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1 1978 Children's Advertising Rule, and the 2003 Do Not
2 Call Registry. I'm delighted to introduce the stars of
3 our panel.

4 I'll start with our writers. Teresa Moran
5 Schwartz is a leading scholar at George Washington
6 University's Law School. She served the Bureau with
7 distinction as its Deputy Director and also served as an

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1 Senior Commissioner. Commissioner Swindle is actually
2 the one person on this panel who actually voted on one
3 of the rules that we're going to discuss, and we look
4 forward to hearing his unique perspective on the Do Not
5 Call Registry and his insights on the other issues
6 raised by these rule-makings.

7 And I guess if I knew baseball better, I would
8 know what hitter it is, the wrap-up hitter or the
9 something like that. Clean-up hitter, thank you. Jodie
10 Bernstein, who served twice as Bureau Director in BCP,
11 and I have to add as a mentor to countless FTC staff
12 members. For her extraordinary contributions to the
13 Agency, she received the Miles Kirkpatrick Award last
14 year and Jodie is currently of counsel at Bryan Cave.

15 And with that, I will turn this over to our
16 first presenter, Teresa.

17 MS. SCHWARTZ: First, I'm going to raise the
18 podium. Jodie got this podium so that it would be
19 lowered, but it also goes up.

20 My role today in ten minutes is to describe
21 these three bold rule-makings and their legal legacies.
22 So, to get started first with the Cigarette Rule. When
23 it came to the Cigarette Rule in 1964, the FTC was not
24 the little old lady on Pennsylvania Avenue described in
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1 it acted with incredible speed, and it used rule-making,
2 which it had never used before under the FTC Act, and
3 which many, including many scholars, thought it didn't
4 have, power it did not have.

5 From Commissioner Phil Elman's oral history, we
6 know it all began on a Saturday in January 1964 when the
7 Surgeon General Committee on Smoking and Health issued
8 its landmark report on the health hazards of cigarette
9 smoking. Three FTC Commissioners were sitting waiting

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1 and labels contain a warning that "cigarette smoking is
2 dangerous to health and may cause death from cancer and
3 other diseases."

4 The statement of basis and purpose, also crafted
5 by Richard Posner, was an impressive brief from the
6 rule, crafted to withstand any legal challenge. It
7 argued that massive advertising portraying smoking as
8 pleasurable without warning of its risks was deceptive
9 under the traditional principles, unfair under a new
10 formulation of the unfairness doctrine, and both
11 deceptive and unfair in its exploitation of children,
12 long recognized as deserving special protection under
13 the FTC Act.

14 The cigarette industry appealed the rule, not to
15 the courts, but to Congress, which responded with
16 legislation preempting the rule.

17 A lasting legacy of this rule-making was its
18 framework of three factors to be taken into account in
19 determining whether an act or practice was unfair. They
20 were whether the practice offends public policy
21 established by statutes, the common law or otherwise,
22 whether it is immoral, unethical, oppressive or
23 unscrupulous, whether it causes substantial injury to
24 consumers or competition.

25 Now, the Commission did not actually apply these

1 factors to the rule-making at hand in any systematic
2 way. Its unfairness analysis for the Cigarette Rule
3 focused instead on the tremendous market power that the
4 cigarette industry had achieved over consumers by its
5 decades of massive advertising that camouflage the risks
6 of the cigarette smoking and created barriers to
7 information about those risks.

8 It was this market power, the Commission said,
9 that imposed a special duty of fair dealing on this
10 industry to inform consumers of their product's hazards.

11 The three-factor approach to unfairness was
12 given new life in 1972 when the Supreme Court cited it,
13 approving in the Esperion Hutchinson case. Within a few
14 years, the Commission was using the Cigarette Rule and
15 its unfairness test to support far-reaching
16 rule-makings.

17 Most controversial among them was the
18 Commission's 1978 proposal to regulate television
19 advertising directed to children. The decision to
20 proceed with this rule-making was based on a
21 comprehensive staff report on Children's Advertising
22 that concluded, among other things, that any advertising
23 to children too young to understand its purpose was
24 deceptive and unfair, as was the advertising of sugared
25 products to children incapable of evaluating the health

1 risks of such products.

2 The notice of proposed rule-making invited
3 comment on three remedies, a ban an all TV ads at times
4 when a substantial percentage of the audience would be
5 children too young to understand the purpose of
6 advertising, a ban on TV ads of highly sugared products
7 when a substantial percentage of the audience would be
8 children ages eight to 12, and a requirement that ads
9 for other sugar products be balanced with health and
10 nutrition information.

11 Even for the activist Commission of 1978, the
12 proposal was far-reaching, and, of course, raised
13 serious First Amendment concerns. Interestingly, the
14 Commission in 1964 had cautioned against using the
15 Cigarette Rule as precedent for regulating the
16 advertising of products ess6.39699 45

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1 injury was to the parent/child relationship. It was
2 unfair, the staff argued, to put parents to a choice
3 between buying products advertised to their children and
4 enduring the conflict that goes with refusing to buy the
5 products. Some of us can relate to this.

6 (Laughter.)

7 MS. MORAN SCHWARTZ: However, with this
8 argument, the staff really rendered almost meaningless
9 the requirement for substantial injury. The other two
10 criteria were similarly easily met. The advertising
11 practices were offensive to the public policies of
12 protecting children, and the practices were oppressive
13 because of the highly disparate power exercised by
14 advertisers over children through their use of the
15 powerful medium of television.

16 The critics, and there were many, focused on the
17 notion that it was government's role to protect parents
18 from having to say no to their nagging children. In a
19 scathing editorial, the Washington Post said it would
20 turn the FTC into a national nanny, a moniker
21 unfortunately which stuck.

22 The Commission terminated the rule-making in
23 1981. After three years, the rule-making record had
24 failed to show that advertising actually affected
25 children's attitudes towards foods and which foods

1 contributed to tooth decay. Further, there were
2 insurmountable difficulties in crafting advertising
3 bans that would not be either under or over-inclusive,
4 since children make up a small percentage of any TV
5 audience. While not framed as a First Amendment analysis,
6 the staff's assessment clearly reflected constitutional
7 concerns.

8 There was no rule, but the rule-making had a
9 legal impact. It spawned a serious Commission effort to
10 reformulate the Unfairness Doctrine. In 1980, the
11 Commission articulated a much more demanding test for
12 unfairness, making consumer injury the primary factor
13 and requiring the injury to be substantial, not
14 outweighed by countervailing benefits to consumers or
15 competition and not reasonably avoidable by consumers
16 themselves. And then in 1994, Congress basically
17 enacted this approach to unfairness.

18 Finally, with minutes to spare, in turning to
19 the rule creating the National Do Not Call Registry, we
20 move forward almost two decades and turn from the FTC
21 Act to the Telemarketing Act that gave the Commission
22 authority to regulate abusive telemarketing practices,
23 including making unsolicited telephone calls that
24 reasonable consumers would consider abusive of their
25 right to privacy.

1 In the original Telemarketing Rule, the
2 Commission had prohibited telemarketers from calling
3 persons who had previously asked them not to call. This
4 was the so-called company-specific approach to Do Not
5 Call. In the 2003 amended Telemarketing Rule, the FTC
6 took Do Not Call to a whole new level. In creating the
7 national registry, it allowed consumers, in one easy
8 step by telephone or email, to register their choice not
9 to receive commercial telemarketing calls. For
10 consumers nationwide who had been experiencing over 16
11 billion telephone calls a year, the registry was wildly
12 popular. In the first 24 hours of operation, 10 million
13 telephone numbers were registered and the number today
14 exceeds 64 million.

15 Congress also liked this rule, and quickly
16 enacted laws to support its implementation and ratify
17 the fact that the Commission had authority to establish
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1 Appeals strongly endorsed the Commission's careful
2 approach. In a ruling with significance beyond its
3 immediate impact on the registry, it reaffirmed the
4 importance of protecting privacy rights and gave the
5 Commission helpful First Amendment precedent in this
6 delicate area of law. If the ruling stands, and it
7 should, it could be one of the most important and
8 lasting legacies of the rule.

9 My time is up.

10 (Applause.)

11 MR. PEELER: Thank you very much, Teresa, and
12 our next speaker is Bill MacLeod, and I would note that
13 we've asked our two law professors to condense their
14 graduate seminar course to 10 minutes. So, we

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1 law class. And as you look at them and look at me, I
2 will tell you that even back then they looked younger
3 than I do, so nothing has changed.

4 But let me tell you about my arrival at the FTC
5 back in 1982. It was actually Tim who lured me out of
6 my antitrust practice in Chicago to come to become an
7 attorney advisor for Jim Miller, the Chairman, and I
8 still remember very vividly my first senior staff
9 meeting in the Chairman's Office when I was introduced
10 to Tim and Tom Campbell and Carol Crawford and the rest
11 of Jim's senior staff and they all told me that our job
12 here is to stop the Star Trek law enforcement. We are
13 no longer going to go boldly forth where no man has ever
14 gone before, and I was wondering what are they talking
15 about, because I had been practicing antitrust law and I
16 had found it a pretty good way of making a living.

17 I was defending companies who had to worry about
18 their distributional restraints that were still being
19 governed by a very Draconian rule that had not yet
20 changed from the GTE Sylvania precedent, but consumer
21 protection obviously is where we were heading, and as a
22 matter of fact, I got a first sense of what the senior
23 staff meant when I did my courtesy calls to the
24 Commissioners.

25 I went up to Mike Pertschuk's office, and those

1 of you who will recall, remember that Mike over the door
2 of his inner office had a sign that said, Washington
3 headquarters for jokes, tricks and fireworks. All who
4 enter here, you felt like you were entering a place
5 where we were going to have fun and I began to realize
6 very quickly that what we were going to be facing in the
7 1980s was the battle between the artist and the
8 engineers, the left brain, the right brain, the
9 economists and the activists, and what we had to do in
10 the Miller team was to figure out how to articulate that
11 in an agenda that would hold up in court.

12 Well, let me start with the Cigarette Rule. My
13 assignment today is to talk about the effects of these
14 rules, and Teresa enumerated very well the statement of
15 basis and purpose, the rule's unfairness articulation
16 that we got. One thing that Teresa did not mention was
17 the introduction that the FTC gave to its three elements
18 in the rule as well as the introduction of the Supreme
19 Court cited in the S&H case, and that was no enumeration
20 of examples can define the outer limits of the
21 Commission's authority to prescribe unfair acts and
22 practices. When the Commission said that, I can't
23 imagine they really believed it, but when the Supreme
24 Court repeated that, once again, in a competition case,
25 S&H was not the affirmance of a consumer protection

1 rule, it was a competition case. It was a competition
2 case at the Supreme Court that told the FTC that it did
3 not have to observe the outer limits of its rules.

4 Well, that led to two things. Number one, one
5 of the FTC's most lasting gifts to the Food & Drug
6 Administration, and that was the legislation that
7 followed the Cigarette Rule. I don't know if I would

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1 closing of the rule and see in a very short period of
2 time the maturation of the FTC and the analysis the FTC
3 started to deliver to a number of its rule-making
4 proceedings. Kid-Vid followed what was in both
5 Chairman Pertschuk's description and in Chairman Muris'
6 description a frenzy here at the FTC.

7 After the S&H case, using the unfairness
8 criteria that were not really criteria, the Commission
9 had launched about two dozen rules, most of which were
10 still open and pending during the late 1970s, and it was
11 not really until Kid-Vid came along that the world took
12 notice. The funeral industry took notice, the
13 automobile dealer industry took notice, they were up on
14 the Hill already lobbying to get the FTC constrained,
15 but it was really Kid-Vid, as Teresa mentioned, that
16 got the attention of the country and really galvanized
17 the forces against the Commission.

18 What did the FTC do? They hired this appellate
19 attorney from, I believe the NLRB was her last
20 assignment before the FTC, and Judy actually just told
21 me this morning that her job when she came in to
22 spearhead the staff effort to review the Kid-Vid
23 Rule-making, was to report back to the Commission not
24 how can we kill this Rule, not how can we make this rule
25 that is already obviously politically incorrect

1 something that will go away forever, her job was to
2 determine whether the Rule would survive an appeal,
3 because that was her function at the Commission. And
4 Judy said she went through the record and she came back
5 and she reported, we just don't have the evidence, this
6 is not going to make it.

7 What kind of appeal might it have been? Well,
8 one of the interesting things that I discovered as I was

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1 free enterprise economy, you will see a couple of
2 citations. One is to an FTC antitrust case, FTC versus
3 Procter & Gamble, one of the most criticized and
4 dismissed cases, these days in antitrust law. That was
5 the case where the FTC decided that the Clorox Company
6 could not be acquired by the Procter & Gamble Company,
7 one of the reasons being that there would be
8 efficiencies in advertising that would simply make
9 Procter & Gamble an unfair competitor in the
10 marketplace.

11 Well, it was not that decision that the Supreme
12 Court cited, it was the concurrence of Justice Harlan,
13 and Justice Harlan said, I frankly don't buy the view
14 that the FTC, and I don't think this court should buy
15 the view, that the FTC propounded in its rationale to
16 block the merger, I think the FTC should not take it
17 upon itself to determine when advertising is part of a
18 social illness, but should recognize advertising as an
19 important measure of the free market economy and how
20 that economy allocates its resources.

21 The second FTC cite was a cite to another FTC
22 rule-making. It was the original FTC Prescription Drug
23 Rule-making, in which the FTC, out of its Bureau of
24 Consumer Protection, was actually practicing competition
25 policy. The FTC in a number of its early rules was

1 promulgating rules not to mandate disclosures or not to
2 reform advertising in some fashion, it was to tell
3 industries that they had to stop restricting advertising
4 amongst themselves, and the Supreme Court cited the
5 FTC's Drug Rule-making for the proposition that it could
6 actually lower drug prices.

7 This blending of economics and law coming from
8 competition policy, you can see in the final report
9 dismissing the Kid-Vid Rule-making and I think you can
10 see throughout the 1980s when we were going through
11 rule-making after rule-making with Ph.D. economists
12 starting with Howard Beales, Fred McChesney in the early
13 '80s, Robert Pitofsky in the late '80s, applying the
14 kind of analysis to rule-making proposal after proposal
15 and saying, this simply does not pass the test of the
16 market analysis that we have to use.

17 One word on Do Not Call. Where does Do Not Call
18 fall in this continuum? I will put to you that there is
19 one feature of Do Not Call that makes it fundamentally
20 different and also fundamentally safer than any rule
21 probably the FTC has ever had to promulgate, and that is
22 the consumer choice that all the rules were analyzed
23 during the '80s and which caused some to rise and some
24 to fall, is the integral part of Do Not Call. It is we
25 consumers who decide whether or not the rule will apply

1 to us and that is going to make it a very hard rule to
2 overcome. I think economics has finally made it an
3 integral part to the FTC rule-makings.

4 With that, I will turn it over to Sid.

5 (Applause.)

6 MR. MILKIS: Good morning, everybody. It's a
7 real honor to be here as an outsider, a political
8 scientist. I feel a little bit like a token, but not
9 too much that way. I guess I should start in the spirit
10 of Judy Bailey's disclaimer this morning and I should
11 say that my views don't necessarily represent those of
12 the University of Virginia.

13 I think the 90th Anniversary celebration of the
14 Federal Trade Commission marks a good time to evaluate
15 the promise and the performance of the Agency, and it
16 also provides an opportunity to examine the critical but
17 uneasy relationship between the bureaucracy and American
18 political culture. As we are heard this morning, the
19 FTC was born of the Progressive Era reform period rather
20 that only began the unending task of reconciling the
21 expansion of national administrative power on the one
22 hand and the anti-bureaucratic tradition of America on
23 the other hand.

24 In one sense, these three initiatives discussed
25 on the panel, the Cigarette Rule, the Children's

1 pursuing consumer protection policy.

2 In all three of the policies in question, the
3 Commission played a leading and independent role in
4 advancing consumer protection policy, sometimes, as in
5 the case of the Telemarketing Rule, at Congress' urging.
6 Although remember, Congress authorized the Federal
7 Communications Commission, not the Federal Trade
8 Commission, to explore the possibility of a Do Not Call
9 Registry.

10 Other times, as in the case of the Cigarette
11 Labeling Rule, without consulting legislatures at all,
12 and for that, the FTC was flogged pretty dramatically by
13 the Congress.

14 In the case of Children's Advertising, the FTC
15 was prompted to take some initiative against the
16 marketing of unhealthy foods to young children, but it
17 went much further than key members of Congress wanted.
18 A situation that was made more tense by changes in the
19 members of the Commission's Oversight Committee during
20 the latter part of the 1970s.

21 Now, a common second narrative about the FTC is
22 that it goes through pendulum swings as it comes under
23 the influence of different presidential appointees. The
24 Commission, this narrative presumes, became too
25 aggressive during the 1970s, did far too little during

1 efforts to roll back social regulation. Rather, the
2 Telemarketing Rule represents the most recent and
3 impressive effort to develop an alternative form of
4 consumer protection that was put in place during the
5 Miller years.

6 Viewing the right to privacy as a conservative
7 principle that complemented, if it didn't conform to his
8 view of the Commission, as an agent of market
9 competition and consumer sovereignty, Tim Muris, a
10 Reagan Republican, showed that conservative activism is
11 not an oxymoron. That conservatism and activism are not
12 competing principles.

13 Now, the two approaches that have shaped
14 consumer protection since the mid-1960s, one dedicated
15 to corporate reform, and this view informed the
16 Cigarette Labeling Rule and Children's Advertising. The
17 other committed to competition and choice, this informed
18 the Do Not Call Registry initiative. They represent the
19 competing frameworks of consumer protection policy that
20 shape and oftentimes polarize contemporary regulatory
21 politics.

22 As the Joe Camel controversy revealed, the FTC
23 is still occasionally buffeted by the conflict by
24 consumer activists and champions of the market. But
25 most recent Commissioners and a substantial part of the

1 professional staff appear to take pride in the FTC's
2 ability to remain free of the raw and disruptive
3 ideological struggles that roil many executive
4 departments and regulatory commissions. They relish
5 working at an island of sanity, as one staffer put it to
6 me, in a sea where many regulators prodded by Congress,
7 the White House, or powerful interest groups have
8 pursued ideological agendas that seek to accomplish,
9 through rule-making and enforcement actions, or
10 inaction, policies that never could have been
11 accomplished through legislation.

12 The FTC's privacy program may be the best
13 example of the bipartisan policy deliberation that has
14 made the Commission a rare, if unique, beacon of
15 regulatory sanity. The Democratically-led Pitofsky
16 Commission put the privacy program on the map, and it
17 matured during the Republican-led Muris Commission. It
18 represents a bold but prudent restriction on business
19 practices, practices like identity theft and irritating
20 telemarketing calls that dog many Americans' days and
21 haunt many Americans' dreams at night.

22 Like the fraud program, which the Miller
23 Commission put on the map and which reached maturity
24 under the Pitofsky Commission, the privacy program
25 reveals how the FTC can be an aggressive servant of the

public interest without substituting its will for the

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1 (Applause.)

2 MR. PEELER: Our next speaker is Commissioner
3 Swindle.

4 COMMISSIONER SWINDLE: Good morning. I don't
5 think I could add to anything that's been said. In
6 fact, if I were to write a paper, it would probably be a

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interesting and informative -- I would hope that they

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1 and work and interact with one another. An absurd idea,
2 the arrogance of it, in my personal opinion, that an
3 organization such as this would think it was in a
4 position to inject itself between a family, or members
5 of a family, namely the parents and the children, is a
6 pretty presumptuous thing. While they might have
7 thought there's a hell of a need here because we've got
8 a problem, and I personally happen to agree, we probably
9 do have a problem, but it gets down to how you do
10 things.

11 And the essence or the best example I've seen of
12 an agency such as this getting involved in something
13 that could be controversial and doing it the right way
14 was the Telemarketing Sales Rule or the Do Not Call
15 Registry. Just an incredible example of doing it the
16 right way, but you know, you learn to do it the right
17 way by experi037

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1 And, as you all know far better than I, this has
2 all been challenged in the courts, questioning the
3 authority of the FTC to do these things. And, you know,
4 the perception of the authority vary.

5 I remember listening to George Carlin one time,
6 you know, the stand-up comedian. He got up and he was
7 talking about authority and power and he said, you know,
8 I've got about as much power as the Pope, my only
9 problem is I don't have nearly as many people that
10 believe that I have the authority of the Pope. So,
11 you've got to have people who believe you have
12 authority, then you've got to move in with confidence
13 and you've got to do it the right way. You can be right
14 and do it the wrong way and lose.

15 The Muris Commission, my dear friend Tim Muris,
16 with this marvelous success and the praise that's been
17 heaped upon him, he's got cartoons written about him and
18 all these neat things, you know, caricatures and
19 articles and everything and praised him and Tim is a
20 dear friend. But it's the same Tim Muris who we tried
21 to do something with the Department of Justice on the
22 antitrust or the competition allocation of who deals
23 with whose cases, that we didn't do our spade work, and
24 we sort of forgot that there's another party up on the
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1 our hat handed to us. It's how you do things. And I
2 think that's the essence of what we're trying to do
3 here.

4 You know, today there's an awareness of the
5 increasing importance of the countervailing forces in
6 our society. That's the thing that keeps us in balance
7 and keeps us in the middle where we are the greatest.
8 We're not the greatest over here on the left wing or the
9 right wing, we're great in the middle.

10 We've got a more open process and technology has
11 helped immensely here. We've gone through these years
12 with these rules. We've been able to learn more as
13 people and we've learned how to push information out to
14 people and that's part of the marshalling of your
15 forces. We've come to recognize the ultimate, and of
16 course, the Cigarette Rule was the way I look at it, and
17 of course I don't look at it from a legal standpoint,
18 because I don't have that background, but I see it as
19 knowing who the forces at play are in the game. And
20 there we took on a powerful force. But today, there is
21 another special interest that is recognized as a
22 powerful force more so than it ever has been in our
23 history, and that's the consumer or the citizen, better
24 said. That's the ultimate special interest.

25 We've come up with a realism that governance has

1 to be realistic, it has to be practical, and that we
2 also learned that government does have a role to play in
3 all this. It can't be an excessive role, but sometimes
4 when industry doesn't do what it ought to do, not what
5 it said it was going to do, but what it ought to do, do
6 the right thing, we conservatives worry about too much
7 government, too much regulation, but I have come to the
8 conclusion, maybe it's because I've been working with

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1 amazed to see how much Congressional pressure and
2 successful influence was imposed on the Agency. And
3 I've had the pleasure of working in the Department of
4 Commerce, the Department of Agriculture and the Defense
5 Department, and I am just absolutely thrilled first, but
6 amazed at how autonomous we really are.

7 There will be little runs at us from time to
8 time by members of Congress, but, you know, if you do
9 good work and you don't step out of bounds and go too
10 far, you develop a credibility and when you've got
11 credibility, it's awful tough for a person in Congress
12 to come and try to get you to do the wrong thing for
13 what he considers the right reasons.

14 The Agency and the people who have been here
15 through all these years are to be commended for the
16 stellar efforts that they have put forth -- and there's
17 Carol Crawford in the back. Hi, Carol0em5crD B3person in Congress t
18 much in the '70s and not enough in the '80s, and I'm
19 reminded -- I'll close with hi6s. Of all ngresso
20 quote, Ho Chi Min, with my background.
21 Laughter.)

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1 wrote something, I've forgotten what it was, some garish
2 title to it, but it was a piece of prose that said,
3 without the cold and desolation of winter, there could
4 not be the warmth and splendor of spring. Time has
5 tempered and hardened me and turned my nerves into
6 steel. That made him the great leader that he was.

7 These swings back and forth that Sid referred to
8 help us find the middle, and in the middle, if we do
9 things logically, rationally, we will not be subjected
10 to a lot of criticism, and more importantly, we will be
11 able to do the work we're supposed to do, not that which
12 some politician might want us to do. And I look forward
13 to the questions and answers.

14 (Applause.)

15 MR. PEELER: Thank you, Commissioner Swindle,
16 and last but certainly not least, Jodie Bernstein.

17 MS. BERNSTEIN: Thank you, Mr. Lee, thank you
18 panelists and thank you for all the preparers of the
19 papers, which were just absolutely outstanding. I read
20 every one of them, including yours, professor, and
21 learned a great deal. And, of course, a wonderful
22 occasion of the 90th birthday party of the Federal Trade
23 Commission, and I wanted to say, just by way of
24 disclaimer, that neither Orson nor I, who were selected,
25 interestingly enough, to be the commenters of the 90th

1 birthday, were here 90 years ago.

2 For me it sometimes seems like it, because, of
3 course, my long history, which now goes back almost 35
4 years, back to that period just following the ABA Report
5 and the Nader Report, which were so wonderfully
6 described this morning, that I really thought, as I was
7 reading the papers and thinking about what I wanted to
8 say, both about the rule-making authorities that have
9 been raised here this morning, and what I could
10 contribute really to this very learned discussion.

11 And what I concluded was, going back again to
12 what we came to call, as we were working there together,
13 the Lean, Mean Pitofsky Machine. That's what we were,
14 because we were facing, as lots of you well know --
15 Commissioner Jones was there with us -- we were facing
16 national advertising that was totally unregulated and
17 had many problems connected with it, and importantly
18 fraud. Fraud, fraud, fraud. And how many of us were
19 there? There were like, you know, it was a dollar and a
20 quarter's worth of lawyers that we had, and very, very
21 few resources to address either of these issues.

22 That's what we were trying to deal with back
23 then. So, that's my background in terms of where I came
24 to this discussion. And part of what I learned from
25 Professor Pitofsky, and I learned it again when I was

1 back with him again, was whatever you're going to say,
2 be provocative. And I've done that over the years.

3 (Laughter.)

4 MS. BERNSTEIN: I intend to do it today. So,
5 first, I'm going to address my question about this
6 program, to Professor Lee Peeler. I'm holding him
7 responsible for this, and here's what the question is,
8 Lee: Why these three rules? Why were these three rules
9 selected? Think about it. Cigarette Rule, which Lee
10 Peeler characterizes as a qualified success; the Kid's
11 Rule, that's a failure; the DNC, the Do Not Call Rule,
12 an unqualified success.

13 So, from this, are we supposed to come to the
14 conclusion by this biased -- I would say biased
15 selection -- that my Commission, the Lean, Mean
16 Pitofsky-led Bureau was totally misguided in the '70s,
17 leading up to this debacle with the Kid's Rule, right?
18 And so, we should never again take on serious health
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1 MS. BERNSTEIN: So, let me tell you what it was,
2 and I'm not going to talk about it in detail, because
3 many of you will have heard of it, possibly many of you
4 have not heard of it, and that was to abolish the
5 so-called Holder in Due Course Doctrine, which had been
6 in commercial law from -- I guess the British gave it to
7 us and we kept it all those years.

8 But we did not try to abolish Section 3 of the
9 Uniform Commercial Code. We did not even try to attack
10 the doctrine, per se. What we did was to make it
11 ransabDC Brard of it, possibly many of you

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1 (Laughter.)

2 MS. BERNSTEIN: -- when I reminded him of it
3 occasionally. He came over and said to Lou Engman, you
4 must not promulgate this rule. You must not promulgate
5 it, it will bring down the credit market as we know it.
6 Well, Lou Engman signed it and it went into effect. It
7 had a tremendous effect, a tremendous beneficial effect
8 of cutting through fraud throughout the country.

9 So, why didn't you pick that one? I don't know.

10 (Laughter.)

11 MS. BERNSTEIN: Similarly, I will make one more
12 point, because I know I'm running out of time. Bill
13 MacLeod's excellent and useful chart that he included
14 identified several '70s vintage rules which were adopted
15 and implemented, and also addressed consumer issues very
16 equally effective. I'll only mention two, the Octane
17 Rule, which was a disclosure rule, and my all-time
18 favorite, the Care Labeling Rule, which generations of
19 Americans applaud to this day.

20 So, each one of them achieved very high levels
21 of compliance, saving resources. Now, I ask you, how
22 would you compare that to the problems that the
23 Commission and Americans faced in trying to deal with
24 those one at a time, with the very short resource
25 assessments that we had at the time? What I've tried to

1 do, briefly, is for the benefit of those who were not
2 here in the early '70s, is rebalance, perhaps, the
3 contributions of the Commission during the '70s that
4 were not all focused on Kid-Vid, and were major, I
5 believe, contributions to consumer welfare in the United
6 States. Thank you.

7 (Applause.)

8 MR. PEELER: Thank you for those excellent
9 remarks. We will definitely change the name of the
10 panel to four rules. And I would say that all of these
11 papers have been posted on our website. The people who
12 have read them have all said they are excellent papers.
13 If you're practicing consumer protection law or working
14 in the Bureau of Consumer Protection, you really should
15 read these papers.

16 So, with the time remaining today, I think I
17 would like to ask the panel to comment on sort of the
18 findings of the research that was done. There is a
19 tendency, I think, to look at these three rules or these
20 four rules as separate happenings that represent sort of
21 a discontinuous policy development at the Agency. The
22 research really shows that there is a continuous policy
23 development at the Agency, and probably the best example
24 is at the time the Kid-Vid Rule is finally closed up and
25 the boxes are being packed, the Commission's fraud

1 program, which leads to the development of the TSR,
2 which leads to the development of the Do Not Call Rule,
3 is being launched.

4 So, from what you've learned, what are the one
5 or two things that you would tell a new attorney who is
6 coming to the FTC or a new Commissioner who is at the
7 FTC they should draw from this experience over the last
8 40 years? Teresa, do you want to start?

9 MS. SCHWARTZ: Well, knowing your history and
10 learning the lessons, I suppose, from the past is a good
11 place to start. And many people have told me when they
12 first come to the Commission, what they do hear about,
13 but kind of vaguely, are some of these rules we've been
14 talking about.

15 And I suppose one lesson would be to go back and
16 take a look at those, because I think the Commission has
17 learned from these experiences, sometimes, in fact, in
18 fairly dramatic form, the Cigarette Rule and the
19 Advertising Rule, of course, were rules, and you
20 couldn't enjoy the slow evolution that you might through
21 case law development. They were big and visible, with a
22 very broad impact. So, doctrines were put to the test
23 in a very visible way, but learn your history. That's
24 one lesson.

25 MR. PEELER: Bill?

1 MR. MacLEOD: Well, I think the first lesson is
2 when Lee tells you what he wants done, tell Lee he's
3 right, and the research will confirm that he's right as
4 soon as you come back with it.

5 I think the lesson from these rules, and the
6 lesson for any Federal Trade Commission aspiring
7 employee is that limits what? As I said at the outset,
8 the question facing us in the early 1980s was limits
9 versus no limits. What did these rules give us? If we
10 had not had the Cigarette Rule, would we have had
11 Kid-Vid? If we had not had Kid-Vid, would we have an
12 unfairness policy statement. If we did not have an
13 unfairness policy statement, would we have a deception
14 statement?

15 Remember what Judy Wilkenfeld said was her
16 assignment when she had to analyze the Children's
17 Rule-making record, will it hold up on appeal? That is
18 where the limits will cut at the Federal Trade
19 Commission, and if you are not ready at the beginning of
20 a rule-making or the beginning of an investigation of a
21 case, to confront those limits, then sooner or later,
22 you may have a very unpleasant experience.

23 MR. PEELER: Sid?

24 MR. MILKIS: You want me to give advice to
25 attorneys? That's a delicious opportunity. I decided

1 not to go to law school after my first prelaw meeting.
2 I would echo a bit what Teresa says about history, and
3 I particularly like the primordial history that we heard
4 about this morning. You know, Bill was putting down
5 those statutes, the horseman, you know, the guy holding
6 the horse back. I love those statutes.

7 You know, when you look at them, the imagery is
8 kind of like the Soviet Union. You know, you think
9 of -- it invokes some kind of Soviet control and these
10 pictures you're getting and the red flag of the market.
11 But what's fascinating is the Federal Trade Commission
12 is given this power to regulate the market in the United
13 States and to do so in a way that avoids socialism.
14 That was a big issue during the Progressive Era.
15 Remember, McKinley was shot by an anarchist, and I think
16 you recognize that you are at a Commission that has a
17 sweeping responsibility to protect against unfair and
18 deceptive business practices.

19 But you must do it in such a way that you
20 respect the deep-rooted commitment to privacy and
21 individual responsibility in the United States. That is
22 a hell of a balance to strike, but I think every
23 attorney who walks into this building has to consider
24 that kind of a mandate.

25 MR. PEELER: Jodie?

1 life and I swear to God it just really has made it
2 interesting, and there's been a couple of setbacks along
3 the way, but taking on sacred cows, that's my forte and
4 I totally believe we should do that. But wisdom tells
5 you to pick and choose carefully, because you've only
6 got so much in the way of resources to do it and you
7 can only survive the bullet a couple of times.

8 Know the legal basis for the actions that you're
9 about to try to take, and then lastly, I think if I had
10 to offer one thought to what this Agency has managed to
11 accomplish with the bumps and obstacles in the road, it
12 would lead us to the day to think in terms of empowering
13 the citizens of this country.

14 The Do Not Call Registry was nothing more than
15 empowering consumers to make a choice. And they loved
16 it. And they made the choice. The consumers will make
17 pretty darn good choices if given adequate information,
18 and this whole process has been to get information out.
19 The harmful things that we can eat, the harmful things
20 we can do, the lousy cars, the lousy furniture, as Jodie
21 mentioned, if consumers know this, they'll make a
22 choice, if they're given an option to make a choice, and
23 I think empowering consumers is all about giving
24 consumers a choice.

25 However, I will say that I want it to be real to

1 get back to what Sid just referred to as the Soviet
2 Union, I'm not all that charmed with the Soviet Union.
3 I've been there, I thought it sucked and it did. So, we
4 want to give power to consumers that's real, not the
5 promises of the Soviet Union to its people to give them
6 people power, because that didn't exist.

7 MR. PEELER: Thank you. And I think we have
8 about five minutes left, so I was going to see if there
9 were any questions from the audience for the panel.
10 Otherwise, I'm going to keep going.

11 (No response.)

12 MR. PEELER: Okay, I'm going to go back for
13 another round. Starting with Jodie and Orson. Jodie,
14 when you were preparing for this, Orson said that when
15 you and he were both here, you were sort of the Annie
16 Oakley and he was sort of the John Wayne --

17 (Laughter.)

18 MR. PEELER: -- of enforcement, and I'm
19 wondering if you would both -- and I think Orson hinted
20 at it in his remarks, but the relationship between the
21 FTC's ongoing day-to-day enforcement program and major
22 initiatives like this that seem to take up a lot of the
23 history books, but the ongoing day-to-day enforcement
24 takes up most of the Bureau of Consumer Protection's
25 time. Your thoughts on the relationship.

1 MS. BERNSTEIN: The relationship between Annie
2 Oakley and John Wayne?

3 COMMISSIONER SWINDLE: I want to hear that one.

4 MS. BERNSTEIN: I think I could shoot you dead,
5 if I had to. If I had to.

6 The relationship between law enforcement and --

7 MR. PEELER: And the rules.

8 MS. BERNSTEIN: Oh, and the rules. And the
9 rules.

10 MR. PEELER: I'm not just trying to get back for
11 the holder.

12 MS. BERNSTEIN: I think you just loaded this
13 question for me.

14 Well, I think my view would be, going back to
15 when I was actually the Bureau Director, was that if
16 there is any sort of sense of being able to use all of
17 the authorities, the rule-making authorities, the law
18 enforcement authorities, and any of the others, such as
19 the consumer education that has been developed as one of
20 the ways in which to inform consumers that it is neither
21 of those two, I think I felt that we were very fortunate
22 to have that number of options available to us, and the
23 Commission still has that and uses it very effectively.
24 So, it's something of a mix, because the Commission
25 never has excessive resources, still doesn't, given this

1 huge broad mandate that it has over the entire economy.

2 So, I think it's kind of a mixture and the use
3 of rule-making at least in those early days, it seemed
4 to me, and it seemed to us then, was one of the most
5 effective ways of dealing with these broad, very broad
6 issues. But that was at a time when other techniques of
7 law enforcement had not yet been developed, not only
8 Section 13B, but joining cases together, the sweeps and
9 so forth.

10 So, that's my view of it. It's still a mixture
11 and I think it depends on what particular issues are
12 being faced at a particular time.

13 MR. PEELER: Commissioner Swindle?

14 COMMISSIONER SWINDLE: Jodie probably used
15 resources as well as anybody I've ever seen, given the
16 task that we've had before us, we still have them. And
17 I thought when you look at all of the things that the
18 FTC could do to all of the people who are doing things
19 they shouldn't do, there's no way. So, you can't pursue
20 each one of them, and you have to really invest in
21 educating people. And I think at least from my
22 experience since I've been here, and not knowing a hell
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1 be commended for what you have done.

2 MS. BERNSTEIN: Lee, could I add one thing?
3 Bill Kovacic mentioned this morning something that I
4 thought was very important, and that was transparency in
5 the Agency. And I think both Chairman Pitofsky and
6 Chairman Muris both focused on that.

7 I can think of very few things that are more
8 important to the credibility of a government agency than
9 its willingness to make its thoughts and decisions and
10 so forth as public as is possible. I know
11 confidentiality, of course, is an important issue, but
12 it really does enhance the credibility of government
13 generally and of this Agency.

14 MR. PEELER: And speaking of Chairman Pitofsky,
15 I know he would be disappointed to know that there are
16 three clocks in this room, and I think they all show
17 different times, but I believe that we have two minutes
18 left, and on the point that Jodie raised on
19 transparency, Teresa Schwartz's papertof7Is iabut /ow
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1 foundation for the Rule. And in the current practice,
2 especially under Jodie Bernstein, the use of workshops,
3 public forums, getting the industry in, getting the
4 experts in, and having a roundtable discussion with
5 people who really thrash out the problems, starts you
6 off with a foundation of understanding, I think is very,
7 very helpful then in the crafting of the proposed rule
8 and then the ruling in itself. And that was missing
9 from Kid-Vid. There was study, there was research and
10 so forth, but you never had this kind of a get-together
11 in advance of starting down that path. And I kind of
12 speculated as to whether that would have made a

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1 Commission is articulating and possibly even making new
2 and broad policies, the appropriate forum for that is
3 something like the workshops, if not rule-making, so
4 industry and all affected parties can have a chance to
5 weigh in.

6 When you are enforcing a very clear and very
7 well settled area of the law, then go ahead and sue.

8 MR. PEELER: Last word, Sid?

9 MR. MILKIS: I get the last word?

10 MR. PEELER: Last word.

11 MR. MILKIS: What a responsibility. I love the
12 workshop idea and I enjoyed reading the transcripts and
13 one of the interesting things about it is how
14 telemarketers themselves would disagree with one
15 another, which kind of cracked open the possibility to
16 take on a very powerful industry.

17 In terms of transparency, I just want to say
18 briefly that the politics of the Commission are
19 fascinating, and indeed the policies of the Do Not Call
20 Registry were fascinating. It wasn't automatic that the
21 Congress was going to go for this. It took some very
22 sophisticated statement crafting on the part of Tim
23 Muris to get this report and also the way he cultivated
24 public opinion. It wasn't a given that the public would
25 buy onto this as enthusiastically as he did, and I just

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1 those of you who pre-ordered. The way we were set up,
2 we were only, unfortunately, able to get people to sign
3 up and pay and they're available, they're all
4 identified. I am so sorry that we are unable to provide
5 extra lunches for people who either couldn't get it
6 together or didn't know about it. There is a deli in
7 this building out G Street for those people wanting to
8 grab a quick bite. So, we'll see you all back at 12:45
9 to hear Chairman Muris, Pitofsky and Collier.

10 (Whereupon, at 12:35 p.m., a lunch recess was
11 taken.)

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