although I don't think we're at the point where Congress
5 expected us to be in 1914 in this respect, what is
6 promising is that the modern trend has featured
7 significant progress in that direction.

8 The third basic objection was poor transparency,
9 and here, again, there's a powerful lesson for any new
10 competition authority. The Commission's early
11 decisions, and if you flip through the early FTC
12 reports, you see this, are extraordinarily cryptic in
13 their treatment of the issues before them.

14 And the basic message that came out of the
15 commentary is that if you want to obtain deference from
16 reviewing tribunals, you have to provide a compelling
17 basis to obtain the deference. Notwithstanding the
18 formal standard that gives you deference with respect to
19 substantial evidence. The basic message of the
20 commentaries, quite properly, I think, is you get the
21 deference you deserve, notwithstanding the legal
22 standard. That has to be earned all the time, if it
23 were a mathematics exam, you've got to show your work in
24 a way that convinces the instructor that you've done
25 good work.

1 The fourth observation deals with ineffective
2 management. Partly as a matter of the overall
3 government design, but partly as the manner in which
4 individual managers at the most senior levels of the
5 Agency allocated their time and did their work.

6 Marc has pointed already to what may be the
7 single most important administrative adjustment,
8 government-wide, and for the Commission in its history.
9 It's the Reorganization Act of 1950. Think for a moment
10 of what Marc described about the leadership and
11 management of the Commission until 1950. The
12 chairmanship shifts every single year. And the
13 individual Commissioners, much like feudal lords, have
14 control over individual bureaus and individual programs,
15 so that you do not have a program developed over time
16 under the supervision of an individual Commission
17 Chairman who is going to be doing this for several
18 years. With the accountability that comes through it,
19 every year it's up for grabs.

20 And if you want to ask why did the Commission
21 stumble about so badly in doing the first thing on this
22 line, the Commission designed before 1950 ensured that
23 the planning was in 12-month cycles, at best. It didn't
24 go beyond that.

25 A key lesson about how institutional design

1 directly affects substantive outcomes, the '50
2 Reorganization Act, which allowed the President to
3 designate the chair, so that you would have a chair that
4 would serve more than 12-month terms, instead of having
5 the continuing disruptions over time, was a vital
6 adjustment.

7 Poor integration of economics and law. Again, a
8 basis for creating the Commission in 1914 is that it
9 would have a comparative advantage over public
10 institutions because it would have a large body of
11 researchers and the research would inform the
12 development of competition and consumer protection
13 programs over time. Realizing the integration of those
14 two sets of capabilities has remained a challenge over
15 time, but the awareness, I think, in the modern era,
16 beginning in the 1960s, about the importance, the
17 possibilities for doing that, has promoted adjustments.

18 And last the continuing criticism of the
19 personnel of the Commission, this I think is the most
20 important single contribution of the Nader Report. The
21 Nader Report motivated a fundamental change in the model
22 by which the Agency recruited and retained personnel.

23 There are painful instances in the '69 report in
24 which Rand Dixon, and he not only told it to the Nader
25 folks, he told it to others, said that is my philosophy

1 for hiring: I can hire really good people out of
2 school, but they'll go away. I want to hire people who
3 will not go away. Unlike the Air Force, which aims
4 high, I'm going to be like the Navy and dive deep. I'm
5 going to penetrate those lower strata of the class,
6 people who are inert and will stay forever.

7 The Nader Report motivated a basic change in the
8 model, and we have come to live with, to accept, to deal
9 with the fact of continuing turnover and rotation, but
10 that shock to the system, the exogenous shock that
11 established a different internal norm was absolutely
12 indispensable to the transformation of the Agency's
13 human capital over time.

14 These are the benefits, these are the recurring
15 themes, I'm now going to talk about things I don't like
16 about the earlier studies and flaws that, perhaps,
17 obscure other things we have to do. A couple of
18 different types.

19 First, bad history. What do you see in lots of
20 the studies? You see the rote recitation of earlier
21 studies. And I understand what's going on, they didn't
22 have the time to go back and really dig through original
23 sources that Marc did, they take the earlier study and
24 take the punch line and say it's still true, still true,
25 still true.

1 But what don't you have in the earlier studies?
2 You don't have common agreement about what the Agency
3 ought to be doing, except some generalized view that it
4 ought to do stuff that's important. Do important stuff.

5 Henderson's punch line, for example, that the
6 Agency spends too much time on trivial matters
7 highlights this. Henderson thought consumer protection
8 was pointless. Don't worry about deception, why are you
9 wasting time on these advertising cases? The
10 unmistakable inference of Henderson's work is that
11 everything ought to be channeled in the direction of
12 competition policy, period. Yet, every subsequent
13 author recites Henderson's words, quote that says, "the
14 same criticism is true today," yet none of these
15 authors, I think, really parsed his work to see that he
16 was really talking about having an antitrust agency
17 only, nothing to do with consumer protection.

18 Weak data in many of the stories. David Hyman,
19 my colleague in the General Counsel's Office, now at the
20 University of Illinois, is fond of telling me, in God we
21 trust, all others provide data. Too many of the
22 formative studies rely on impressionistic assessments of
23 authors without giving you the specific cases that would
24 inform your judgment about what they're thinking about.
25 In so many instances, no context is provided. Criticism

1 did not take account -- and I've got a CF site to Tom
2 McCraw at the bottom. Tom McCraw, just about 25 years
3 ago, held a wonderful seminar at the FTC on industry.
4 Tom McCraw said, regulatory experiments must be judged

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1 isn't like that. There's a lot more continuity, many
2 more links over time.

3 Second, bad political science. I mean, this
4 literature for the most part ignores the political
5 constraints and forces that operate upon the Commission.
6 The Cement Institute case was the product of a textbook
7 effort to do good research and channel it into a case,
8 regardless of whether you think it was a good case or
9 not. By contemporary standards, it was a great job.
10 The Commission was almost turned into the city's largest
11 three-sided swimming pool by Congress, because it
12 brought the Cement Institute case. Commentators don't
13 talk about that dynamic. The force of Congressional
14 oversight, the fact of judicial oversight.

15 The best book on this score is Thomas Blaisdell
16 book in '32, points this out and says, ah, this broad
17 collection of powers comes with it some fairly powerful
18 limitations and dangers. Trying to use it is going to
19 require not just technical proficiency, but
20 extraordinary political adroitness. And they had a
21 sense of public management in many instances.

22 This literature suggests there are no upward
23 limits on capacity, but if you do one good thing, you
24 can immediately do another. It's like thinking on the
25 basis of Do Not Call that Do Not Spam is right around

1 the corner. You went to the moon yesterday, you're
2 going to go to Mars next month, aren't you, and Saturn
3 after that. No sense that doing one thing well
4 immediately means you can do a natural extension to
5 something else immediately. And it ignores the
6 cumulative nature of policy.

7 A couple of conclusions about lessons. What
8 would my report card look like? Coming out of this,
9 first, one basic institutional criterion, do you have a
10 good strategic plan? Are your goals well-identified?
11 Not just for internal discussion, but external debate
12 and analysis.

13 Second, are you tracking the nature and type of
14 cases you're bringing and are you following their
15 outcomes? Following their outcomes is very important.
16 There is a tendency in this city, and I have
17 participated in this, to grade policymakers by the
18 number of things they start. That's like measuring the
19 effectiveness of an airline by the number of flight take
20 offs. Landings, not our problem.

21 In economic terms, there is a tremendous
22 capacity there. If you're not internalizing the
23 results, in effect, to impose huge external costs on
24 your Agency. You don't fill out the score card, at
25 best, when any individual chair leaves, the grade is an

1 incomplete, because you don't know until years later
2 what the actual grade is.

3 Are you evaluating advocacy initiatives and
4 outcomes in the same way? Are you investigating
5 capability and knowledge base that gives you the
6 credibility to persuade courts to know what you're
7 doing, to persuade judges that you know what you're
8 doing over time? Are you displaying information about
9 what you're doing? Are you putting information into the
10 public domain so you can engage in a public debate?

11 There's a natural reticence to do this, to do
12 after-the-fact assessments in a candid way. But if
13 you're afraid that your ideas are too fragile to
14 withstand scrutiny, then maybe, maybe in that instance
15 it's time to get some better ideas. So, to put
16 information into the public domain is an important good
17 practice that comes out of this. And, finally, a
18 commitment to do after-the-fact assessments.

19 How did the story end? What were the
20 consequences both with respect to process and outputs?
21 Implication for good leadership. What should good
22 leaders do based upon this literature? You maximize
23 positive externalities for the Agency and new leaders in
24 the future. You make their lives better, as well as
25 those of the employees.

1 You engage in a continuing process of
2 self-assessment and you promote critical public debate.
3 In short, we're not really in the business of looking
4 for best practices. So, to say best practices suggests
5 that there's a final fixed destination, it's a
6 continuing search for better practices, and that's what
7 I think the literature says we ought to do.

8 Thank you.

1 audience, others by my sitting and listening here. One
2 of the things that's sort of unique in this area, both
3 in antitrust and consumer protection, is we have more
4 than one federal agency addressing the question. We've

1 partly as a bit of experimentation diversification,
2 partly, certainly, as a matter of legislative interest
3 in having its own institution. That is an unmistakable
4 part of the original legislative design. I would say
5 that, you know, I have to come clean on this, it's
6 awkward to be an academic and take these jobs.

7 In 1997, I wrote a paper that talked about dual
8 enforcement and the discussion said, hey, you know, on
9 the other hand, you've got to pick. I said, well, okay,
10 I'll add a conclusion, I'll say if there had to be one
11 agency in antitrust, that it should be the Department of
12 Justice. Now, I wrote the thing at a time before, he
13 back peddles, damn electronic databases.

14 (Laughter.)

15 MR. KOVACIC: But at the time that I did hedge
16 in the paper and say there's some very interesting
17 things happening that are serving in many respects that
18 couldn't realize the basic game of the institutional
19 design. And if I had to back off or reassess my earlier
20 suggestion, I think the rationale for the
21 diversification has been realized more in practice than
22 modern nature.

1 as consumer protection. Securities and Exchange
2 Commission, I'm a securities lawyer, that's a completely
3 different analysis, way of doing things, different
4 marketplace, one that wouldn't -- even though it came
5 out of the Federal Trade Commission, it was initially
6 organized at the Federal Trade Commission, it would not
be one that should be consolidated as paras paras paras parsnot

1 government has a DNA, a basic DNA of how it was
2 conceived and put together, and the FTC came out of the
3 Bureau of Corporations, and you go through Marc's
4 history of it, and then it ran into World War I and then
5 it ran into the conservative '20s and then it ran into
6 the judicial problems -- the problems that President
7 Roosevelt had with the Supreme Court and the New Deal
8 and that's the way it was born, if you will, and that
9 makes it a confusing history.

10 The SEC came out of the crash of 1929, huge
11 problems in the security industry, something had to be
12 done, and a basic disclosure, if you will, with respect
13 to the '33 Act, an agency to assure proper disclosure
14 was established. And that was, it was born cleanly, if
15 you will. And that's what gives it the continuity. Its
16 mission was clear, it was a good mission and it didn't
17 overreach. If you talk to Louie Loss about 10(B)(5), he
18 drafted it in a couple of hours. Very simple. And lots
19 of judicial interpretations of it. But the mission has
20 been consistent from the start. The Federal Trade
21 Commission, much different DNA.

22 MR. GELLHORN: Marc?

23 MR. WINERMAN: Well, two thoughts, first of all,
24 it's much easier to measure the success of the SEC
25 because you're dealing with a more limited universe.

1 The Commission's universe, and particularly on the
2 consumer protection side, because that's where the
3 comparison is a broader universe and --

4 UNIDENTIFIED SPEAKER: Use the mic.

5 MR. WINERMAN: I'm sorry. Is a broader
6 universe, and in addition, much of the work that the FTC
7 does, for example, creating databases for state and
8 federal agencies to work together, is more or less
9 invisible and the state and federal regulators realize
10 it but the general populous wouldn't.

11 And I guess I would also point out that the SEC,
12 I believe it's Joel Salzman, who is the historian of the
13 SEC, points out that the first four Chairmen were Joe
14 Kennedy, James Landis, William Douglas and Jerome Frank,
15 and in the '40s, the Agency completely tanked when it
16 was relocated in Philadelphia, so they are not without
17 their own peaks and valleys.

18 MR. GELLHORN: Well, that leads to sort of do we
19 have explanations of the Commission's peaks and valleys?
17 ~~and~~ i own peaks and vall2nk,

out some of the things that he did, the broad mandate of

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1 that is, let's assume you're attending the 100th one ten
2 years from now, and I hope we all are here, what would
3 you expect different to be said at the 100th than at the
4 90th? I tried to stump the panel.

5 MR. COX: I would hope, following what Bill
6 said, I don't think there's any best practices, period.
7 I think what Jefferson said about we need a little
8 revolution every 30 years is right. That's basically
9 what I think you were saying, Bill. And if you don't
10 have a little revolution every 30 years, you're going to
11 have a big revolution. I would hope that things would
12 have changed by then. In the next ten years, I don't
13 know what it would be, but because of that change, the
14 Commission will be as energized as it is now.

15 MR. WINERMAN: I guess I would say that the
16 terms of the various competition debates won't change,
17 but although the terms won't change, I would hope that
18 the Commission continues to participate vigorously in
19 the debates and react to the debates and initiate parts
20 of the debate, and on the consumer protection side,
21 particularly the Commission stays highly adaptable to
22 technology, both in their use of the furtherance of the
23 Commission and in preventing the abuses of those
24 technologies, and again, the changes in front of us, but
25 hopefully the Commission will continue to look after

1 industry.

2 So, on that, I think it's just very important
3 that you have the variety and I think that's what
4 Congress had in mind. Every European country has this
5 kind of a jurisdiction, not the kind of litigation
6 things that we do.

7 On planning, one of the experiences that I had
8 trying to plan was that the lawyers are not planners.
9 They're not comfortable with doing that, they want to
10 adjudicate facts, and if you're going to get real
11 planning into this Commission, you've got to find a way
12 of loosening up the Commissioners.

13 Now, Chris White took our planning thing and
14 turned it into the absolute first hand, which was an
15 information system. We didn't even have that at that
16 time. So, we did make some progress. But I just think
17 it's terribly important and I'm sorry to intervene, but
18 I needed to say something.

19 (Applause.)

20 MR. GELLHORN: I'm sure I speak for every one
21 when I say thank you very much. And to the panel, I
22 don't think we have to wait ten years to make a
23 judgment. Thank you very much.

24 MS. BAILEY: Thank you. We'll take a break
25 until 11:15 and then we'll hear from our next panel.

1

(Applause.)

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