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FTC-HEARING-COMPETITION -00

FEDERAL TRADE COMMISSION HEARING ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY

SEPTEMBER 13, 2018

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[*] TREANOR: And it's my honor and my pleasure to introduce these first set of FTC Hearings on Competition and Consumer Protection in the 21st Century. And we at Georgetown Law are very pleased to be hosting this event. a And I think it's very fitting that we're here. Georgetown Law's connection to antitrust and consumer protection is longstanding and very deep. Dean Robert Pitofsky served as Bureau Director, commissioner, and then Chair of the FTC over his long distinguished career.

Numerous agency leaders have been graduates of Georgetown Law; most recently, our current FTC chair, Joe Simons, we'll be hearing from him shortly. Also commissioner Nominees Christine Wilson, former DOJ Assistant Attorney General, Christine Varney. Monique Fortenberry, Deputy Executive Director of the FTC.

We're very proud of having educated so many of the leaders of the FTC. And among our current faculty, David Vladeck, who is at the end of our panel today, was director of the Bureau of Consumer Protection.

Howard Shelanski was director of the Bureau of Economics. Professor Steve Salop was both a senior official of the FTC's Bureau of Economics and a mentor to Chairman Simons and Christine Wilson.

Actually, the chair, the chair and I were just talking about how his time in Georgetown had really prepared him in every way that you had. We're just very proud.

And it's appropriate and it's particularly appropriate I think because in some ways these hearings are intended to follow the path that was set by the FTC's global competition and innovation hearings which were held in 1995 when Bob, Bob Pitofsky, was the FTC's chair.

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

FURMAN: And don't take my thunder, okay?

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

And for those of you who want to hear more about the antitrust issues of today right here at Georgetown Law, our global antitrust symposium which is now in its 12th year and is one of the most prominent antitrust conferences outside of the ABA Spring Meeting will take place this room in about two weeks, so.

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

(APPLAUSE)

SAYYED: Okay. I won't take long except to thank everybody for coming and to tell people a little bit about what we'll do today. We'll turn to the chair in just a minute. But I just want to tell everybody this event is being webcast. The webcast will be posted to the FTC's website shortly after we conclude. This session is being transcribed and the transcript will be posted quickly.

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

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

We have an open comment process. And so we encourage people to continue to comment. That comment process will be open through probably the end of February.

But we encourage people to comment on what they hear today, both what is presented and what is discussed. And then, all presentations made here will be posted on the website. And as I noted, the transcript of the session will be posted, so I'd say with that, I'll turn it over to the chairman and he'll kick us off to get started.

SIMONS: All right. Thank you so much, Bilal. Good morning, everyone and welcome.

On behalf of all of us at the Federal Trade Commission, I want to thank you for coming to the opening of our Hearings on Competition and Consumer Protection in the 21st Century. Our goal is to make these hearings as informative, insightful, and consequential as possible, covering some of the most important competition and consumer protection policy and enforcement issues of the day. We believe we are situated to do just that.

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

We are very fortunate to have a large group of highly respected participants representing a diverse range of views, including academics, practitioners, enforcement officials and representatives from public interest groups.

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

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

This change, which began in 1981, reflected new learning that had begun to influence the Supreme Court antitrust doctrine. It was primarily driven by the scholarship of academics; the most prominent -- Phil Areeda, Don Turner, Frank Easterbrook, Richard Posner, and Robert Bork, were associated with either Harvard University or the University of Chicago.

They applied microeconomic principles to antitrust questions and paid attention to empirical work, which led them to conclude that a lot of pre-1970s antitrust case law was inconsistent with rational, pro-competitive, and economically beneficial behavior.

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

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

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

First, some recent economic literature concludes that the U.S. economy has grown more concentrated and less competitive over the last 20 to 30 years, which happens to correlate with the timing of the change to a less

enforcement-oriented antitrust policy beginning in the early 1980s. These concerns merit serious attention, and they will be part of today's discussion.

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

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

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

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

I approach all of these issues with a very open mind, very much willing to be influenced by what I see and hear at these hearings. I am old enough to have witnessed in my own career dramatic changes in antitrust policy and enforcement. These changes have largely been driven by developments within the economic community, which were then adopted by the legal community. The movement by the economists, however, has not always been in the same direction.

In the 1950s and 1960s, a substantial body of empirical economic work purported to show significant anticompetitive effects at relatively low levels of concentration. In 1968, the DOJ issued merger guidelines based on these studies. But just about the time the guidelines were issued, the economic studies on which they were based were being substantially discredited.

As a result, the agencies over time raised the concentration levels at which mergers were seen as problematic. A more recent example where developments in economics increased the level of successful merger enforcement involves hospitals.

In the 1990s, the government lost a large number of hospital merger cases in a row, and the agencies considered whether to give up on hospital merger enforcement. Fortunately, we did not. Instead, we engaged in empirical economic studies that demonstrated the anticompetitive effects of hospital mergers, and we revitalized our hospital merger enforcement program.

So the developments in economics can suggest, depending on the circumstances, that our enforcement has either been too aggressive or too lax. This episode involving hospital merger enforcement really drove this point home for me personally. The use of economics should not be thought of as a one-way ratchet, only driving down the level of antitrust enforcement.

Good economics might point us toward more or less enforcement, depending on the facts and the analysis in front of us at the time. In my view, basing antitrust policy and enforcement decisions on an ideological viewpoint, whether from the left or the right, is a mistake. Whether or not we expand antitrust beyond the consumer welfare standard, I would rather make policy and enforcement decisions based on the best evidence and analysis, including in particular, empirically grounded economic analysis that enables the analysts to weigh the costs and benefits broadly defined to help determine the best approach.

My hope is that these hearings will significantly improve our ability to do so, and help to bring about a new and improved consensus among our antitrust stakeholders.

But we are not focused solely on competition issues today or throughout the hearings. The strength and direction of the agency's consumer protection mission is also something that we are going to explore at some length at these hearings.

Today, our most significant and difficult consumer protection issues often revolve around the use and abuse of technological capabilities not likely imaged during Bob Pitofsky's chairmanship.

As a result, we will be having multiple sessions on data security issues. And our upcoming hearings on platforms, big data, and artificial intelligence will address consumer protection issues, including privacy, as well as competition issues.

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

I also want to thank our co-sponsor and host, the team at the Georgetown University Law Center, for helping us pull this initial effort together. I also want to recognize the staff of the FTC for their efforts in both preparing for the substance of this event and undertaking all the logistics to bring us together.

I, and all the commissioners, are grateful for the work of so many people both within the FTC and outside the FTC, who are engaged in making this a successful effort. Thank you for attending, and I hope you enjoy the hearings.

(APPLAUSE)

And I'll turn it over to Bilal.

SAYYED: Okay. So, I'll just take a few minutes the panelists and then try to get out of the way, in no -- in no particular order, or maybe some particular order.

Jason Furman will speak first. Jason is presently a professor at the Kennedy School at Harvard University, and was formerly the chair of the Council of Economic Advisers.

Tim Muris, just to Jason's left, it was most -- is presently a senior counsel at Sidley Austin but was also chairman of the FTC from 2001 to 2004. And previously, director of both of the Bureau of Competition and the Bureau of Consumer Protection but not of course at the same time.

Just to the left of Tim is Alysa Hutnik. She's a partner at Kelley Drye, and really an expert in consumer protection law.

Immediately to my left is Jim Rill. Jim is senior counsel at Baker Botts presently, but was head of the Antitrust Division for about 1989 to 1992.

And then we also have Janet McDavid, who was not a head of the either agency but certainly is one who has been considered to head either, maybe even both agencies, had in the past. Jan is a partner at Hogan Lovells.

And, finally but by no means least, Professor Vladeck, who serves as director of the Bureau of Consumer Protection just a few short years ago. And, of course, is a professor here at Georgetown.

So, with that I'm going to turn it over to Jason. And just remind everybody if they have questions, raise your hands, pass your questions over to some of my colleagues who are collecting question cards.

FURMAN: Thank you so much. And I thought Chairman Simons' remarks were perfect in three respects. One is you want somebody to be open-minded coming to this question, because thinking really is evolving very rapidly.

Second, he had a really excellent capsule history of antitrust thinking, and third, I think he made it clear that he was deferring completely to economists in how he was proceeding on this matter.

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

When I was chairing the Council of Economic Advisers, I came to this issue partly out of what I'll now admit was paranoia. There was a crime that had been committed and we were looking for suspects.

The crime was low productivity growth and high inequality, something clearly going wrong in the economy. Productivity growth being about a percentage point lower over the last decade than it had been previously; at the same time, high levels of inequality continued to move higher.

And those were the two factors that were underlying the slowdown of the growth and income for the typical families that I think is the central challenge for economic policy. So, what can you do to raise productivity growth, to reduce inequality?

And we were looking around a lot of different suspects. And just to be clear, there is more than one cause of this set of phenomena. But one thing we alighted on was this area. Part of what motivated it was a few sub-facts under those two big ones. And let me just list a few of them.

One, a number of economists had documented that throughout the economy, there was less churn and dynamism. Fewer businesses being created, fewer older businesses, larger businesses increasingly dominating the economy, fewer people moving from job to job. So, a little bit more of a sclerosis than we like to think is the case for the U.S. economy.

There was, in terms of inequality -- I'm sorry -- reduction in investment, a trend down in investment. Partly, that's shift to intangibles, but not completely, and trying to understand that.

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

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

Now, one way to look at what's going on in the firm and the industry level is to use aggregate industrial data, and to divide up the economy into 10 industries, into 800 industries, and look within each one of those what's going on in concentration.

And then, numbers did that -- a number of people did that. Grion et. al., Archer et. al. -- we did at the Council of Economic Advisers, and you saw it in the press as well and places like The Economist. And we generally find that in about 75 percent of industries defined in this way concentration increased.

Now, as the antitrust community was quick to point out, there is some dispute as to whether it was 35 years ago people realized this was an idiotic procedure, or 50 years ago that people had realized this was an idiotic procedure. But that these aren't antitrust markets.

Now, the people that put this forward from the very beginning, including ourselves, understood that. No one would bring in an antitrust case based on these types of aggregate data. Everything has pluses and minuses.

But we're trying to look at economy-wide phenomenon and really needed to use economy-wide data because the type of relevant antitrust market analysis we have for some parts of the economy -- and I'll talk about it in a moment, but we don't have it for all of them, and can't really aggregate up, synthesize, and add it all together.

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

And subsequent research by Gutierrez [ph] and Philepon [ph], among others, has found actually that as this aggregate level, increases in concentration are tied to reductions in business investment, are tied to reductions in R&D by business, and also are associated with rising markups in those industries and rising rates of profit in those industries. So, you see these different measures seemed to, in a broad sense, work and explain some of what we are interested in.

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

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

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

And you see that in a variety of data including remarkably at sort of a root by root level in terms of the pricing, so there's a wealth of microeconomic, more traditional antitrust evidence for this.

So the question now is why have we seen this increase in concentration? And what are its consequences? I don't think there's any single answer to the why question.

In some cases, the increase in concentration may be for good reasons and reflect increases in efficiency, increases in competition that weed out some of the less effective firms, globalization, and the like. This is an explanation that's been stressed by economists including David Ardor [ph], et al.

That's the story that probably works pretty well in the retail sector where it wasn't that there were a few big mergers. It wasn't that there was some collusive common ownership. But the company Wal-Mart figured out how to have better supply chain management and grew. And then Amazon did the same online. And as a result, there's more concentration in that sector, and it reflects that increase in efficiency.

For a lot of the economy, though, the story is much less benign than that one, and it gets to -- has its roots in what Chairman Simons described as a large change in the way we thought about antitrust.

Kwoka has documented for example the FTC's oversight challenge looking into mergers, used to look at six to five, now we'd never look at something like that. So you have changes in antitrust enforcement. Some of it may be grounded in other parts of the economy.

We should be looking also at things like regulations and rent-seeking that allow companies to create rules that benefit themselves at the expense of others; certainly, in questions like intellectual property. And I think a lot of these competition issues are about antitrust, but they go more broadly.

And then if you look at labor markets, you want to look at occupational licensing, something the FTC has been at the forefront of for a long time, land use restrictions and a whole bunch of ways that reduce competition in the economy.

So, I think you have this combination of good reasons, bad reasons. And then you have some that are ambiguous. If you look at something like the tech sector, you've seen a lot of innovation, but you also have platforms with network

effects that lend themselves to scale that might say that it's efficient to have a single producer at scale.

It's also efficient to have a single municipal water company, but that doesn't mean we would want to let it go off and charge whatever it wanted to charge. I'm not saying that we want to regulate technology the same way we regulate municipal water. It's much more complicated. And it's an issue that I'm currently looking at as head of an expert panel for the UK government reviewing digital competition by trying to understand the combination of good reasons that you've seen companies grow with innovation and competition and bad.

I want to talk about why we care about this. Traditionally in economics, this is just about prices, and it's about prices being higher. I think that issue matters. Airlines prices and cellphone bills are higher in the United States than they are in Europe, because European competition enforcers have been more vigorous. They have more players in those industries than we do. So, I think the price issue matters. The price issue may be a lot smaller than some of the others I talked about. One is innovation, what this does to the incentives for business investment for R&D, for productivity growth.

There's a longstanding debate between a review of Arrow and Schumpeter in economics about the impact of competition on innovation. But there's a number of ways in which it could be deleterious.

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

If you have one hospital in town, it's a lot harder for a nurse to threaten to move to another hospital to get a pay raise. If you have two hospitals in town, it's much easier for the two of them to collude tacitly or even illegally to hold down the pay of nurses.

Even in the fast-food industry, there's evidence that anti-poaching and non-compete agreements have a deleterious impact on workers' bargaining power, help to hold down wages, and have been part of the reason that the labor share has been reduced.

In summary, I think this evidence is coming from a variety of different places, and a variety of different perspectives. If you're trying to ask a question about the economy as a whole, you're not going to have one definitive data source or one definitive study that's going to answer that question. You have to take a collage of views. And I think that collage involves looking at the pattern of what we've seen in the data that I talked about in terms of falling labor share, falling investment, rising markups.

Looking at the industry level and seeing whether those phenomenon are industry by industry tied to concentration, and they are. Looking in a deeper, more careful way where we can, and we can -- we've done that in a lot of different industries.

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

(APPLAUSE)

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

MURIS: Well, thank you, Bilal. I'm honored to be here, once again following in the giant steps of my friend and predecessor, Robert Pitofsky.

We first met in 1976. But it was 1988 working on this second Kirkpatrick Commission that we realized we shared a vision for the FTC.

Not that Bob and I always agreed, of course. Minutes after being sworn in as chair, I announced to a somewhat nervous reaction that there was indeed a new majority. I said there was no longer majority of New York Yankee fans on the commission.

The FTC has enjoyed great success for decades. And I'll address a few topics here. First, what durable success means for an agency like the FTC; then the vision that Bob and I shared that has led to the agency's success.

Next, I consider recent challenges from two Ps, paternalism in consumer protection, and populism in antitrust. Because both of these isms once dominated FTC work particularly in the 1970s. I discuss history. I lived through the 1970s, and the decade was disastrous for the FTC. Nostalgia expressed explicitly in recent literatures is misplaced. I have no desire to relive those years and neither should you.

I'm submitting a longer paper with lots of footnotes, like lawyers do. And I'll make a lot of assertions for which those footnotes provide support. But starting with success, it has to be built on something more ephemeral than headlines. A definition that is less ephemeral starts with the recognition that an agency needs a clear understanding of and support for its core mission among its constituents.

Second, this core must derive from a vision clearly shared not just today but enduring -- enduring through electoral cycles. Over time, perhaps, decades, stakeholders adjudge favorably the core mission of successful agencies.

Finally, a successful public institution needs a coherent strategy. The positive agenda must direct the institution at all levels from the staff to the managers to agency leaders. Without a general strategy and positive agenda, an agency merely reacts.

The FTC has such an agenda, the heart of which is to attack practices that harm consumers by hampering the competitive process and violating the basic rules of exchange. The FTC's success in large part reflects this shared vision.

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

Regarding cases, Robert Bork once remarked that firms either make war on each other or they make peace. This framework reflects the consensus that the most harmful practices occur when firms stop competing vigorously; making peace to hurt consumers. Horizontal mergers with likely anti-competitive effects are one fertile area for firms to make peace. Firms also make peace through non-merger conduct. As with mergers, of course, collaboration is not itself sufficient to assess consumer welfare.

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

In rare instances, a single firm with market power can exclude competition to harm consumers. The 2001 Microsoft case, probably the most famous recent example, it's, those kind of cases are important to any antitrust program.

A particularly fruitful category of troubling single-firm conduct involves misleading the government. Misuse of courts and government agencies is effective way, this rent-seeking, to stifle competition. Such strategies are not limited to single firms, of course. They're the cheap exclusion which is a felicitous phrase that the people at the FTC have invented.

Two antitrust immunities helped protect this rent-seeking, NOR and state action. Some courts have broadly interpreted these immunities for -- and for decades, 40 years in fact, the FTC has sought to circumscribe both with three Supreme Court victories and state action.

On NOR, the agency saved consumers billions of dollars at the gas pump in Unocal and provided large benefits for pharmaceutical consumers in Bristol-Myers Squibb among many other successes.

The vision for consumer protection is identical to that in antitrust. When competition alone cannot defer dishonesty, private legal rights help, there's government-developed common law. When the market forces are insufficient and common laws ineffective, there's a role for a public agency. And consumer protection and the antitrust naturally complement each other. Under the FTC's positive agenda, robust competition is the first and most important way to protect consumers.

And the FTC's role is crucial but it's a referee, not the star player. The foundation and core of consumer protection is the systematic attack on fraud begun in 1981. And the FTC has continued to expand in each administration the fraud program.

The commission has long evaluated advertising by legitimate businesses, and in this century has expanded into privacy, and with many successes. The National Do-Not-Call Registry being one of the most popular government initiatives in history.

But yesterday's success has become today's challenge with robocalls clogging our phones. In terms of robocalls, the FTC has been aggressive and ingenious but ultimately, robocalls are like spam.

Spam was, ultimately, the most effective way to deal with spam was when the ISPs developed tools to be able to screen out the majority of spam. And in the same way, robocalls I think will be best dealt with when those who deliver phone services and others develop the legal and technical tools to block unwanted calls.

Now, I've written and with Howard Beales that we criticized the Obama FTC on occasion. But compared to the paternalism of the CFPB to which I turn next, the FTC has been a paragon of virtue.

Let me turn to those two P's and their contrary vision for the FTC. The first is the return of the paternalism of the 1970s. The FTC of that era sought to become the second most powerful legislature.

In one 15-month strength, the FTC issued over a rule a month seeking to transform the entire industries along the vision of the then-very young people in charge of the Bureau of Consumer Protection, as proposed most of these rules were market supplanting with adverse consequences.

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

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

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

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

Now, those who defend the CFPB sometimes raise behavioral economics, which is a recent challenge to the benefits of markets. In its extreme version, it's based on the idea that errors that -- and people, obviously, sometimes make mistakes. But the idea is that those errors are systematically irrational.

Now, some people will tell you that normal economics assumes that consumers have perfect knowledge in their economic calculators. Well, I was schooled by those normal economists, and I learned about transaction cost and imperfect information from those individuals. So, I think that that parody of economics is simply inaccurate.

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

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

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

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

These are misguided calls. For one thing, what a tech or digital company is, is hard to know. We have new technologies but they're being diffused through the economy. Moreover, these companies have different positions in the market. Some have big market shares; some don't.

Equally important, we've been down the populist road before with disastrous consequences. John Nuechterlein and I discuss some of this history in a new paper that John will discuss in detail later. And let me talk about the highlights.

Before Wal-Mart and Amazon, another company used the same kind of tools to become the largest retailer in the United States for over 40 years. This company was so important, the company was the Great Atlantic & Pacific Tea Company that John Updike, the young John Updike, used the company as the title in the setting for his iconic short story which every one of my generation had to read in high school. And what happened was A&P success triggered a backlash, and the government went after A&P for two decades.

First, they passed the Robinson-Patman Act which embarrassed the antitrust world for much longer than two decades, and took a long time for the antitrust world from which to recover.

This new legislation was not enough. First, the government prosecuted the A&P successfully criminally. They still weren't done. They sued to break the A&P up. Finally, a new administration came in, the Eisenhower Administration, and settled for some vertical divestiture.

The problem was this long war of attrition caused the leadership of the A&P to focus on fighting the government, not on its new competition. And today, all that's left of the A&P are the coffees. Eight O'clock, I think it's called Eight O'clock. And the company itself is gone.

Now, it's true that the FTC largely abandoned RP in the 1970s, but there are two vestiges of populism that were strong at the FTC in the 1970s and the first was predatory pricing.

There were three important cases, probably the most prominent of which was the coffee case. In the -- in the early -- in the mid-1970s, Proctor & Gamble, then the most feared marketer of consumer goods had Folgers Coffee. Folgers Coffee expanded into the heartland, into the East, into the heartland of Maxwell House.

Maxwell House General Foods responded, massive price war, benefiting consumers enormously. How did the FTC respond? It sued General Foods for responding against the best marketer in the world. I'm not making that up either. And there were -- and there were other such cases. And a call for return to predatory pricing is an important plank of the new populist agenda.

Another bulwark of the 1970s antitrust was reliance on the simple market concentration doctrine. And the concentration levels were levels that no one today would regard as significant.

The prominent example was four firms with 50 percent share. This theory was sometimes married to a populist animus toward bigness, which led the commission to seek vertical disintegration of the then very unconcentrated oil industry.

And through 1980, the FTC was pursuing de-concentration long after the majority of the economics profession had dominated or had abandoned extreme versions of the market concentration doctrine.

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

In contrast, consider the current, in antitrust -- I'm sorry -- consider the impact of the current reformers who which to return antitrust to focus less on consumers and more on protecting less efficient businesses.

Imagine how the companies they would now punish would have fared in their desired legal environment. Once the newcomers had grown beyond a certain size, perhaps by the late 1990s, their lawyers would have counseled them to be cautious about expansion, innovation, and price cutting, lest they face antitrust liability for disadvantaging their less efficient rivals.

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

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

(APPLAUSE)

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

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

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

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

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

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

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

world. And I don't want to suggest that that's a bad thing. I think it's a good thing, properly founded, property principled, properly directed, because I think a sound competition policy is essential to the operation of a market economy.

So, what have the agencies done, and what is the challenge facing them in the future? The agencies were responsible, I think particularly the FTC and the Department of Justice in the formation of the International Competition Network in 1990 -- in 2001, following on the report of the Department of Justice International Competition Policy Advisory Committee, the ICPAC that was put together in 1997 and reissued its report in 2000.

The International Competition Network was founded on the platform of the Fordham Program in 1991 with 12 members. Tim Muris was very instrumental in putting that together. Now, we have well over 100 members, 100 agencies that are members of the International Competition Network. And the ICN has been extremely important in producing guidance that's based on market economics and due process for its member countries and for other countries around the world, essentially soft guidance, but nonetheless effective and responsible guidance.

The ICN has produced merger notification and procedure guidelines, has put out through its unilateral conduct working group of guidelines on predatory pricing, guidelines on dominance. Most interestingly I think the work that the ICN has done in the area of procedural due process and the antitrust, the working group -- excuse me, the working group on agency effectiveness which was headed -- task force was headed by the Federal Trade Commission, the work of Randy Tritell and Paul O'Brien has been extremely effective in putting out guidelines on due process, guiding principles, annotated guidance and similar documents.

These are extremely important contributions that are made towards convergence, if not harmonization in the antitrust world. Similarly, the OECD again under U.S. leadership has put out a protocol on hardcore competition. Also, documents on the merger notification and procedure really anticipating ahead of time the ICN's work in that area. The OECD has also issued a very monumental report under the leadership of then-Chairman and then Assistant Attorney General Varney on due process and procedural fairness.

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

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

On the question of its advocacy, what we have is a fairly general statement, however, not one that gets into the specificity of when and how that advocacy might be best advanced and effected and implemented. And I think that's a challenge as we will indicate going ahead. The ICN, the International Competition Network, is continuing its effort towards promoting convergence in substance and procedure through workshops and similar efforts to bring about convergence and harmonization and sound principles.

Non-governmental agencies as well since the last time, since the 1995 hearings increased their efforts. The U.S. Chamber of Commerce has issued a so-called expert report -- I say "so-called" because I was on it, so therefore I've got to be modest -- expert report on due process and the way forward, somewhat controversial in that it advocated the establishment of a cabinet-level coordinating committee for dealing with international antitrust.

I think one head issue that I personally had some -- it was on the report, had some skepticism as to its efficacy although there should be more coordination among the agencies of the federal government. The American Bar Association has had several task forces, several reports in this area, a due process report and currently a program

going forward, soon to be I think finalized on sort of a, if you will, not a report card but an analysis of the implementation of due process, task force headed by my partner, John Taladay and Melanie Akin (ph). Also, the ABA is soon to present a paper on the use of public policy issues in antitrust globally.

That is the extent to which non-antitrust factors flying under the flag of antitrust tend to adulterate -- that's my pejorative, not theirs, I expect -- tend to adulterate the efficacy and substantial foundation for antitrust enforcement. The ICC, International Chamber of Commerce has issued a report in this area that is of significance and extols again the need for global consensus and fair procedures. The private sector is active -- is it enough active? No, but increasingly active in this particular area.

So, what are the challenges going forward? There are limits I think to the efficacy of soft guidance, of soft convergence. It's necessary, essential, but is it enough? Is it sufficient? My answer to that is I think you need to go beyond it. There are -- there's no structured mechanism right now for establishing, if you will, ambassadors (ph) for evaluating the extent to which the guidance of the various international organizations and national organizations that I referenced are being actually implemented and then can -- then followed in the nations around the world, including sometimes I might say the United States.

We see action in China involving a merger by Coca-Cola which I think has questionable economic foundation, the denial of a transaction involving NXP which had been approved by every other agency in the world on grounds that are difficult to discern any kind of link through it to sound antitrust. We seeing in Korea in expanded reach for extraterritoriality, in an area where there may be no effect, whatever on consumer welfare in Korea. We see in Taiwan enforcement actions with no printed, published and maybe not even any practiced sound standards for due process.

All of these issues I think are a challenge, a huge challenge to global antitrust including the United States going forward. And sometimes, frankly, the United States has been criticized for its use of CFIU.S., criticized overseas by its use of CFIU.S. to in effect undermine sound antitrust analysis and engage in national championship work. I'm not trying to agree. I don't agree with that in many respects, but I know that has been criticized overseas and recently.

In a speech, former Director General -- former commissioner for competition of the European Union Mario Monti said that Europe has much sounder antitrust leadership, foundation, correctness than the United States. We have to be aware of that and be sensitive to it.

So, what should be the response going forward? And I don't pretend that I have any particular wisdom here, but throw out some ideas and actions that I've seen. First, there is an increasing, I think, demand, interest for the United States agencies to become directly involved in individual enforcement actions overseas where the effectiveness on important interests of the United States, not to protect the U.S. champion but where there's an important interest to the United States that bears on effective competition policy.

We have in our agreements and then in other international principles, mechanisms for cooperation, notification, and transparency. These I suggest should be implemented. They have been implemented by the United States. In Boeing McDonnell Douglas for example, the U.S. was very much involved in attempting to I think put on -- I'll say put on the right track the European Commission's analysis of that transaction even to the point where this guy was an antitrust professor at Arkansas, I think named William Clinton got involved in the lobbying before the European Commission on that transaction.

The actions of the Federal Trade Commission in certain circumstances have been salutary. I think in discussing a matter involving Intel in Japan, it was effective outcome. Press reports indicate there was effective outcome involved in U.S. involvement with Qualcomm, a principal issue in China. And of course the -- I'm not sure how, I think effectively about greater convergence in understanding and consultation, the U.S. criticism of the European and the commission's action in G.E. Honeywell.

We must respect foreign agencies' interpretation of their own law. We don't necessarily need to surrender to it. In our efforts to converge, to consult, I think the decision by my classmate, Ruth Bader Ginsburg in the vitamin C case

sets a good principle for the question of respect, but not total deference to foreign law.

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

And I'd like to close with reference to the initiative that's recently been announced and promoted by Assistant Attorney General Makan Delrahim to establish a multilateral framework for procedure in antitrust cases. He recently spoke at the Fordham Conference indicating that there's significant progress in that area, that some 12 or so countries are signing on. We haven't seen what they're singing on to in detail yet, but signing on to the principle. It's a major first step by a national antitrust agency to attempt to persuade other countries that there needs to be some system -- joint system for assisting in the implementation and review, not a scorecard, but a review of the extent to which the guidance document for the so-called soft guidance is actually adopted and fomented in the international arena.

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

(APPLAUSE)

SAYYED: All right. Thank you, Jim.

And, Alysa, (inaudible) I note that I'm very envious of the ICPAC, that they had apparently three to four years to do their report.

HUTNIK: So, switching gears to consumer protection and privacy, and like most consumer protection lawyers, I have pictures.

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

So, taking the time machine, let's see if we can get there, back to the 1990s and while some of us might have had Mariah Carey on the radio, hopefully no one is going to raise their hands on that, here at the FTC in 1995 hearings had technology front and center in the focus.

And there, the focus was innovative changes and convergence happening with the online marketplace, television, cyberspace, even radical new technology issues such as purchasing compact disks over your telephone. And notably even then, the FTC was already anticipating issues with the amount and the type of data collected online, who was accessing that data, how many people who were accessing that data, cyber security issues with the data and the associated other consumer protection considerations.

The resulting Pitofsky Report from those hearings provided an effective roadmap for consumer protection business guidance and policy for over 20 years. Tim Muris mentioned durability. This policy has been extremely durable. That report centered on several key tenets: one, consumer sovereignty. This is a point that's been echoed in the 1980 FTC policy on unfairness and in decades before in adjudications and business guidance, the idea that we would give consumers access to material information and allow them to make their own choice without regulatory intervention, to do it conveniently.

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

And while some might argue that the application of these concepts has ebbed and flowed over the years, they're viewed by many as the successful foundation to the FTC's approach in consumer protection. It's an approach that is largely consensus-based. It's not largely political. It's measured and it intentionally considers competition concerns with those of consumer protection. It's also a framework that supports our nation of innovation. We are experiencing and witnessing a technology revolution that has no end in sight and a robust marketplace that provides feedback when a line has been crossed. Through both consumer choice, a vibrant press and government enforcement.

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

Now, like any balanced framework, we should continue to ask tough questions to determine if and what changes may be warranted so that the agency's consumer protection mission can continue to be fulfilled for the next 20 years.

And in looking at the comments filed in response to these hearings, these certainly raise several themes. One of the main themes that Chairman Simons started out with was the concept of technology, whether the technology marketplace of today and tomorrow requires the change to the FTC's organizational structure and allocation of resources. And just as the 1996 Pitofsky Report following those hearings observe that there would be challenges to the agency's consumer protection mission with the evolving technology marketplace, today's cyber threats and technology changes and innovations will absolutely test the FTC's expertise and its resources.

Technology plays an integral part of the consumer experience whether at work, at home, in educational settings, healthcare, facilitates the way we interact with each other and with the world around us. So, it's no surprise then that technology should play such a key role in most of the FTC's consumer protection enforcement cases. And given the technology emphasis of commerce today and tomorrow, does the current FTC's organizational structure and investment of resources in technology expertise reflect the present and foreseeable needs in order to fulfill the consumer protection mission.

One of the second themes and many might call it a pain point reflected in the comments is the ever-growing patchwork of consumer protection and privacy laws around the globe and here in the United States. The 1996 Pitofsky Report recognized the obstacles that a multitude of conflicting laws would pose for commerce, particularly for small and medium-sized businesses and new entrants. Today, these compliance obstacles have only grown, particularly in the area of privacy where there appears to be a race to become the most comprehensive in regulating data practices.

And given the examples that we are seeing in Europe, California and elsewhere, it remains an open question on whether the commission's risk-based approach will have to yield to a national and uniform approach to privacy. But that may be easier said than done with respect to passing federal legislation particularly in an election year.

So, in the near term and in the absence of a uniform federal standard, what type of guidance and policy leadership can the agency provide that could be helpful to the national and global discussion on the costs and the benefits of more prescriptively regulating business practices?

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

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

Doing more with less also might involve all aspects of the commission's in-house expertise with more visible collaboration with the bureaus of competition and economics. Indeed, the unfairness prong of Section 5 requires that

competition be taken into account and more transparency on this involvement in the competition analysis in consumer protection cases would provide helpful guidance to businesses, which in turn will help consumers.

The last theme that was raised that I'll touch on by the comments and which played an important role in the Pitofsky Report as well is how important the FTC's supporting and incentivizing company participation and meaningful self-regulatory programs is. They're not a substitute for government oversight, but they can enhance the agency's consumer protection mission with a lot less cost. History has shown that self-regulation is more nimble and able to move more quickly to address innovation and technology changes.

And when the FTC promotes the use of self-regulation and incentivizes companies to embrace such standards, industry responds time and time again and consumers benefit directly from this carrot rather than stick approach, incentivizing rather than purely focusing on punitive deterrence.

So, I will keep my comments shorter. It lead me to concluding remarks that with the rapid changes that were happening and all the discussion around technology, we're largely discussing many of the same types of issues that were discussed in some form at the last set of hearings in 1995. And as we hear from many voices during these hearings, I can say from my personal experience working with startups, working with large companies, new entrants, those that have been around for decades, most companies are motivated to do the right thing while also remaining competitively viable.

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

Thank you.

(APPLAUSE)

SAYYED: Okay. Well, Alysa, thank you. We're going to -- and thank you for getting us almost back on schedule. That's why friends know, being off schedule just a few minutes would be a major achievement in my life.

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

SAYYED: Okay. Thank you. I just want to remind everybody that we do have some of my FTC colleagues collecting question cards. So if you have a question for the panel members, just write it on the card, raise your hand, we'll pick it up, and we will try to get to it. But before we turn to both of sort of the panel Q&A and audience Q&A, we're going to ask separately, both Jan McDavid and David Vladeck to both comment on what they've heard and honestly comment on whatever they'd like to comment on.

But I'm sure it'll be germane. So I'll first turn it over to Jan and then turn it over to David when Jan is complete.

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

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

Hearings provide the FTC an opportunity to step back and consider broad philosophical issues without the pressure of fact and time deadlines arising out in particular proceedings. That's a real luxury that most agencies don't have and the FTC does.

That kind of introspection allows the FTC to identify opportunities for improvement. It also offers an opportunity for democratic participation, which is one of the objectives recently outlined by commissioner Chapra in his paper last week.

I speak here as a practitioner who advises clients everyday on antitrust issues. And I share the FTC's view. That competition produces the best, most innovative, lowest price products and services for consumers. Most antitrust enforcement actually takes place in conference rooms in law firms and boardrooms in corporations where people like me advice our clients on where the lines are and how they can achieve their business objectives without crossing those lines.

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

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

The antitrust statutes as they've been interpreted by the agencies and the courts in recent years, in the last 30 years or so, provide a framework that knowledgeable council can apply as we consider the unique facts brought to us by our clients. And of course, we also bring the bear the economic concepts that are so important to underlying antitrust analysis today. Over the course of my career, I've seen the development of sound antitrust doctrine rooted in a principled analysis, and above all the positive role, the economic analysis played starting really with the Supreme Court's decision in General Dynamics, which was decided just before my final law school exam by Bob and the GTE Sylvania decisions and leading to various iterations, for example, of the merger guidelines.

In contrast, one of my mentors, former FTC commissioner Tom Leary, said that during his early career, when they would be defending a merger before the agency, they would say, "God forbid it would achieve any efficiencies," because that was suspect in the '60s and early 1970s.

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

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

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

Instead of well-established principles grounded in consumer welfare and sound economic analysis, we would be applying amorphous concepts of bigness and fairness, some of which turned traditional principles on their heads, such as lower prices that don't have the underpinnings of a predatory pricing analysis, or penalizing large successful technology company simply for being successful because they created new products and services that consumers genuinely desired.

This could return us to the era of Von's Grocery where the dissent lamented, "the court grounds its conclusion solely on the impressionistic assertion that the Los Angeles retail food industry is becoming concentrated because the

number of single-store concerns has declined." This led Justice Stewart to complain that "the sole consistency I can find in the antitrust laws is that the government always wins."

But even that wouldn't be true in a populist system because ultimately we don't have an administrative system in the United States. We have a system of enforcement and the agencies and private plaintiffs bear the burden of proof. In Europe and many other countries, the government can simply say no.

Here, they have to go to court, and they do so grounded in facts and economic analysis that supports their case, but with a framework that everyone understands. Where there are legitimate concerns about fairness or employment effects, for example, those issues should be addressed under different regimes as it's done today with the CFIU.S., unless as in the case for example of the no poach cases, there is a legitimate antitrust concern directly affecting employment and arising out of particular conduct.

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

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

Thank you.

(APPLAUSE)

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

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

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

So I generally agree with Alysa. I'm going to try not to repeat the points that she made. What I'd like to talk about or what I think are three-main challenges the commission faces going forward. And the first and this I think Alysa brought up is tech, tech, tech. Virtually everything the agency does today has some connection with emerging technologies.

When Chairman Leibowitz and I got to the FTC, we did not have a tech infrastructure. We did not have a single technician on staff, to the extent we needed to engage in forensic analysis, we had to outsource it. Today, because each of the successive chairs has built upon the tech infrastructure that we started to build, the agency has more technology capacity than ever.

But I still wonder whether it's sufficient. The agency needs deep expertise in things like artificial intelligence. It needs the forensic ability to conduct investigations in data breaches and in other kinds of consumer injuries. We need better forensics, better tools. And so, one challenge I think the agency faces going forward is to make sure that its infrastructure, its resources match the challenges that the agency faces.

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

Second, the challenges of protecting consumers in a digital economy. Now, the FTC in 2012 issued a report that tries to set out a framework about how consumer protection matches the FTC mandate. And I think there's a lot of very

valuable advice in that report. I would urge the new commissioners to dust it off and take a look because it provides, I think, a blueprint at least for dealing with some of the difficult questions the commission is going to face.

For example, automated decision-making, I'm not necessarily a foe of artificial intelligence. After all, we all know that human decision making is not necessarily great. Right? But it provides all sorts of challenges for regulators. It's a black box system. You can't interrogate an algorithm and it can be a breeding ground for disparate treatment that is based on impermissible factors.

And rooting out those kinds of problems is very difficult for the agency. Data driven offers in pricing. The marketplace is full of variable pricing and variable offers. I mean there have been challenges about Facebook's ads for housing and so forth.

These are very difficult challenges the agency faces to ensure fairness in the marketplace. And the lack of transparency in the algorithmic decision-making process runs a real risk that at least some consumers are going to face tyranny by algorithm. The commission needs to figure out how it can be an effective regulator in this space.

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

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

And Alysa talked about the usefulness of self-regulation. This is in the area where we've encouraged self-regulation. We actually detailed a lawyer to work out of our San Francisco office to be an outreach person to the app development community or encouraging some kind of self-regulatory body. But we didn't succeed.

So there are some enforcement challenges that the agency faces as well that are magnified by outdated statutes that the agency has to enforce. Neither (inaudible) nor some of the other statutes that were enacted before anyone could envision a digital economy like this need to be updated. And I would hope that the commission can work with Congress to do so.

I think the lack of civil penalties in Section 5 cases has been a serious lack for the agency, particularly in data breach cases. The RAND Institute is not a number of studies, making clear that the economic incentives, particularly for box stores and other kinds of consumer-facing companies don't push hard enough to ensure robust security defenses.

That is it's economically rational to risk a data breach because the cost of strengthening one's defenses may outweigh. I think civil penalty availability in those kinds of cases would add a necessary deterrent. And my help stem the (inaudible) ID theft. I think we need to update the unfairness doctrine.

It's interesting because the unfairness doctrine seems to at least be interpreted by some to require some form of economic or economic-like harm. But the statutory mandated the FTCs to prevent unfair and deceptive practices. Now I try to remediate them when they take place. And there are many harms that are just not actually well-remediated by money.

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

My last point is the regulation of big data. There's now pervasive data collection. It's ubiquitous. In fact, the last bastion in privacy, our homes is now yet another side of data collection. People have always on, always love devices of the internet of things. They're going to put censors in people's homes, all of these -- these serve useful purposes. But they involve enormous data collection.

And we need to figure out how to protect consumers in this area of ubiquitous data collection. We don't have laws that really deal with this. The aggregation of data is a real sort of enticement to data thieves. So, Apam Ohm (ph), who worked at the FTC when John and I were there, wrote in a law review article about 10 years ago where he forecasted there might become a time where there would be databases of ruin.

That is, that the data collection would be so ubiquitous that whatever fact that you would be mortified to have revealed to the public or to other people, that those facts will be in a database. Well, given the ability of data sharing, data lakes, the ubiquitous movement of data, there really is no answer to those questions now.

And those are questions that the FTC has to address. We did -- when I was at the FTC, we did a 6B on the data collection by data brokers. And I think that was a good start. And I think one of the things that I'd urge the commission to think about is using a 6B authority to get a better handle on basically just how consumer data flows, where does it go, who has access to it, what kinds of constraints, if any, ought to be imposed?

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

(APPLAUSE)

SAYYED: So thank you, David. What I'd like to do now is I have a series of questions and in frankness we've shared them with the group in advance. But, of course, they were prepared before I knew what anybody would say. What I'd like to do is first ask the panelists, maybe to ask questions of each other or comment on what others have said.

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

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

If what you're saying is that there were certain papers written decades ago and those papers are still a hundred percent correct, and we should base all everything on these tablets that were handed down and any change would be populist and barbarian, then I think I quite disagree with that. In fact, even some of the assumptions and arguments of people like Bork and Posner and others made, economists in IO have long known that they were quite fragile, and based on very specific assumptions that weren't very robust that the world was much more complicated.

As you said, Janet, people do take into account a broader set of considerations. But to some degree, economists need to do a better job of understanding this broader set of considerations too. So I think this is an evolving area.

As the chairman said at the very beginning of the remarks, I think that continued evolution is important. I think that if some of the macro evidence data and motivations that I said lends more impetus to that, I think that would be a welcome development and an important one. But I still would then use that to motivate -- you saying micro market by market techniques to think about cases, not some of those types of macro data.

But I don't think that irrelevant in motivating us to push further and think harder about ways that frankly enforcement has gotten more lax. And that has had deleterious consequences for the economy.

SAYYED: Well, Tim, it looks like you want to -- yes.

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

(UNKNOWN): When did you publish it?

MURIS: 2014. I think Bilal sent it to you. And what we said there -- essentially -- look, the way to think about Chicago is the way to think about the American revolutionaries. There was this revolutionary band of brothers. But what they were -- they were opposed to the old order. And the older order was overthrown.

But once it came to running a government, they split like Adams and Jefferson. If you take a list and put this in the paper, Baxter, Bork, Boman, Posner and Stigler, they either hadn't thought of or they disagreed radically on how to approach antitrust policy, mergers for example. Those guys were all over the lot from the most aggressive, Posner to the most restrictive, Bork.

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

SAYYED: Any other reaction or anybody would like to put questions?

MCDAVID: I agree with Tim. But I also agree, Jason, that this has to be evolutionary. We don't regard them as the tablets that came down with Moses. Economic theory has evolved. We had three iterations in the merger guidelines. And the ones we have in place now actually reflect how the agencies have been analyzing mergers for quite a long time. And they introduced new concepts such as unilateral effects analysis that weren't in the original versions.

So we do evolve. But I am very concerned about the inability to discern the consistent thread that I found when I was a young lawyer, and I'm very worried about how clients are then going to have to handle this stuff.

RILL: Well, Jan, you've touched on merger guidelines. Let me ask a question that I have asked people to think about. And this is not been to reflect on a particular administration or not. But in 2010, the previous administration revised the horizontal merger guidelines and changed the whatever you want to call it, safety thresholds or presumption thresholds from HHI of 1800, post-merger HHI of 1800 being -- under some conditions presumed anti-competitive to level -- HHI level of 2400.

And also, in fairness, I think Tim Muris and I wrote an article suggesting that some change was appropriate and we may have landed at around 2400. But let me put that out there. I mean to be able to think the -- the thresholds in the merger guidelines should be adjusted downward.

MCDAVID: Well, I deal with the guidelines all the time. And my view of the HHIs is that they are useful as an initial screen to identify the deals that need additional scrutiny. And then they show up in the complaint if the agency challenges the deal as part of the basis who either doing so, and in between we don't talk about them very much because we talk about competitive effects analysis.

Where is the real competition that takes place? And having numbers attached to it and squaring market shares creates a sense of precision about this process that simply doesn't exist in reality or in the way the guidelines are applied. So I don't think it's necessary. I have clients who come to me and say, "Well, as I run the HHIs, we've got an 1800." And then I discover that they've defined the market in a way that the agencies would never agree with. And therefore, the client has assumed something will be fine, when in fact, they're going to run into a real buzzsaw.

MURIS: Look, the guidelines do tell you something significant if you think -- forget the HHIs, think about -- I heard John Baker gave a good talk on this Friday after our retrospective analysis came out when I was chairman. Think about it in terms of the number of significant competitors.

Bill Baxter, we argued with him when he put the guiidelines out in '82. Six to five was his marginal case and we wanted to make it five to four. But Bill, Bill was a structuralist, much more than modern people are and he thought that there wasn't very many competitors, six or five. Jim Rill essentially, when he put out his guidelines, made it much more of the focus that Jan was talking about.

But when they did the guidelines in 2010, they were relying on data that said four to three was the marginal case. And in fact, John Kwoka, among others, had published papers out of the FTC's line of business data that showed the

importance of the strong number three to ensuring competition. But it's the marginal case. There are lots of four to three's challenged and occasionally higher.

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

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

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

MURIS: Well, they overthrew the old order. That was forty years ago.

FURMAN: Right. But anyway, I don't think we need to -- so I think sort of everyone treats them that way. I don't think one needs to re-litigate that. I think the question is do we need to make some changes. On the HHI, I would just do the average of whatever Fiona and John think it should be. But I think the argument for raising them also involved focusing and making sure you were refocusing and being vigorous above them in terms of a screen and everything else you're taking into account.

So I think it's not just the number, but a whole bunch of other things. And some of that is also frankly dependent on the courts. When you're bringing hospital cases and you're still losing hospital cases even when you have, I think, unanimous commission voting for them, that means there's a set of thinking, some of which was shaped in the past and is -- that needs to probably be modernized and updated to deal with changing research, including issues like wages, which I think is an important one when thinking about hospitals.

MURIS: Well, the FTC is mostly winning, as the chairman said, mostly winning hospital mergers. And the problem was there was this silly belief in the Elzinga-Hogarty test. And we got Ken -- I went to Ken and Ken testified, he had very -- two very simple propositions. He said, "I can't believe anybody would apply that test to hospitals."

And second, "I can't believe anybody would pay me to say anything so obvious." And those two -- those two propositions, believe it or not, helped carry the day in two circuit courts very recently blessed the FTC's opinion. But Jason, you're right in this sense, because these cases are decided out there by individual district court judges, the FTC actually had to overturn some of the district court judges in circuits. But I think the FTC's way of looking at it is correct. And it mostly wins. But obviously, in the world of individual judges, you could get some variance.

SAYYED: Let me ask -- I know Jim have some comments.

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

In the '92 guideline, we said, this is presumption that's carried on with further analysis and then went into then the other factors including entry and competitive nature of the marketplace, which I think that's the major change from the '82 to '92 guidelines. I think one of the interesting things about the 2010 guidelines, very creative and very interesting. was probably in order, is the distinction between the analytical framework and the guidelines and the analytic framework when the commission goes to court.

The 2010 guidelines are very, I don't say critical but somewhat almost dismissively market definition issues, as a proxy for the -- base for the analysis. Shortly after those guidelines, we not only analyzed, the commission went to court.

And if you look at its brief in the Polypore case, it doesn't appear that the 2010 guidelines existed. They were very much the traditional analysis, '82, '92 approach. So I think there is a distinction that one has to draw between what the agencies do in their analysis, which is obviously extremely important if you don't want to go to court, and the practice of the agency's -- put into their court pleadings, which are more traditional because I think the judges had become comfortable and accepting the analytical framework of the '82, '92 guideline approach. So I think there's a distinction there that we have to be aware of.

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

I think David is 100 percent right about not -- strictly non-monetary protection. I as a young scholar wrote a couple of papers about how contract law protects subjective value. But I'm not at all sure you need to revise the unfairness guideline. I think another speech would be also because the FTC has protected that non-monetary, as David mentioned, the first -- the first security breach case that we've got and it was when I was chairman involved Eli Lilly where what happened was a non -- not just poorly trained, an employee who wasn't trained at all managed to send out a list to the world of -- I think it was 600 people who were taking Prozac.

And email addresses are very easily identifiable. A lot of people have their names, certainly their last names. And obviously we thought that was -- that was private information that ought to be protected. And you could -- you could spin a case of monetary loss, but utility functions when I talked about those economists who trained me, Gary Becker was one of them and he was one of the first to put other things in utility functions.

And the -- that's the way the FTC thinks and David's right that the commission ought to stress that. I think you can read that in the Unfairness Statement now but certainly statements to that effect would be useful.

VLADECK: Yes, and to Tim's credit, Tim and Howard published an article that's a classic, I think a classic in the Mark Twain sense that it's something that everybody talks about but no one's ever read. But in it -- but I didn't read it. And in it, Tim makes exactly that point which is that the Unfairness Statement ought to be construed to cover kind -- the kinds of behavior that we would think of as invasion of privacy toward.

But in fact, oftentimes when a bureau director brings a case like that to the commission, there's real pushback. And not every commissioner unfortunately is quite as enlightened as Tim is on this matter. And so I think that going forward some clarity needs to be injected into the process, either through a revision of the Unfairness Statement or some declaration by the commission writ large that these kinds of harms are subsumed in the Unfairness Statement because there are some case that Tim actually raises questions about in that article, and the result was I think you said was sort of hard to reconcile.

The order was hard to reconcile with the complaint language, cases like DesignerWare, Aaron's, and that's because there was friction within the commission. And so we need some resolution to this issue because increasingly, the harms that are caused through data breach, other forms of revelation of privacy information are not necessarily economic in nature and the Unfairness Statement should simply make that clear or the commission should make it clear in some other way. So I don't disagree.

MURIS: Well, I appreciate the fact that we had at least one reader and -- but I think maybe the solution is the next time the commission brings a case like that is just to issue a public statement that interprets the Unfairness Doctrine.

MCDAVID: Or perhaps in these hearings and the report...

MURIS: Sure. Another good suggestion.

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

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

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

SAYYED: That leads right into a broader question and the commission takes -- I think takes seriously its obligation to provide clear guidance, business guidance on consumer education. So I wonder if folks up here think there are other areas where new or updated policy statements or materials are needed. It ties in as well to the idea of the self-regulatory model as well. Put that open maybe to David and Alysa initially but, of course, that is just as potentially true on the antitrust side of things.

VLADECK: Yes. Let me just make a quick comment, which is the agency spends enormous amount of time on guidance documents. When I was there, the endorsement guides came out, the Green Guides, 300 pages of narrative. These are really important documents. We understand why regulated parties need the kind of guidance that the agency can provide. But doing a good guidance document is an enormous undertaking.

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

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

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

And so I think taking concepts like the 2012 privacy report and taking the Unfairness statement and really bringing it up-to-date, that would be relevant for the clients, the innovative clients that are thinking of how to use machine learning and using AI, and using facial recognition and having it consolidated in some ways where the topics overlap so that they can use that and not feel like they are targeted with gotcha enforcement down the line when they are trying to interpret necessarily flexible standards and to do the right thing.

VLADECK: Well, and this goes back to the 6B question, which is in order to issue some of these guidance documents. For example, the use of biometrics in the marketplace. I think the commission might do well commission a study to get a sense of how widespread these practices are, where companies are going, what the immediate future looks like, because this is a topography that the commission needs to understand but I don't know whether it has the knowledge base today to issue a guidance document on these issues.

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

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

SAYYED: Okay. Well, let me ask if there's any reaction to that. If not, I'd turn to another topic. Well, this is -- this ties in to a question we got from the audience. I'll raise it in two ways. And I think this -- first, there's a common critique that the U.S. has lost or is losing its leadership role on antitrust policy globally, that what we see developing outside the U.S. is a model predicated on the framework of the European Union or European countries. And that this is being adopted by some of the newer agencies and newer countries.

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

RILL: Let me start out with the competition side because I don't think I've done much consumer protection work since we put Joe Camel out to stud. The -- there is a challenge here in the global framework of competition agencies. I mentioned in my earlier remarks the recent speech by Mario Monti in effect claiming that the European methods of antitrust, the European foundations for antitrust were far superior to those in the United States.

The challenge has been there for a long time. I think there is a concern that there is a divergence of enforcement principles and due process principles, substantive as well as, procedure and substantive around the world. And one that's increasingly being affected. I think that the U.S. has not lost its attempt, its leadership in the sense of the work that's done within the ICN. Largely the U.S. pressure, for example, to put out -- the U.S. initiative that put out the guidance documents on due process for the agency effectiveness working group, U.S. leadership of the working party on (inaudible) cooperation in the OECD.

This had a profound effect and produced a major report on due process, so I think that we're not running up the white flag any time soon. I think it is responsible -- it is a responsibility of the U.S. in two areas to preserve I think leadership not only for, it's not America first. America first sometimes could be America not there. I think it's America trying to present some of the principles that have underlined antitrust enforcement in our country and in our -- in our jurisprudential base to try and put those across.

I think two areas where this can be done is continuing the guidance through the international organizations. And I think further attention should be given to the -- if you will, the moral suasion, the publicity effort that I think underlines initiatives such as Assistant Attorney General Delrahim's multilateral framework for antitrust procedure deserve attention. And I think the increasing use of bilateral agreements on competition policy, bilateral memoranda of understanding is a good way to go about it.

And I think also that the agencies need to be perhaps attuned more as they have somewhat in the past to actually engage in consultation and advocacy if you will, in particular instances where the agency, foreign agency seems to be departing from a globally accepted principle, procedure, or substance, and in effect didn't engage in consultation as provided for in a number of instrumental -- instruments of cooperation.

I think those are important. I think the final point that the agencies need to be concerned about, the United States need to be concern about is the problem sometimes of an agency action being misused by a foreign agency that say, "Well, you're doing it so we can do it." There's a lot of copycat misuse of U.S. agency. We need to be -- the U.S. agencies need to be conscious of the risk of that copycat. Recent article by Koren Wong-Ervin, Josh Wright lists a number of areas where that's happened following up on some, actually some consents being used as an expression of law. Bosch, for example, Motorola Mobility -- Google Motorola Mobility by foreign agencies as well. The U.S. -- this is an expression of U.S. law. They misuse that and have that as a copycat for the misapplication of antitrust law.

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

FURMAN: I'll -- can tell you the answer in like six months, but for now, I mean I think a lot of the issues around big data, the -- I think the empirical question that I don't know the answer to is -- talking about before is, if you think

there's diminishing returns to data, then you're a lot less worried about it than if you think there's some region of increasing returns. And there's -- you know, people do computer science and say with machine learning when you get past a certain point, you get to this place where you can do the AI in a certain way that you couldn't do before you got to that scale.

If you have that, then I think you have -- do have to start to worrying about data becoming a barrier to entry, that there will be some large economies of scale in the machine learning AI space. And that you have to try to look at issues about who owns, for example, and something consumers may overlook and not fully understand and have those property right defined more properly.

On the other side of argument, the -- in a world where you think it's intangible capital producing things rather tangible capital makes it easier to enter and anyone can come up very little computer algorithm and enter the market. So I think this -- in question of, is it just a really cheap -- the AlphaGo reinforcement learning, the latest iteration of it that DeepMind did isn't that long or complicated a program, doesn't actually use any data. It just plays itself and generates the data, anyone in this room could have done it although none of you did.

(UNKNOWN): No, we couldn't.

FURMAN: But -- and so if technology is like that, then I think we don't need to be that worried. Anyone in a garage can do it. If technology is this increasing returns to data, then I think we do need to be more worried and I -- I don't know which, so I apologize.

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

(UNKNOWN): Let me just be clear. Algorithmic collusion is a whole different issue from the...

SAYYED: Yes.

(UNKNOWN): ... big data one and another.

SAYYED: Exactly. Although we are having some difficult separating out the people to do one or the other, but anyway. No, we're going to devote a lot of time to it. And that was a key -- one of the things the Pitofsky Report did was just sort of think about things that were going to come up over the next 5, 10, 15, 20 years and that's part of what we're doing on -- in that space.

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

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

FURMAN: Yes, no, absolutely. And you're creating a real incentive to leave panels early. I think (inaudible) It's working out really well for me. I think that's a really important issue. I think there's a sort of longstanding view that everything in technology is evolving so quickly that there's no point enforcing anything, because by the time you do, it's changed and there's some new competitor. And MySpace has disappeared or Internet Explorer has been dethroned or whatever else.

I think there's something to that. I think there's a lot of irreversibility, too, though. It's easier to stop an acquisition now and change your mind five years from now and allow it than it is to take a company that's already acquired and split it up. The second is basically impossible. The first, the cost of making an error in not allowing the acquisition may not be that high if you can change it later.

So there's a little bit under uncertainty, of literature and economics, there's an option value of waiting when you're making irreversible decisions and allowing a merger is one. I think you have to figure out how to think not just about market share but about the ecosystem as a whole, and if you are buying up something that could be a competitor later, then I think you're affecting the ecosystem and something that, prices, especially if there are no headline prices isn't a useful guide to market share, isn't a useful guide to -- but it's competition for creating a type of market and ecosystem. So I think that does require a new thinking and probably under that option value of waiting the uncertainty is an argument for more, not for less in those cases.

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

MCDAVID: Thank you, Jason.

(APPLAUSE)

SAYYED: He made a special effort to be here. So let me -- we -- unless members on the panel want to ask each other some questions. We have a number of questions from the audience and I don't want to be too selective because we did ask for questions, but I would like to get to them, so if people are ready, we'll do it. And Jason did leave in just the right time.

But maybe others could think about this either narrowly or more broadly. How -- and here's the question, how do we analyze -- how do we analyze the harm to small businesses who rely on large platforms to reach new customers in ways they never could before? So that may touch on two specific topics.

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

One of the things I'm surprised with is the number of times people bring me antitrust issues that are really contract law issues. I used to teach contract law. I don't think in the big picture sense that the platform -- so-called platform issues need to be analyzed any differently. The toolkit we have is perfectly adequate and it goes back decades when the -- you know, when the new industries were evolving. We're talking about going back to the 1990s.

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

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

VLADECK: Let me just add one thing. You know, dealing with platforms is an issue that rises both -- on both sides of the building. For example, I mean, one of the ironies in the Google investigation were the companies that were complaining about anti-competitive conduct were the very companies that wouldn't have exist but for Google. And that interaction becomes very challenging.

Also some of the platforms raise serious consumer protection issues because they are essentially bazaars selling multiple products on the same page. And so questions about deception, who's responsible for the deception arise with some frequency. So I think one un-sort of-met challenge on both sides of the building is what do we do about platforms? I mean, we do have -- there are certain immunities for baseline content, but that doesn't really resolve some of the consumer protection problems and some of the antitrust issues that arose, for example, in the Google investigation.

HUTNIK: I would just add. On the consumer protection side, we're talking about platforms and responsibilities and, David, I hear you earlier in terms of talking about the limited resources for enforcement, some of the things that

we've seen is deputizing platforms to be responsible for those that they let into the bazaar, and that may be all well and good but there's a lot of interpretation and a lack of guidance on what is reason oversight and monitoring, what's scalable, and not doing a gotcha on that.

VLADECK: And they're all fair questions.

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

SAYYED: Let me -- okay. Any other comments on that? Let me turn to a question that is -- I think I'll direct it to everybody. It's a similar question. So the question says that former Chairman Muris mentioned imperfect information in contrast to behavioral economics. But in standard economic models, imperfect information causes transactions not to happen. It does not cause buyers to be fooled.

So here -- I think here's the question. Aren't buyers sometimes simply fooled and should they protected for being fooled? Or from being fooled? I think that's both a consumer protection and in some ways a competition question but I'll turn it over to David first.

VLADECK: The answer is yes. The commission has struggled with what is a reasonable consumer and what percentage of consumers must be deceived by a message, but the mission of the commission is to prevent deception in the marketplace and Tim and I may disagree at the margins about this but I agree with Tim's fundamental point, that the core mission of the agency is to protect against fraud. And the statute doesn't really use the word fraud, it uses deception.

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

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

MURIS: I agree with both of those points and let me take the economic modeling part of that. It almost 60 years since Ronald Coase's famous article and the applications of that are all about transactions costs. And shortly thereafter, George Stigler won his Nobel Prize in significant part for discussing that advertising was an extremely powerful tool for the elimination of ignorance. Well, obviously there's -- if there's ignorance, we're talking about a world with transaction costs and that's the world in which you need an FTC enforcement, as I was talking about.

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

SAYYED: Okay. Well, thank you. Let me follow up on a point David made as well about a bureau of technology in the FTC. I'm going to depart a little bit from the question, but ask, first of all, to the other panelists think about that, is it something that's relevant on both the antitrust side of house as well as the consumer protection side of the house?

And what might it look like and I raise that, maybe it's a little unfair because I didn't raise it earlier but we have, David was a bureau director, Tim as well as being chairman was a bureau director. How do you set up these things for success, really? That's maybe my question.

VLADECK: I defer to someone who's the chair -- the chairman. I think that would be the chairman's mission, not -- I mean I think it would be important to retain some of the technology infrastructure in the bureaus. I mean much of what the Bureau of Consumer Protection uses technologists for are forensics for investigations, but there are a lot of,

there's a lot of value to having access to skill technicians for the policy issues that the agency is going to have to confront moving forward. Biometric identification, things like that. These are difficult technical questions.

MURIS: Look, the bureaus are complementary. They're not substitutes. As the only person ever to head both of them, they are significantly different. They're different in their personalities, they're different in the career paths. And they are, in many ways, autonomous, and it's important -- let me give you an anecdote. I wanted the Bureau of Consumer Protection to do more in working with criminal authorities. And I unfortunately insulted them and told them that they were being -- they were too self-satisfied. Those were not the words I used.

And I regrouped and after about a year, they decided it was their idea. And they now have a very successful criminal liaison unit which, of course, they take complete -- a hundred percent credit for which is fine with me. And it was a mistake on my part to criticize them in the first place, but it's a wonderful organization. It reminds me of working in OMB in the old days where you have people who -- it's their career. And it's not as transitory as the Bureau of Competition, but embedding in the bureau like David says would be a very sensible way to go. Anybody else?

Anybody else? Okay. I will answer one of the questions. There is a reference in the question to the Office of Technology Research and Investigation, what we call OTEC which does sit in BCP. Question is, why this is unit insufficient to get the job done now? Without commenting too much on whether it's insufficient or what job they are focused on, we are -- it is a very small group and more resources would probably be appreciated by the chair, by the commissioners, and even by the bureau directors.

So maybe I'll end with a question that maybe I have, and it's a real question given the difficulty of managing agencies, do you think the FTC should have more resources to do its mission, and maybe how would you, if you were to allocate those resource, how would allocate them? So I have no particular -- I'd like the private perspective as well as the, the folks who have not been at the agency as well as folks who have been at the agency to maybe give some thought to it.

RILL: I think a question like that to be addressed by is like asking the Protestant minister what he thought about the latest papal encyclical. But when I was at the division, one of our major efforts was to enhance the workforce at the division, both from the standpoint of law and economics. And it was shorthanded when I got there and we were able to build it up and I think increase the efficacy of the agency with more resources.

It is difficult to get those kinds of resources with all the other budgetary demands and we ran into a number of problems. Partly solved by the filing fee issue, but I think the agencies do need, but certainly the division needed more resources at that time sensibly used and sensibly coordinated. The commission I leave to the people who've worked there.

MURIS: Well, I have a long-running view about this and when -- in '81 when we came in, we were asked to reduce resources. The way to think about it is FTE, we put the agency on a path from 1800 to 1200. And that's where it was when we -- in the mid 1980s.

When I came back in 2001, I asked for a comparison with the mid 1980s and Bob had had about a thousand and it turned out, in professionals, a thousand and 1200 were about the same, very small difference. And what had happened, there was a lot of outsourcing and a lot of productivity improvements. Technology had had a significant effect. I think the agency is up to 1150, something like that.

RILL: That's right.

MURIS: And I don't know how that compares with 2001. I suspect there have been some more productivity improvements, probably not as dramatic as in the 1990s. But Bob did a hell of a job with a thousand. I think we're headed for another retrenchment era, so I think it's probably wishful thinking to ask for significantly more resources, and besides the people, there's -- BCP, for example, has a significant infrastructure burden that we managed to satisfy with the money from Do Not Call which we used for building up the infrastructure for Do Not Call, which was very helpful for the rest of the agency.

But I think at the present, the present rate strikes me as significantly more, we ended up about 1260, about 1060. And I thought we did a lot. I thought Bob did a lot, so I'm not -- I don't think more resources are in the cards and I think they're doing a lot with what they've got.

HUTNIK: This is not from an internal perspective but I think it's all about the priorities, right, where do you want to focus the resources that you have. And some of the themes from today were -- we have division of enforcement and we need more manpower in terms of business guidance and I think to not get distracted by calls for regulation which would take a whole bunch of people off of doing some of those things now. That may not be as productive.

MCDAVID: Speaking only on the competition side, the lawyers and economists with whom I work regularly at the commission are incredibly dedicated and hardworking. The general populace has a view of government employees that is deprecating, and it's not fair. They do yeoman's work. They work weekends, they work nights. And a lot of the competition mission is consumed with things they can't predict. What's the merger wave going to be? All of which are time-sensitive. So they have to at least retain the kinds of resources they've got because you'll burn them out.

VLADECK: Yes, I would argue for more resources. I understand Tim's argument and I realize this is probably swimming against the tide, but since the 2001 or 1981, Congress has added considerable workload to the agency, and changes in the marketplace have required the agency to do more work. The Bureau of Consumer Protection at its height when I was there and I don't think we've added any resources to it had fewer than 450 people, including most of the people in the regions.

People work extremely hard. They're incredibly dedicated, but there are lots of people with fingers in the dikes and the water is just coming over the transom. So I would urge the commission to think about asking for an increase in resources. And I think -- of course, most of it should go to BCP, but I think the agency could well use a couple hundred more FTEs.

SAYYED: Okay. Well, I think we'll conclude right there. We were on -- targeted for 11:45 and I think this is where we are. Before we conclude, I'd like to thank a bunch of people. First, I thank the panelists including Jason who had to leave very much for devoting some time and effort to this. I'd like to thank my colleagues in the Office of Policy Planning who have been working very hard on what will probably be about 20 days of sessions, and this is only five percent of the way through once we're done today. They're just a wonderful crew to work with and I'm very proud to work with them. And I think have the best job at the commission.

(LAUGHTER)

And finally, thank also the staff of the executive director for helping put this thing together, and you'll see more of it this afternoon, but I won't be on stage, I wanted to put that out there. And then thank everybody for showing up and paying attention. We'll be back here at 1:30, so if you come here slightly before, that'd be great. There's a cafeteria across the courtyard if people want to eat law school food.

(LAUGHTER)

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

(APPLAUSE)

(RECESS)

SAYYED: Start it in a -- in a minute or so. Let people coming in if they're trying to hit the 1:30 mark.

Okay. I'm just going to say welcome back, and remind people in the audience or new people that two of my colleagues, maybe more, are collecting questions that you may write on the question card, and they'll be brought up to the panel the end of the panel for some audience Q and A.

So, with that, I'm going to turn this over to Greg Werden from the Antitrust Division, and he's going to discuss with the panel whether the U.S. economy has become more concentrated and less competitive.

WERDEN: Thank you. I'm not a fan of introductions, so I will not introduce our speakers, they can introduce themselves if they want to spend their time that way, that they have total control over their time. The way we're going to organize this is Jon is going to give a long slide presentation and then each of our other panelists will give much shorter presentations, and they will go to a series of questions that I pose, and then finally questions from the audience. So, Jon.

BAKER: Thank you. Thank you, Greg. And nice to see all my co-panelists, and thank you Bilal, and the FTC for inviting me, I was involved in the hearings in 1980 -- '95, and I'm delighted to be back for the -- for these today.

So, the FTC hearings two decades ago that I just referred to, were spurred by two challenges for antitrust policy. Markets were becoming increasingly global and innovation competition was becoming increasingly important. And today, we have an additional challenge for antitrust policy, the economic evidence has been accumulating since the 1995 hearings and much of it for the past five years or so, that shows that market power has been growing for decades. And I think of what we're seeing as today's antitrust paradox, a conjunction of substantial and widening market power with well-established and extensive antitrust institutions.

Oh, what's with that one? All right. So, in my presentation I'll sketch the evidence that market power has been growing over the past quarter century and has become substantial in the United States. And I'm going to go through nine reasons, none of them is individually decisive, there are ways to question or push back on each, but their weaknesses are all, are different.

And so if -- so when you take them collectively, they paint a compelling picture of growing market power. And I'm also going to explain why the recent economic trends I point to reflect growing market power, not solely increased scale economies and temporary rents to early adopters of new technologies in competitive markets.

And to fit my presentation into the allotted time, I will say less about most of the reasons than will appear on the slides. And the very last slide will reference my forthcoming book, the first chapter of which goes into more detail on this topic including full cites for the research that's referenced on the slides. And it will also mention criticisms of the research that I don't have time to bring up in my presentation, although I'd be happy to talk about them during our discussion with, later.

Before I get into the nine reasons, I want to make clear what I mean when I use the term market power. Firms exercise market power in their output markets as sellers by raising prices or by altering other terms of trade adversely to buyers relative to what would prevail in a competitive market. Market power is not just about prices, it can be exercised on other competitive dimensions, too. And market power can also be exercised in input markets, exercised by buyers, and that's defined analogously.

The first of the nine reasons to think that market power has been growing is that we insufficiently deter anticompetitive coordinated conduct. The Justice Department keeps on covering cartels year after year. They seem to form at the same rate that we catch them. And that suggest under-deterrence because the penalties are probably too low to deter collusion, and there's no reason to think that the threat of penalties chills pro-competitive conduct or leads to excessive compliance expenditures. And under-deterred express cartels are probably the tip of an iceberg, because tacit collusion is probably even harder to deter.

We also insufficiently deter anticompetitive mergers and there's several empirical studies that support this conclusion. Now, what happened here? Did I hit a wrong button? All right. I need a tech guy -- there we go. Okay. The third reason is insufficient deterrence of anticompetitive exclusion. Since the late 1970s, the courts have targeted rules governing exclusionary conduct for extensive relaxation, and in some cases the new rules conferred de facto legality on such conduct.

The empirical evidence that exclusion is under-deterred is about the competitive effects of vertical practices. Now, vertical conduct an exclusionary conduct are not the same thing, but there are correlated, and the evidence shows that vertical restraints often support collusion and there are a number of examples of competitive harm from vertical restraints and vertical integration.

That interpretation -- oops, let me go back here. Yes. That interpretation of the literature on vertical conduct may surprise some of you. So, I want to make an important methodological point. Most empirical studies about the effects of vertical restraints are looking in the wrong place to learn about whether stronger antitrust enforcement would be beneficial.

If you want to know whether oligopolists can use vertical restraints to harm competition, you won't learn much by looking at markets with competitive structures or in markets where the firms could be deterred but from anticompetitive conduct with a threat of antitrust enforcement. Looking in those kind of markets lets you learn about potential pro-competitive consequences, and about ways that firms can craft their vertical arrangements to limit the inefficiencies and costs that they may impose.

Now, you might see some instances in which vertical restraints harm competition, but the markets aren't randomly selected, you'd expect in general the studies would not often find harm to competition, even if the conduct could be harmful in other settings that are not being studied, where one might want to think about antitrust enforcement.

And you're not going to learn much about whether relaxing antitrust constraints has or would lead to greater competitive harm. If you want to identify the effects of antitrust enforcement in the econometric sense, you have to compare outcomes with and without antitrust constraints, and the -- there's a McKay Smith study that's in the small print on the slide of -- about resale price maintenance, and that's a rare example of a study of a vertical restraints that addresses this identification problem. And it finds it on the whole, competition was harmed when the antitrust constraints on resale price maintenance were relaxed.

Fourth, market power is durable, markets are not invariably self-correcting, cartels and monopolies often last a long time. The eight-year lower bound on the length of the average cartel compares favorably with the time it takes to create -- to correct rather, erroneous judicial precedents, even Supreme Court decisions through later court decisions that overrule them or narrow them procedurally, or substantively, or through lower court decisions that distinguish or limit them, or through legislative abrogation.

Our fifth, the increased equity ownership of rival firms by diversified financial investors is another reason to worry about growing market power. Rival airlines, or banks, or pharmacy chains, or other competing firms increasingly have overlapping ownership by financial firms like Blackrock, State Street, Fidelity, and Vanguard. The initial studies have found that common ownership leads to higher prices, and this is an active research area where we're likely to learn more soon.

Sixth, increased governmental restraints on competition. Over the past few decades, the U.S. has broadened patent scope substantially, and granted too many patents after inadequate review. This trend may have halted, but it's not really been reversed. And other examples of governmental restraints that may be on the rise include occupational licensing and lobbying to limit rivalry.

All right. The seventh is the rise of dominant information technology platforms. Now, the empirical evidence suggests that price cost margins have been growing economy-wide since 1990 in the United States. And the trend seems clear, although the magnitude of the margin increases has not been measured precisely.

Growing price cost margins are probably tied to investments in information technology. Dominant information technology and internet platforms aren't the only firms making those kind of investments, or likely exercising some market power as a result. But the platforms are an important part of the story, because they're likely insulated from competition in some of their major markets.

All right. So, eighth. Oligopolies are common and concentrations increasing in many industries. The best evidence that increasing concentration allows firms to exercise more market power comes from studies of particular industries like airlines, brewing, and hospitals. The economy-wide evidence on concentration suggests only modest increases in concentration and in many -- and many industries with rising concentration remain unconcentrated.

But the economy-wide evidence is less reliable than the industry specific studies and that's because the economy wide studies often use broad product markets when it would be better to look for competitive problems in more

narrow markets. And they often use national markets when it would be better to look at regional or local markets.

Now, some of the evidence involving broad national aggregates is consistent with rising overall concentration, but could instead reflect increased multi-market contact. But that could equally raise competitive concerns about coordination. And there are recent studies that also find concentration is high and possibly growing in many labor markets, potentially making it more possible for businesses to exercise monopsony power to depress wages.

The final reason to think that market power has been increasing is a decline in economic dynamism. And Jason Furman highlighted this reason this morning. Growing market power is a leading explanation or a plausible contributing explanation for a range of economic trends. A secular slowdown in business investment, rising profits as a share of U.S. GDP, a slowed rate at which firms expand when they become more productive, a declining rate of startups, a shift in growth and productivity gains from entrants to incumbents, and a growing gap in accounting profitability between the most and the least profitable firms.

So I've interpreted the evidence in these nine categories that I highlighted as indicating growing market power. And I want to explain now I think that's a better interpretation of the most plausible alternative, namely increased scale economies and temporary returns to the first firms to adopt new information technologies in competitive markets.

Now the benign alternative has an initial plausibility, because the efficient size of firms has likely grown over time in many industries, as a result of the high fixed costs of investments in information technology, network effects, and an increased scope of geographic markets. That means that firms could grow larger, and concentration could rise, and price cost margins could increase even if markets are competitive. And in addition, the first firms to invest in new information technologies might earn substantial rents which should be temporary if those investments don't confer market power and their rivals follow suit with investments of their own.

But the first six reasons I gave for thinking market power is substantial and widening in the U.S. cannot be reconciled with the benign alternative, anticompetitive coordination, mergers, and exclusion are under-deterred, market power is durable, and increased equity ownership of rivals by financial investors of the -- well, can soften competition, and governmental restraints on competition have grown.

Also, market power is a better interpretation in the benign alternative for the other three reasons. The growth of dominant platforms probably does owe a lot to scale economies and first mover advantages. But those platforms may still have the ability to exercise market power by excluding rivals. Scale economies and rents to early adopters of new technologies probably did contribute to rising concentration in various industries.

But there's often independent evidence that the firms in those concentrated markets exercise market power, which is not surprising because the same fixed expenditures that make scale economies and rents to movers possible can deter entry and soften competition.

Now, some of the evidence for the loss of economic dynamism could be consistent with the benign alternative of growing scale economies and returns to early adoption of new technologies in competitive markets, as well as consistent with increasing market power. And that might include the rising profit share of GDP and the growing gap in accounting profitability between the most in the least profitable firms.

But other aspects of declining dynamism cannot be reconciled with the benign alternative. The benign interpretation assumes that profits rise because markets are increasingly dynamic, with higher rates of entry, investment, and business failure. In competitive markets, growing scale economies yield higher profits because entrants have a greater risk of failure when fewer firms can succeed.

Early adopters of new technologies would earn profits, but they'd be temporary, competed away by new or expanding rivals making their own investments. But the benign interpretation is inconsistent with the evidence showing the reverse, a slowing rate of new entry, a declining rate of expansion when firms and plants grow more productive, and a secular slowdown in business investment.

And in addition, the financial markets appear to view corporate profit streams is less risky than in the past, and yet if markets are increasingly dynamic as the benign alternative supposes, those streams would be viewed as riskier. The bottom line is that growing market power is a better explanation for declining dynamism, and for all nine reasons taken as a whole, than the alternative of increasing scale economies and early adopter rents in competitive markets. The benign alternative might -- may well be a partial explanation, but increasing market power is likely an important part of the story too.

Now, I don't need to spend much time with this audience explaining what's wrong with market power. The harms within markets are described on the slide from a partial equilibrium perspective within an industry, within a market, the harms that they can arise regardless of whether market power is exercised by sellers or buyers.

Market power can also harm the economy as a whole by slowing economic growth and increasing inequality. And the adverse economic consequences of the exercise of market power could be reinforced if firms and industries can use their market power to secure political power, and use their political power to protect or extend their economic advantages.

So, just to summarize, the evidence I presented shows that market power has been growing in the U.S. economy for decades. From an error cost point of view, we've learned that we are deterring anticompetitive conduct less than we thought we were in 1995 when the FTC last held hearings. And that means we should take steps now to strengthen our antitrust rules, institutions and enforcement. And, Greg, I think I'm going to reserve my remainder of time for rebuttal.

WERDEN: I'm sorry. You have to check in with the clerk before you start talking. If you've ever argued the Court of Appeals, that's the rule.

BERRY: Oh, okay, good.

WERDEN: Steve?

BERRY: Okay, good. So we got new slides here.

WERDEN: Yes.

BERRY: Good. Okay. I want to give a talk that -- only about six minutes that I think is complementary to what Jonathan is talking about. And I want to talk about what kind of evidence we should weigh more or less as we're looking at this debate. And in particular, I think that Jonathan's mix of evidence was quite different than the evidence you often see in presentations in the -- in the press, by macroeconomists, and by other non-specialists. And I wanted to indicate what some of those distinctions are so that we can think about what evidence is the most convincing, and also what kind of things we'd like to look forward to in the future.

So, I'm going to divide things a little bit starkly into good and bad. And to talk about the relative bad, I want to go all the way back to the year 1989. And in the year 1989, there were two I think magisterial chapters that were published in the handbook of IO. One by Dick Schmalensee and one by Tim Bresnahan and Dick Schmalensee was a participant in and a sympathetic observer of decades worth of work that did something like what people are doing today, which is try to look at the correlation of various outcomes like prices and markups with measures of concentration like the Herfindahl Index.

And his chapter laid out a whole host of problems with that, but I want to emphasize particularly one. The Herfindahl Index in particular is probably better thought of as the cause of market competition, an interesting summary statistic of what is going on rather than as an effect that causes outcomes. The Herfindahl Index itself is a function of market shares, which one function of outputs which are codetermined simultaneously with price.

The most famous example that people used in those days is that differences in firm heterogeneity where, cost heterogeneity where you had some firms with very low prices, that those low marginal cost would feed into their market shares, their market shares feed into the Herfindahl Index, but their low marginal costs also flow into markups, and you see a positive correlation between markups and concentration that has to do with efficiency rather

than with competition. That's the problem of simultaneity, the problem that in this case, correlation is not causation, and we should be very skeptical I think of these studies that in some ways naively regress an outcome on a Herfindahl Index.

Now, some people in this literature I think are actually quite aware of this, and they think of this is a problem with the Herfindahl Index itself, is correlated with other things, is endogenous, they look for purely statistical ways of dealing with that endogeneity, they look for what's called an instrumental variable or just a more plausible exogenous variation in market structure.

And that brings me to the second of those great handbook chapters written by Tim Bresnahan, and what he pointed out is that even if we grant that you have discovered the true causal effect say of the number of firms on price, you haven't established anything about the role of markups, either on the output side or on the input side.

And let me just give you one example of that. I teach freshman micro, and on the third day, we teach them that supply slopes up, and there are a bunch of shifters, among them are the number of firms that shift supply back and forth, and that's because of the upward sloping marginal cost curves of the individual firms.

Demand slopes down, as you move the number of firms to the supply curve, moves against that demand curve, and it shows that as the number of firms goes up supply shifts out, prices fall. In the perfectly competitive output market, decrease in concentration drops prices. But there are no markups, you haven't found evidence of markups, you may have found evidence of increasing marginal cost.

The same thing happens on the input side, it is an implication of the perfectly competitive model of wage determination that an increase in the number of firms will drive wages up. That's not evidence of monopsony power. What Bresnahan said is that we actually have to separately consider demand and cost and competition. And we can't do that and one equation or one correlation.

I think that kind of evidence with -- by the way did not feature greatly in conference discussion, should be downweighted a lot, right? We thought it died with the publication of these two chapters 25 years ago, and some of us woke up and were a little startled to see it suddenly outside of our window looking in, and that's trouble.

I want to talk for just two minutes about possible alternatives. One is just to look at, directly the facts of policy that have changed, and what effect did they have, we can learn about policy that way. Let me skip a couple slides though. Another thing though is to back away for one minute, to back away form -- for one minute from causation, and just think about measurement, what has happened to markups, and we heard about these papers just a minute ago. I think they do show that regardless of cause, our best evidence is that markup are going up. It's sensitive to measurement like whether you include certain intangible and fixed costs in that or not.

But that kind of simple descriptive cross-industry measurement is very valuable for telling us what has happened, but not why, not why. So, I think ultimately, we're going to have to do what Jonathan suggested, we're going to have to do studies of individual important industries and ask what is going on. So, here's an example a graduate student of mine did as a -- as a part of his thesis. He looked up the wholesale sector, that's pretty important, that's a pretty important sector, right? And what does he find? Concentration is up, aha, concentration is up.

On the other hand, output is up, that doesn't sound like monopolization, does it? Output is up. The product itself has changed, multi-warehouse wholesalers are locating closer to their customers, they're investing in IT for logistics, they're dual sourcing goods, you can shop between China and the United States with one stop at a wholesaler. The nature of the good is changing. And when you put this to a Bresnahan-like series of models, you'll see that markups are going up in the industry just like in the cross industry analysis, but for a mix of all of the reasons that Jonathan mentioned, not for one or the other, but for all of them.

Product quality is going up, that's pushing prices up that pushes margins up. The marginal cost is going down as firms get better logistics and locate closer to their customers, marginal cost is falling, that's efficiency, but markups go up, competition is really going down. And that also contributes to the markup effect.

Why don't we see the entry that Jonathan talked about? Implicitly there must be fixed costs or some costs that are preventing new entrants from somehow competing away these profits. It's costly to build all of those plants near your rivals and that's a sunk cost, and it's very hard for that to be competed away.

This is a complicated story. And what I want to finish with is a substantive hypothesis. What if this is true in broader sections of the economy, what if it's happening in broader sections, not just wholesale, maybe IT, maybe other parts of retail, maybe broad sectors of the economy, that firms for endogenous reasons or changing their production methods and their -- and the quality of their products so that marginal cost is falling and fixed cost is rising. Markups are going up, concentration is going up.

If that's happening in a broad scale way, it doesn't seem just that big is bad, but we're way, also, we're way far from the theory of perfect competition as well. We're in this very complex setting where there's some good and bad things happening, like Jonathan, it's not just economies of scale, there are other things too, there are competitive effects as well. We can't just wave our hands and say it's all fine.

I also don't think we can just simply say, big is bad. And I think it's these better kinds of evidence, these descriptive studies at the broad level and causal studies that are within industry level that we ought to emphasize, and I think are the ones that are going to eventually tell us what the correct policy path forward is, and these guys are better policy experts than I am, so I'm mostly going to listen for the rest of time.

WERDEN: Thanks very much, Steve.

(APPLAUSE)

WERDEN: Good job. I'm not sure who's going next, but why don't -- why don't you do it?

WRIGHT: Okay. There are a few of my students in the audience who are laughing at the idea that I'm going to do anything in six minutes. But let's give it a shot nonetheless. I think sort of extending the discussion from Jon and Steve to move on, probably start in the same place as Steve which is I went to grad school in economics and studied in IO in the early 2000s and those handbook chapters were sort of taken as the starting point for learning empirical IO, we didn't read studies that attempted to infer causations and changes to HHI on the effect on price, we read Steve's stuff.

I think the fundamental challenge in this area, and then I'll dive into the data is that while it is probably true that zombie IO economics has died in economics departments a long time ago, I think the fundamental challenge in part is making sure we don't get antitrust policy that adopts zombie IO, and I think that's a challenge for the agencies, I think it's a challenge for IO economists. because the punch line for some of this is going to be on the real questions that matter for designing policy, my interpretation of the evidence is that we know -- we know a lot less, and probably need to know a lot more before we start playing much with policies, I'll spend the rest of my time talking about that.

For starters, I think it's important to separate, we're going to talk about testable hypotheses, and testing with empirical data, I think it's really important for these discussions, Especially, if we're going to attach any policy relevance to them, to separate claims. One of the claims around is that we've got a rise in concentration at the aggregate sort of of non-market level, sort of really aggregated industry sectors, stuff made with metal, not necessarily just capturing firms that are competing against each other.

There's a second -- a second set of claims that try to do relationship between what's happening in markets, changes in concentration in markets, and relate those to a price or output or markets, so are we getting more or less competition.

And I think there's a third set of claims that is, is any of this caused by lax antitrust enforcement. I spend most of my time talking about why it is so important for discussion of antitrust policy that we focus on markets, and not sort of broad, aggregated sectors, that doesn't mean that the sector-based research isn't incredibly useful. It is, we

learned things like at a rough level what's happening to markups over time, that is interesting as a descriptive matter.

We don't, and often these studies are used to sort of glom on causation and make claims about whether antitrust is doing too much or too little. The reason that we care fundamentally about markets and not sectors in antitrust is because the fundamental lesson of those IO handbook chapters, and I think most of modern IO in this area is that competition and concentration are different things.

Concentration can be caused by more competition. It can be caused by less competition. I think Steve had this as the Chicago critique on his slides, I'm at UCLA guy, I'm going to call it the Demsetz critique, or else I'll lose my Bruin lunch card. So, but the fundamental idea that we grapple with and what makes antitrust hard is that changes in concentration can be the outcome of more or less competition, that makes identification difficult. It makes broad claims about whether we have too much, or too little, or sort of goldilocks just right levels of concentration really difficult to do, and probably outside the scope of the ability of modern IO.

And that really was the lesson of sort of the big empirical revolution of IO in the 1970's and 1980's. So, punch line for me is I think a lot of the evidence that we see are attempts to do some of these broad industry sector stuff, where we do exactly what we learned not to do in the 1970s. We regress markups or price, or profit on really broad, aggregated industry data. And then the policy world sort of jumps on and make causal claims, and sort of we're off and running, and I think that's a dangerous place to be in.

There are attempts to do better work, there are attempts to do sort of more sophisticated merger retrospectives and tradeoff, the broad general insights, we're learning about one case, and maybe I think in discussion, we'll talk a little bit more about that. But my read of the evidence is at the aggregated sort of relationship between aggregated concentration and competition outputs, we don't know much that's relevant to formation of antitrust policy, I think there are interesting questions, I think it is important for modern sort of IO economists and for the agencies, for the FTC and the DOJ who have great collections of IO economists inside those buildings, to engage in answering those questions.

And I'd say, it's great that we all get to come up here and engage in those questions, but I'm hopeful that the economists inside the agency who are experts and have access to data, things like agency predictions in individual cases that they can test against data, that they're also an active participant in that discussion.

So, I think the real challenge moving forward is if you've got data that isn't what you need to have the type of discussion that you want to have about whether it is desirable to move policy one way or another, whether it's mergers or something else, the challenge I think both for the academy and for the agencies is to invest in producing those data, producing tools, producing studies to move the ball forward in that literature, because I certainly agree, there are interesting questions here that require investment and are sort of worth the time. I'll stop there.

WERDEN: Fiona?

MORTON: Great. Hello, everybody, and thanks to the FTC very much for being invited to contribute to this panel. I agree with both Jon and Steve on the IO research here. It seems very easy to run the wrong regression, to someone without a PhD, it looks tempting. We need to resist that temptation, because it is in fact just wrong.

But we need to find another way to answer the question, that's not an excuse for not answering the question. And as Josh said, concentration and competition are not the same thing, it's not actually I think very informative to learn about aggregate concentration in the United States, I'd like to know about competition in the United States.

And I think as Steve said, the markups are a good way to get there. I think the real reason that we're -- that there is consensus among a large fraction of the people who do this work for a living and the people who read the newspaper, that we have a competition problem in the United States comes not from papers published in academic journals, but from two main sources.

One is, for people who work in this area, the actual experience of litigating. So it took 23 years from the time the FTC first found a pay for delay agreement in the record to getting the Supreme Court to say, yes, under certain conditions those could be anti-competitive.

Twenty three years, and a pay for delay is when a branded monopolist pays the generic to stay out of its market, okay? That is pretty straightforward. It's exclusionary conduct, it harms consumers, it keeps prices very high, why did we have to wait a quarter of a century to get that practice banned, or it -- never mind banned actually, to get that practice scrutinized properly.

The American Express opinion by the Supreme Court completely misses the locus of competition between American Express and Discover. It's all about American Express' consumers versus the retailers and so on, and gives a complete miss to the issue of competition, which is what the antitrust laws are supposed to protect.

So when you look at litigation, and you look at what the agencies are trying to prove in the courts, it's all really heavy lift, and as Bill Baer said when he was at DOJ, why are some of the mergers we're reviewing even getting out of the boardroom? They're just obviously anticompetitive, and yet we had to litigate them anyway. So, I think that's one big area that we look to for evidence as to why there are anticompetitive effects.

A second one is our experience as consumers. Look around at hospitals, airlines, beer, media, big tech, I think people in the economy walk around buying things, and the experience they have is of less competition. And I think also consumers can get can easily confused between what is regulated and what's not. So, for instance, pharmaceutical prices and cable prices are not fundamentally something that antitrust can do a lot about, and yet those things are exhibiting less competition, also for the reason that Jonathan covered in his talk about lobbying to get government protection.

So, what's my response to this emerging consensus? We need to revisit the economics, and I will say this slowly because it's worth saying 25 times, and I don't have that long, so I'll just say it once slowly. Economic analysis is not the same thing as less enforcement, okay? Chairman Simons said it exactly right this morning. Economics is a tool, if you feed a set of facts into the economic analysis box, okay, you can come out of this merger is competitive or this merger is anticompetitive. It works beautifully, okay?

But what happened in 1975 as we applied economics to antitrust and we got the pendulum swinging down, okay? Arguably we had too much disorganized enforcement, the pendulum swung down, and now we have these things as sacred texts, and the answer is always if you believe in the sacred texts of Chicago, to enforce less. Obviously, if you enforce less for 30 or 40 years in a row, you're eventually going to pass the optimum, okay? And that's what we've done, I think.

And we need to recognize -- I luckily was too young to be part of that project, and so it's -- I mean, perhaps easier for me to see that we've well overshot the optimum. And that we need to go back and look at the economics fresh and try to get the right answer. And let me remind you all that there's a big drumbeat of dollars in favor of keeping those sacred texts, because the parties that have monopoly profit would like to keep the monopoly profit, and they will spend their monopoly profit to fund people who say that less enforcement is always better.

So it's a -- it's going to be difficult to achieve progress in this area, because the parties that have financially gained from less competition are going to work hard to keep their status. So I just want to alert all of you in the media and the enforcement community to be battling courageously for the consumer.

But I think that the bottom line is that we have the tools, and we have the ability to get the right answer, and we should use them, and we should not be trapped in paradigms from 30 years ago, because those are really outdated to the extent they were even correct 30 years ago, which I would not stipulate to. All right, that's all.

WERDEN: Thank you. We're going to turn now to a series of questions that I will pose to our panelists, they've gotten the questions in advance, and actually done some negotiating. And there's a designated first answerer on each of the questions, but after that it's up to them to work it out. So, the first question which is directed initially to Josh, it goes like this. Jon's basic point is that we have more market power than we used to and that's bad.

Assuming that we do have more market power than we used to, and that it's a significant increase in market power, my question is, do you agree that it's necessarily bad, and do you think something ought to be done about it?

WRIGHT: First, no one ever told me there was negotiating. I always get -- I always get left out. So let me spend ten seconds fighting the premise and then I'll give up an answer. The question is sort of assuming arguendo, the increase in market power then sort of -- is that of -- is that a bad thing? And I think my ten seconds is almost up, but I will say I'm not sure that the premise has been established. But assuming per the question that it is, again, I think we get back to the fundamental point, and some of these old Chicago texts are pretty good including Demsetz's on the point about identification which I still think is very relevant to our discussions about concentration and price.

I have a feeling you meant a different one. But I think here, we don't know ex ante, and this is the fundamental problem whether increase -- we in antitrust want to care about changes in market power that are attributed -- attributable to reductions in competition. That is not all of the ways in which market power can be increased, if we want to do antitrust that is sort of consistent with IO, if we want to get the economics right, we need to have a set of tools that enables us to distinguish between those propositions.

So, what do I think can or should be done? There are simple answers floated around, we could have -- we could sort of go back, I don't think anyone here wants to do that, we could go back to really simple structural rules that equate competition and concentration. We could pool, dust off the 1968 merger guidelines, do antitrust with our fingers, count the firms, and pretend as if we can make causal inferences from changes from concentration to competition.

We could have bright line rules that have presumptions of liability if mergers are above and X share or above X dollars. We have one of those in the Supreme Court, I count that as one of the bad cases we ought to get rid of. But there's pending legislation that does something like this.

None of that I think is based in sound economics, so I think what we're left doing if we properly reject those ideas is making a serious investment, both in the academy and in the agencies to improving our tools and being able to answer better some of the questions that we struggle with now with identification.

I think we're starting that with merger retrospectives, I think if you look at the evolution of the way inside the agency empirical analysis of mergers happens now versus 10 years ago, much less 20 years ago, the improvement is remarkable, but I think it is a burden on the agencies and on the academy in these areas who like to publish journal papers and whatnot but sort of engage on these questions, both to fight against sort of oversimplified fixes that will probably do more harm than good, but also to subsidize investment in more knowledge to do a better job designing and calibrating policy with these questions.

WERDEN: Anybody else?

MORTON: Yes, I would disagree. I think we have the tools. I don't think we need to spend 10 years developing new tools. I think we could start now. There isn't anything wrong with our existing standards or economic analysis. I think the problem comes when you try to apply it.

So if you're in court and it's -- and the judge is taking the view of recent cases that we have seen, which is either ignoring the facts or ignoring the economic principles or not applying the horizontal merger guidelines, for example, in terms of are efficiencies merger specific, are they verifiable, are they cognizable.

I think that's where the problem comes and, of course, if an agency is confronted with -- at the end of the day, they disagree with the firms and they have to go to court, that's the outside option. And if you have a very weak hand when you go to court, then there's not much you can get as a settlement. So I don't think actually think we have a problem with the economics. I think we're ready to go there.

BAKER: Greg, I don't know the rules on, like, random intervention so I'm going to make one in the absence of a rule. So the thing that I have in mind in terms of getting the -- I think we're all for getting the economics right. But, for

example, some of these areas go the other way so it's not a Chicago text but in 1968, Oliver Williamson wrote a pretty well-known paper on efficiencies and mergers.

Fifty years later, there's not a single federal court decision -- no merging parties have prevailed on an efficiencies defense, so 50 years is a heck of a good winning streak. I agree parties sometimes do a bad job presenting efficiencies. I've been inside an agency -- but I think there are places where we could do better. That's one that comes to mind that sort of cuts the other direction.

WRIGHT: The -- just on that last point, I just want to observe that if the overall overriding problem is we're worrying about growing market power, sure, there's a good -- there might be good government reasons to think about ways in which we could do reforms that avoid showing less beneficial conduct but there problem is to strengthen antitrust enforcement and that should be the overriding focus at the moment.

WERDEN: All right. Let's move to the second question. You've heard from a number of our speakers today about the evidence of -- or related to increased corporate profits. This evidence seems fairly clear. The trend is worldwide. But it is more pronounced in the United States than elsewhere and here, the profits are highly concentrated in relatively few hugely successful companies. My question for the panel is -- and Jon's going to first on this one -- does the presence of a relatively small number of hugely successful technology companies in any way suggest a failure of antitrust?

BAKER: So the answer is not per se. I mean a large and profitable firm size and successful alone doesn't mean antitrust has failed. Firms can and do grow large and become successful, you know, providing customers with valuable products and services and that includes large technology companies. We want to encourage firms to grow successful and profitable by offering better and cheaper products and services.

We should also be concerned if firms including large and successful ones exercise market power in some other major markets or threaten to do that through exclusionary conduct or collusive conduct or merger. Now, I pointed to the growth of dominant information technology platforms as a reason for concern about increasing market power because I think their high margins probably reflect market power in part, not because of their success per se.

BERRY: Yes. So I think I would combine my answer a little bit to these last two questions which is that -- and the IT example is good. I think they have high markups, they have high profits. For many good reasons, they have high markups. I'd just sort of say it slightly opposite from Jon, it's not just market power. I think it's a combination of market power and doing things that people want and gaining efficiencies. And so it's not -- but as I said before, it's not bad per se but I do think it has implications for antitrust even if it's not bad per se.

Take two of these firms. Take two of my big wholesaling firms that have an overlapping set of locations. If the markups are already very high, the stakes for a merger become that much more severe because they're already operating on inelastic parts of their demand curve. So I think in many cases, we can sort of litigate whether it was bad -- whether we got here or not. And I personally think we're going to figure out -- it's a mix of things and we're going to say some bad and some good.

I think what I'm more interested in is the forward-looking discussion of what are the implications, now that we're here, is there something that we should be doing, is there a kind of scrutiny that we should be offering that we haven't offered before. And I'd really like to hear from my closer to practitioner colleagues what those things might be.

WERDEN: You want to get in on this?

MORTON: I'll answer it as answer to the next question you're about to ask me, how about that?

WERDEN: Okay. That's fine. Next question. Steve sketched a scenario in which technology is changing in a way that increases the sunk costs and decreases the marginal costs of companies. That scenario rings true even if lots of other forces are at work. I would like to hear from the panelists on what they think likely accounts for the empirical observation of increased markups over the past four decades.

MORTON: Okay. So I'm going to take the first half of that question and then Steve's question on what do you do enforcement-wise. I think what we need to do is adjust our enforcement analytics to fit the market structure as Steve suggested. So let's take, for example, the presence of network effects. Network effects are when the value of the product rises in the number of users. So a social media platform is more valuable to me, the more other people are on it. What do we get when we have network effects? We get concentrated market structures. Everybody wants to be on the same network because all their friends are there.

Okay. So we get market shares that go 99 percent and 1 percent or a few little epsilons. We don't see market structures of 70/30 or 50/50 in a world with network effects. Okay. So we necessarily are going to see concentrated markets. Is that a problem? No. As we've said already, just per se, just that fact, that's not a problem.

But we need to recognize that the locus of competition has shifted. Competition in that market does not display itself in the market. The 30 is not competing with the 70. No, it's competition for the market. Who is going to be the winner-take-all? Who is going to get to be the 99? There are some firms that start out together and one of them gets ahead and the market tips and that winner gets 99 percent.

Okay. So now that we know that the locus of competition is for the market, not in the market, how would we do antitrust? We would care an awful lot about entry. We would care an awful lot about potential competition. We would care an awful lot about acquisitions by the 99 percent of a teeny little epsilon percent. Why? Because that epsilon percent doesn't have a lot of share, but that's where the competition's coming from. That 99 percent guy is afraid the epsilon is going to become one and attract all the teenagers and there's going to be a flip.

Okay. So we care a lot about that little epsilon and that's where the competition's coming from and we need to dust off our theories of harm when it comes to potential competition. We need to stop investing so much importance in market share. The market share of the little guy is not big and when you calculate the Herfindahls, nothing's going to happen when you do this -- when you analyze this merger. Does that mean there was no competitive significance to this little player? Quite the contrary.

All those little players are the only ones that are making the 99 percent pedal faster and work harder to keep consumers because they're all potentially able to overthrow the incumbent. So that's a way in which we have standards, lessening competition and so on that work perfectly well in an internet platform or a network effects market. But we need to think about focusing our enforcement efforts at the place where the competition is, which is a little bit different in some of these markets than it would be historically in, say, automobiles. So I think there are big implications for antitrust enforcement and I would point people in that kind of direction.

WERDEN: Do you want to weigh in, Josh?

WRIGHT: I think I agree with probably everything in that in terms of description of that and other contexts being appropriate to worry less about the shares and worry more about the competitive constraint imposed by the rival. I think that's sort of a common theme, focusing on the competitive constraint directly rather than using shares as a proxy that probably holds across a bunch of areas. I will make the observation that it is with respect to Steve's explanation with the sort of increasing sum cost and reduced marginal cost.

That -- one of the implications and I think this is a hearing for another day. But one of the implications is that a lot of those industries are industries that are intellectual property intensive, and one of the potential tensions that arises and I think the agencies have to engage with and be thinking about as do academics who are thinking about these things is, you know, the idea that we sort of are chasing markups leading us into those industries, invites a risk of having antitrust and IP sort of go back to the '60s and 1970s eras where they ran directly into each other.

I think a lot of work has been done to try to get antitrust and IP to serve as complements in the direction of competition innovation rather than substitutes. And there needs to be in those areas -- if that indeed is the right story, I think there needs to be sort of significant thinking about how to make sure that complementary relationship stays intact.

WERDEN: Okay. Let's move on to the next question which concerns dynamism. You've heard quite a lot about that today as well. And Jon refers to some evidence on dynamism as one of the major reasons for rejecting a benign explanation for some of the trends that have been observed. But I will point out to our panelists and our audience that the databases on which economists rely may be missing a lot. The broadest database that I'm familiar with is the Census Bureau's Business Dynamics Statistics, which is a very high quality longitudinal database that includes every business in the United States with at least one employee.

But it doesn't include any of the businesses with zero employees. And you say, "Well, how big a deal can that be?" Well, the answer is a presentation done by Census economists a few years ago revealed that between 1997 and 2010, 75 million startups in the United States had zero employees while only 7.6 million had one or more employees. So over 90 percent of the startups in the United States are being missed in the data that shows entry rates going down. So my question is, well, what data, if any, is telling on dynamism? And Steve is going first on this one.

BERRY: Okay. So I'll start off confessing my confusion a little bit. So when we talk about market power -- I know what we're talking about, we're talking about the ability to hold price above marginal cost. When we talk about dynamism, a few things come to mind and they seem different. One is a simply descriptive question which we might want an answer to which is has turnover in some sense changed? Is -- are the rates of entry and exit from various industries fundamentally changed?

I think one of the things Greg is asking is how good is the data on that. I don't actually have a great independent opinion on how good is the data on that. But there's another thing that I think Jonathan suggested, which is it's not a descriptive matter of entry and exit. It's a question of whether the economy is delivering important innovations to consumers in the form of lower costs that are actually passed through to lower prices and/or better products. And it's possible as with our last question that you have a set of really big, great innovative firms who protect their position by being very innovative. In that sense, we'd have a lot of innovation and not much turnover and I don't know if that's dynamism or not.

It does make me think hard though about Fiona's point about potential competition. And I think maybe this is what Jonathan is getting at. If there are firms who got where they are by being innovative, how do we ensure that the innovation continues? Surely not by seizing their intellectual property, for example, that seems bad.

But I duly take more seriously potential competition, is the data that Jonathan's referring to evidence of a lack of potential competition? I'm a little confused by that. It's more on sort of actual entry and exit. But these are always first order questions, these questions about innovation are always first order questions, and I think if we accept that we have these very large, very profitable, certainly firms that got where they were by innovating, again, I would sort of say, well, let's start from where we are and ask how we move forward. And I don't know that we have dispositive evidence, but it seems like an important question.

MORTON: I would agree with everything Steve just said and I think then, the purpose of antitrust enforcement is to ensure that the large firm that got where it initially got on the -- by innovating and serving consumers continues to do that. If there isn't effective antitrust enforcement, then you have the possibility of entrenchment and monopoly profits and a decline in -- in the kind of innovation and price competition that we would like to see.

So it's very important that we have effective antitrust enforcement in this sector so that -- and if we do and we continue to have high concentration, then they're competing hard and we're getting what we want as a society, but if we don't enforce here, then I think we can't be sure that we will.

BAKER: And I'd like to just respond by reminding you that I talked about six different indicators of declining dynamism, and really only like one or two depend on the data set that Greg was working -- is worried about -- I was talking about the secular slowdown in business investment and rising profits this year, GDP, slowed rate which firms expand when they become more productive and shift in growth and productivity gains from entrants to incumbents and the growing gap in accounting profitability between the most and least profitable firms, and then also a declining rate of startups, which is more about the data set Greg is emphasizing.

WRIGHT: One small point on the relationship between business dynamism, I think for this purpose, however, we defined it in antitrust is that, you know, of course, there are issues to explore here on potential competition, but a point of agreement with Jon is, you know, public restraint scenario where the FTC has been very active, sort of state or locally imposed barriers to entry that reduce the ability for entry are a big deal here and an area I don't think the FTC needs to be convinced that it is worth spending time on. It has done for a really time. It has done in a bipartisan and consensus oriented way for a really long time.

My own view is that area is probably -- if we're looking for an area to agree on for more cases to bring, I think those cases have legal issues with state action defense and whatnot, but if you want to target the resources of the agency at stuff you know is anticompetitive, state barriers to entry including occupational licensing is a -- is pretty good stuff and stuff that I think the agency would be well-served, and we do lots of competition advocacy but used to be an area where we brought a few more cases.

WERDEN: Shall we go after the lawyer monopoly first? I think we can get an agreement right here. That's the one that's really problematic.

(UNKNOWN): I'm in, Greg.

WERDEN: Okay.

(UNKNOWN): You're asking an economist that question.

WERDEN: They know. Anybody want to say anything more about dynamism? Are we done? Okay. Good. So my final prepared question for the panelists is a broad policy question. If the plan is to somehow ramp up antitrust and the solution is not just to spend more money at the agencies which, of course, is always welcome, what should be done and by whom? Congress, the courts, the agencies? And in particular I ask, one change in substance or procedure do you recommend and what one change would you most strongly caution against. And start with Jon.

BAKER: So in the book that I mentioned that I -- that's coming out next spring, I talk about a number of substantive presumptions for ramping up antitrust that I'd like courts to adopt but I don't want to do the equivalent of, you know, picking a favorite child. I can't really describe them all here. So instead, I'm going to give you two cautions rather than one of each. So on substance, I would caution against presuming that vertical conduct is pro-competitive and I think I talked about why in my presentation, and on process I would caution against introducing direct political influence into antitrust enforcement.

WERDEN: So why don't we just go down? Steve, next?

BERRY: Okay. So I really wanted to hear the practitioners talk to this more -- more than I wanted to hear myself talk about it.

WERDEN: You can pass if you want.

BERRY: But let me just say one quick thing which is -- it falls upon this last point. I think in general the state of the evidence and I think this is even consistent with Joshua's concentration about the state of the evidence, is that I think we could do with some flattening of priors and some less presumptions in general, that I think that's -- it's a time when things are changing, when there's a lot of interesting data and we're not quite sure what it means and the idea that we have strong presumptions, say, about what is vertical or potential competition being bad, I think a lot of presumptions should be at question and that we should be acting as though before we do the analysis, before we get the data to a specific situation, we should be more modest and are basing in priors should be flatter I think just in general.

MORTON: And since current practice is to be extremely worried about over-enforcement and not at all under-enforcement, that would flatten, I agree. I don't have any cautions, so I'm going to do three recommendations, make up for Steve's one. so we're symmetric.

I think it would be -- I'm going to identify who should do this because I'm not enough of an expert in that area, but I think it would be helpful if courts were to actually follow the definition of consumer welfare that is correct and the horizontal merger guidelines. In particular, that efficiencies have to be cognizable and merger-specific and benefit consumers. That would be a big help.

A second big help would be if we were explicit about our concern for potential competition and instructing courts to consider that as an important element in that markets where it is proven to be an important element.

And third, I would say that there is, as Josh mentioned, I think an increasing use by firms of government processes to protect themselves from competition and to exclude, and I think it would be helpful if someone could figure out a way to adjust Noerr-Pennington and similar kinds of laws to make it less possible for incumbents to keep out potential competitors and entrants. Those would be my three.

WRIGHT: Steven, Fiona stole my thunder. But let me say, I would sort of, one co-sign Steve's proposal that priors be flattened here and we take sort of hard looks at presumptions that are driving enforcement, whether they are structural presumptions in favor of more enforcement, whether they are presumptions that go the other way. I think flattening priors and reevaluating those is sort of -- no time like the present to take out zombie presumptions while we're reevaluating the economics.

I would say for the agencies that certainly includes -- Congress has such bright line proposals in front of it. And I'm sure would like to hear from the agencies about what they think about those bright line presumptions but I would also say in addition to quickly co-signing the reallocation -- I guess I'm not allowed to increase the budgets. Reallocation toward public restraints where I think a disproportionate amount of the harm, you line up a hundred economists and 99 are going to agree that that stuff is harmful, we're not going to have sort of big reasonable fights over which way that the welfare effects cut, so I say reallocation in that direction.

And the last one I would say which is more procedural and resource allocation inside the agency -- I do think -- there are a lot of really tough questions facing the agencies and facing IO economics and helping guide through what I think is a really interesting time and how we calibrate antitrust policy there.

A hundred-some PhD economists between the agencies and I guess I'm not allowed to raise the number to 200 without firing some lawyers which will not be popular here. But I think there are ways to more deeply involve economists inside the agency in these discussions. I think the more of that whether it is through 6Bs at the FTC, whether it is -- a lot of ways to do that. And I think the more of that, the better.

BERRY: I'd like to comment on something that Josh and Fiona, talking about the -- I really don't think -- I mean sure, there are public restraints that are harmful and appropriate to be concerned with if you want to enhance competition, but I don't think the idea of reallocating the FTC and DOJ budgets towards public restraints is necessarily a good idea.

What I'm worried about is that a lot of public restraints, there are other mechanism that are outside of antitrust laws, legislative and, for example, for addressing them and probably more effectively and where advocacy in front of other regulatory agencies and the like.

But it's the antitrust agencies, you know, (inaudible) too in the states but the antitrust agencies are really the most important actors in stopping private anticompetitive conduct, you know, at least along with other actors. And I'm worried that of taking enforcement resources away from those important efforts by the antitrust agencies, the way that Josh's proposal would suggest.

So it's clear, we think the budget should go up.

WERDEN: No argument from me on that. I think start with my pay. We have a bunch of questions from the audience and two of them are almost identical, so obviously there is a consensus that this is the most important issue because we have two who agree on...

(UNKNOWN): They were sitting next to each other.

WERDEN: ...on this. The handwriting is almost identical. I think this is not two independent draws but what the heck. So I will rephrase. What, if anything, should the antitrust agencies be doing about Amazon?

MORTON: About what?

WERDEN: Amazon.

WRIGHT: Doing the same thing they do in all of -- analyzing -- I mean the -- I think the point of the conversation and the reason for the silence is that I think we are all believers in the idea that you get the toolkit right and you fight over how to get the toolkit right and you work out how to get the toolkit right and you apply it evenly across the economy. You could take account of differences but you don't have different sort of...

MORTON: You don't pick out a firm and say, how do we do...yes.

(UNKNOWN): Yes.

WERDEN: So if I rephrase the question, are you aware of any antitrust case that the government should have brought against Amazon but didn't, would you say no?

MORTON: Well, if they should've brought it, then they should've brought it.

WERDEN: Are you aware of it?

MORTON: Oh, am I aware of one? No.

WERDEN: No. Okay. Okay, that's enough for Amazon. We have a question about static versus dynamic view of market power. And this came up quite a few times in the conversation, but since I've got question, I'll put it again.

Because profit is the necessary incentive for innovation and investment, how should we think about many of the things we're observing today like high margins and network effects in terms of a dynamic view of how competition works?

And, Fiona, you addressed this quite a bit already but is there anything you would like to add?

MORTON: I mean, this is why Steve and I have been saying let's look forward and let's try to keep firms honest. You have a good idea, you do something really well, you innovate, you get enormous amounts of revenue, people are very happy. That's excellent. But then it's very easy if we look at the historical record for such a firm to find it easier to exclude rivals rather than compete. Competing is hard. It's hard work.

And so we need to have a toolkit that's up-to-date and used to make sure that as we move forward, a firm that has significant market power is getting it honestly by competing on the merits and delivering innovation and low prices. And if that's what we're getting, that's excellent, but it would be not efficient and not good for consumers to stop enforcing against these firms.

BERRY: Yes, I mean Fiona mentioned, you know, earlier the idea of rivals buying competitors just to -- just to remove the potential competition. We've talked about that a bit. And you're -- I don't think you're blaming the innovative firm or punishing the innovative firm by trying to see if we can stop that from happening. And my -- I have a question. I'm not quite sure whether we should be looking at acquisitions by these firms differently than we would, and I don't think that's blaming them or depriving them of the benefits of their innovation.

WERDEN: Let me slow things down a little. You -- after I ask a question you can go next. Somebody who's worked in an agency realizes and I'm sure our panelists do, too, that none of these questions are as simple as they might appear in a panel discussion.

So if you get some, let's say, dominant technology platform and it's proposing to buy some nascent competitor that might come up with the next greatest idea or might have it already but hasn't got it to market. How do you know

whether to think this is bad because this threat to the incumbent monopoly is being squelched, or this is good because this is the way that this new idea will come to market?

MORTON: So here I think we rely on Jon and his error cost framework to think about this. Right? If you don't know whether the acquisition's going to going to be pro-competitive or anticompetitive, you have to think of the harms you're creating by getting it wrong. And if under-enforcement creates tremendous harm because the dominant technology platform has lots of market power and that's going to be a huge problem, then we have to make sure we're weighting that risk appropriately.

And it may be that we don't have very much information about -- or as much as we would about the potential competitor as we do in markets where we're assessing whether a 15 percent share should be allowed to buy a 20 percent share.

There's a lot of more information about the products, about the way competition arises, about the prices and so forth when you have competitors already in the marketplace. When it's potential, the problem is much more difficult. Does that mean there's less welfare at stake? Not at all. So just because there's less information doesn't mean we get a free pass to do nothing about it.

BAKER: And I wanted to add -- sort of going back to the original question about where they're talking -- which was asking about static and dynamic competition. Some people have the idea that competition is somehow bad for innovation, and that when we are acting as antitrust enforcers if that's what we're -- who we are, to increase competition, we're just going to -- we're going to benefit the buyers with lower prices but somehow will impede innovation and that there's some -- a trade-off. And that's not necessarily right. And it probably isn't right on average.

There's lots of evidence that competition spurs productivity, lots of economic studies. And on innovation particularly, I read the literature saying the motive that firms have to innovate by escaping competition is probably stronger on average in the data than the motive to innovate that comes appropriating more returns on the margin.

And it's not surprising, because firms that are making major R&D investments always have -- usually have a lot of reasons other than preexisting market power to appropriate submission returns to -- even if there's some imitation and successful incumbents may be discouraged from developing new products because they're -- that would cannibalize their existing rents, and because as Steve and Fiona have been emphasizing, firms with market power can discourage new competition with exclusionary conduct. And so there's every reason to think that more competition is good for society for dynamic innovation oriented productivity reasons, not just for static price and quality reasons.

WRIGHT: So long as we are including the -- maybe the caveat or the definition that in Jon's claim that more competition is good, that we're not equating competition to the number of firms. I get nervous about these discussions when they convert to policy, because the temptation is when I've got a really, really hard, ballsy problem to figure out, like is that acquisition of the nascent or small competitor a good or bad thing on net -- on welfare, the trade-offs are really difficult to figure out. And it is sometimes tempting and I think history teaches us certainly in antitrust that there is a temptation that is often succumbed to by agencies to sort of cling to those bright line presumptions, because you can do them.

And that I think is something that in that area, we certainly don't have enough empirical evidence or economic theory to do, it involves -- this may be an area I think Fiona and I disagreed some about whether we've got all the tools we need. And I think -- I think we probably agree, we've got most of what we need, but I think there are areas where we could do better and even if that means doing better means learning more about the distribution, potential competition's one of those areas...

MORTON: But here's the problem, Josh, if you say we don't know enough to draw a line, I'm fine with that, but that's not the same thing as saying because we don't know anything, we're going to decide all the cases so that it's fine for the big firm to buy the potential competitor.

WRIGHT: You certainly didn't hear the latter claim I've made. I voted these cases.

MORTON: Okay.

WRIGHT: And to bring them.

MORTON: Yes, let's not go there. But yes, I -- then I agree.

WERDEN: Okay. Good. So rephrasing this -- these next two questions. Economists are really on top of how goodly or badly market concentration tells you that there is competition or not competition in an industry. So we don't want to further that conversation. The question is what else, what would you look at if you wanted to know how competitive a market sector the whole economy is.

BAKER: Well, it's easier on the sector, right? And the fact of the matter is there are a lot of tools of merger analysis looking at the close substitution of products and differentiated products markets, for example, which I think are well-accepted as being much better than concentration measures. And in my understanding concentration is used largely as a screen, I'm not the practitioner. And I think some of us maybe even questioning that a little bit. But in horizontal mergers really I think practice has moved very, very far away from concentration measures and toward the closeness of substitution of merging parties.

I think there's less consensus in vertical mergers, but there are a new set of tools that look at changes in bargaining that result as a -- as a result of vertical competition, I think those are not as well-accepted outside of economics, and I understand some of the legal fights going on right now are not even over the specifics of whether a particular merger should go forward as much as they are about whether those economic tools have value.

So I think there are, in both horizontal and vertical cases, real tools of economics that focus on I think what is actually at issue in these cases both horizontally and vertically. If horizontally, they're well-accepted maybe less so vertically.

WERDEN: When you get to a case, you're going to have information that a researcher wouldn't have, a lot of it. And it can be very useful. And we have tools for analyzing it. I think where the question was coming from is as a researcher, you know, as a policymaker, if you're looking at the whole big picture, what is it you should look at?

BAKER: Yes, okay. So since I'm such a micro guy and I find it hard to move past the aggregation as the sum of its components. I think it's very hard to do at the broad aggregate level. Broad evidence on markets, broad evidence on profits are interesting and they do not particularly get to the whys. I think they're a flag of interests I would say.

MORTON: The field of IO is a micro-field so we're just really bad at answering this question. And if you look at Jon's list of cites, a lot of those people are in finance or macro or labor.

BAKER: Or labor.

MORTON: That have come in to this empty space that we generated, which is how do we describe the economy as a whole because our field doesn't do that. And so that's partly why we have these conflicting methodologies...

WERDEN: Don't you wish we had some occupational licensing here?

BERRY: You know, it's -- you know, in all honesty, as I said before, it's actually excellent that those papers are raising these questions. That's an excellent thing that these questions are being raised by those papers. And I think people deserve a response. In the meantime, we don't necessarily believe the causal conclusions of those papers.

WERDEN: I was just handed this emergency question. Are there important competition issues that antitrust can't handle? And I take this to be antitrust enforcement as we know it. So these would be problems that would be addressed in some other way than antitrust cases.

WRIGHT: So, sure. Natural monopoly, you know, the heart -- you can't -- you have to regulate that. You can't use...

WERDEN: We did that. We're kind of past it.

MORTON: Well...

WRIGHT: Well, it's important...

WERDEN: Wait, it's almost all gone.

MORTON: Your electricity bill I'm afraid to say has some regulation in it.

WERDEN: A little bit. But I'm at the mercy of am unregulated water monopolist...

WRIGHT: And then some of the governmental restraints we were talking about have to be dealt with legislatively.

WERDEN: Apart from regulating monopolies which is an old but still good idea, is there anything else you wish to do?

WRIGHT: Well, I mean I do think when people talk about the tech companies, they -- and this is a good question for the FTC is that people are sometimes talking about data and other forms of social relationships that I think are difficult to handle outside of the existing antitrust framework and may be subject to different kinds of regulation. And I think sometimes when people talk about old-fashioned antitrust they are also talking about, for example, political power and I think that's way outside the realm of traditional antitrust regulation. I think it should stay there. But it doesn't mean that -- it doesn't mean there shouldn't be some response.

BAKER: And then also leader follower conduct that leads to tacit coordination, that's very hard to address through antitrust laws.

WERDEN: Do you think it should be addressed at all?

BAKER: Well, I -- you mean do I think someone -- some other actor could do a better job than the courts, like that?

MORTON: So I don't want to...

BAKER: It's the same problem that the antitrust agencies have.

WERDEN: So that would be a no.

BAKER: I -- you know, I mean it would be nice to be able to do that but I don't -- I'm not sure how.

MORTON: So I'd like to follow up on what Steve said. I mean there's political power, there's things like privacy, there's misinformation. It's not clear that vigorous competition fixes the problems that people want to see fixed in those domains and it might be that you want another agency or some other law to do that if that's what the community would like to see done.

So I think there are calls -- you read in the paper about people who would like antitrust to -- or perhaps think that antitrust can fix everything and my view is that that's not going to work. That antitrust is very well-geared. It's a set of economic tools, it's very well-geared to certain kinds of problems and that we should look elsewhere to other kinds of regulations if we have different kinds of problems to fix.

BAKER: Greg, let me come back, in fact I'm completely baffled that you're subject to a -- to an unregulated water monopoly and I know we're here and I still am confused by it.

WERDEN: It's not my house here.

(UNKNOWN): Yes, no, I just mean...

WERDEN: There are many unregulated monopolies in this country.

BAKER: I agree and why we gave up on so many of them, I'm still baffled by.

WERDEN: Okay. Running out of good questions here. So I'm tempted to say we're done but I will give the last five minutes to our panelists to say whatever they choose to say to wrap up.

BERRY: Remind them about the book, Jon.

MORTON: Yes.

BAKER: My publicist says this. That every one of you go out and buy it when it's available.

WERDEN: Are you offering a discount?

BAKER: You'll have to discuss that with my publisher.

WERDEN: Have you set the price yet?

BAKER: I don't think it's even available yet.

WERDEN: Okay. It's too soon to talk about.

MORTON: I think it's great we're having these hearings.

WERDEN: Okay. Well, then we're going to take our break now a few minutes early.

(APPLAUSE)

SAYYED: All right. I think let's get started. It's the last panel for the day. And as I mentioned at the beginning for those who haven't read the website or when I hear at the beginning, because of at least the potential for what our difficulties tomorrow. We're going to reschedule tomorrow's sessions until probably sometime late in October. So, this -- we turn now from mostly antitrust, but not exclusively, to consumer protection issue with respect -- and James Cooper now with the FTC will moderate this panel.

COOPER: All right. Thanks, Bilal. Welcome everyone. Good afternoon. I'm James Cooper. I'm the deputy director for economic analysis in the Bureau of Consumer Protection here at the FTC. It's my great pleasure to be here and take part in these hearings and moderate this august panel.

Before I get started, I have to, recently -- I'm on leave from academia, so I'm not used to doing this. But anything -- I'm going to try to say zero of substance today. And in the off chance I do, anything I say is just my opinion only and not necessarily that of the Federal Trade Commission or any individual commissioner including the one sitting next to me.

OHLHAUSEN: Most especially not.

COOPER: Most especially the one sitting next to me.

OHLHAUSEN: No, kidding. James and I have worked together for many years.

COOPER: Yes. All right. Nearly, you should probably already heard today, nearly 25 years ago, Chairman Pitofsky, he began the FTC's journey on the path to become the nation's privacy and data cop. Along the way, much has changed, when this all began, things like the iPhone, Facebook and Google didn't even exist.

But today, we find ourselves in a digital economy that lives on consumer data. Clearly, this evolution has provided tremendous value for consumers. We have vast troves of information in our fingertip, most of us can't get anywhere without our phones anymore, myself included. And we can connect with millions of people instantaneously as I'm sure many of you are doing right now via Twitter. I could go on.

But at the same time, the fact that consumer data is so tightly woven into the fabric of today's economy, it's presented unique consumer protection challenges. Part of what I think makes these issues so tricky may stem from

the fact that it's not agreed upon framework for analysis. As we've heard a lot today, antitrust is married up with microeconomics, it has been for about the past four decades.

Privacy and data security, however, yet to find similarly suited mates. So, the FTC, or clearly economics is an important role in shaping privacy and data security policy. For example, the seminal work of the economics in information that garnered Nobel Prizes for people with names like Akerlof, Spence, and Stiglitz teaches us generally that reducing the cost of information flows typically improves market performance because it helps consumers make better choices.

But at the same time, privacy and data security policy also involves significant consumer values such as dignity, the right to be let alone and autonomy, which are really difficult to balance in a typical benefit cost framework, though they're equally important.

Never the one to shy from a challenge, the FTC has been in the forefront of trying to tackle these complex and weighty matters. As I mentioned before in the beginning of 1995, when Chairman Pitofsky conveyed a series of -- when Chairman Pitofsky convened a series of workshops designed to educate the FTC and the public on consumer protection issues surrounding the online use of consumer data and continuing with the 2012 policy report and subsequent reports on -- and workshops examining issues like big data, the internet of things, data brokers, and most recently, informational injuries through what former Chairman Kovacic called Policy, Research and Development, the FTC has continually attempted to calibrate its enforcement posture to balance consumer interests and privacy in data security with the remarkable benefits that -- with the remarkable benefits that the digital economy provides. And I think that these hearings will continue that tradition.

So this brings me to the subject of our panel today. Today, we appear to be at an inflection point. Many of the same intercurrence that are animating the challenges to the antitrust status quo that were addressed earlier today, and that will be addressed another hearings, couple with catalysts of high profile data breaches, the use of social media to attempt the influence of 2016 election, Cambridge Analytica and the coming online of GDPR have caused many to -- have caused many to question whether the current privacy and data security framework needs a rethink.

For example, some have suggested the U.S. should adopt a more European-like approach. And it appears that California has already taken up the mantle. We see legislative proposals in various forms kicking around Congress. So, today we hope to work through some of these thorny issues, examining where we are, where we might go, and what that might mean for both consumer privacy and the digital economy, which has provided us with so much.

So we're very -- I'm very happy, we would all be happy to have an all-star panel to help us on this journey today. So to my immediately left is Maureen Ohlhausen. Maureen is currently a commissioner of the Federal Trade Commission. She was acting chairman from January 2017 through April 2018. Before that, Chairman or Commissioner Ohlhausen was a partner Wilkinson Barker Knauer where she focused on FTC issues, including privacy and data protection.

She was also, served at the FTC for 11 years prior to that, where she was the director of the Office of Policy Planning. And prior to that, she was a clerk for Judge Sentelle on the D.C. Circuit.

So next to Commissioner Ohlhausen is Howard Beales. Howard is a professor of strategic management and public policy at the George Washington University. Importantly for the purposes of our panel today, Howard from 2001 to 2004 served as the director of the Bureau of Consumer Protection. In addition, in his earlier stint at the FTC, he helped think about and really develop a lot of the framework today for how we analyze informational issues surrounding consumer protection.

Next to Howard is Daniel Solove. He's the John Marshall Harlan Research Professor of Law at the George Washington University. Daniel is one of the leading privacy scholars in the country. In addition to writing some of the seminal articles in privacy, he along with his co-author Paul Schwartz are the author of a casebook on information privacy law, that everyone including me uses to teach that subject.

He is also the CEO of Teach Privacy and runs a myriad of privacy programs, which unfortunately for us may mean he has to cut our early. I don't think he will. Because he's got something going on tonight, including his annual privacy

forum, Privacy Salon, things like that.

And then finally, last but definitely not least, David Vladeck is the A.B. Chettle Junior Professor of Law at Georgetown University Law Center. And he, like Howard, was the director of the Bureau of Consumer Protection from 2009 to 2013. And before that, he spent 25 years at Public Citizen litigation group.

So we're kind of lucky here, I mentioned, to have Howard and -- Will, Howard and David because in their timeframe with Lydia Parnes and kind of -- in between as well really took the -- really helped usher in the era of the FTC being involved in privacy and data security and really kind of being at the helm of that in large part.

So what I want to do with the format today, we're just going to have a discussion. We don't have any presentation. But we're going to drill down on some questions. And we also will have -- if you have questions from the audience, we would -- we'll be taking note cards to -- I guess there are designated people to take those questions and we'll certainly save some time at the end to address these.

So, let me get started, and we're -- the big picture headline question of this panel is to kind of see, take stock of where we are in the privacy and data security regulation in the U.S. and where we need to go. And I think that if we're going to assess that, maybe in sort of a high level, we should think about what would be the goals of the privacy and data security program?

So at a high level, what should a privacy and data security program be concerned with -- what sort of values should it protecting and how might we think about measuring whether that goal is accomplished? So, Maureen, I want to have you take a first crack of the question and invite others to respond or react.

OHLHAUSEN: Great. Well, thank you James. And I'm delighted to be here. Thank you to the organizers for including me in the panel.

This is a topic I've thought a lot about, what are the values that we are trying to protect and pursue in our privacy and data security enforcement in the U.S. I would say one of the first values -- because our authority under the FTC, whether it's deceptive or unfair acts or practices and are affecting commerce. So first of all, it's commercial. Right? Everyone forgets that one at the end. But it's in Commerce.

And then deceptive. That means that there was a promise made to a consumer that isn't kept, or unfair, which means there was an act or practice that caused substantial injury to a consumer that the consumer couldn't reasonably avoid, that is not outweighed by countervailing benefits to competition or the consumer protection.

And of course, the FTC isn't the only actor in the space. We already have lots of other or certain number of other privacy laws. You think about HIPAA. You think about financial privacy. You think about the CPNI rules for communications data. So those are areas where in a way if you think about it, we've already as a society through our political system decided there are special buckets of information that need special protection.

So where does FTC fit in there? First of all, to talk about deception. I was actually at the FTC back when we brought the first online privacy case, Dan Caprio was there with me as well, and some other people in the audience probably too, under Chairman Pitofsky in the Geocities case So, they had made a promise about how they would collect or use data and they didn't keep that promise.

And we've brought lots of privacy cases alleging deception since. And what we're trying to protect there, I think, is two-fold. One, it's consumer sovereignty. Right? The consumer made a choice and that choice wasn't respected. So I think that's the primary thing.

There is also a competition element there, because you certainly want to allow the marketplace to operate in an efficient way where you have -- someone not getting competitive advantage because they've lied about what they're doing and they actually aren't adhering to it. Maybe it's costly. I mean that was like an Uber case that we brought, it was -- they had initially promised that they were going to do certain things with the data. And then it turned to stop accessing it. And then it turned out to be kind of expensive to keep that promise. So we had to modify our order. So I would say the first thing is consumer sovereignty.

But then the second thing, I think that we are supposed to be protecting is protecting consumers from substantial injury. And that is captured in our unfairness authority. Now, what is substantial injury is really the question. And you don't always need a promise made to consumers. In fact, unfairness, I think, works particularly well when there hasn't been a promise made to the consumer. But there is sort of an expectation that consumers won't be injured through data collection and use.

So some of the cases that we've brought in that space involve things like collecting and sharing real-time location data about consumers, because that can be abused in a way that can be used for stalking, right? So there's a health or safety risk. Certainly, the collection of financial information or the failure to protect financial information that could -- that's sensitive. So it could be used to hurt consumers financially.

One of the things -- we mentioned the informational injury workshop. And so one of the things that I tried to do with that is actually come up with a little bit of a taxonomy of the different harms that we have addressed through FTC enforcement. And what I came up in doing a review of all the cases that we've brought in the privacy area, the first one I already mentioned, which is the distortion or not respecting consumer sovereignty and through deception.

Financial harms, health and safety. I mentioned that one already, and unwarranted intrusion. So cases -- we'd have some where we had the TRENDnet case where there was an internet-enabled camera that had a pretty obvious flaw in its software, so that anybody who had the IP address could hack into this camera that was sold to be used for home monitoring and watching your kids, right?

So we think, well, that is intrusion. We also had the rent-to-own, that was Aaron's case. David and I agreed very, very aggressively on that one.

VLADECK: Well, it was the DesignerWare case.

OHLHAUSEN: DesignerWare, that was it. Right, right. Very good. But where the laptops had a program that could turn on the camera and companies could use that or take screenshots.

And then last one is reputational injury. And my view is that the FTC, we've never brought a case purely to -- based on reputational injury but reputational injury has been certainly present in some of the cases that we've brought such as the Ashley Madison case.

So I would say those are the -- reputational is a little I think more controversial. But otherwise, I think those are the types of things that the FTC's approach, the authority that we've been given, those are the values that we should be pursing in privacy.

COOPER: Yes. Would anyone else like to weigh on that? Sort of at a high level? Perhaps even leaving aside the FTC's goals. What are some things that -- what would we think of? What should we be thinking of when we think about an enforcement program or regulatory program to protect privacy? What sort of values should we be protecting? What should we be thinking about?

VLADECK: So let me just add to Maureen's point about the DesignerWare, Aaron's kinds of cases. Ashley Madison, I'm not sure is a reputational harm case only. And I think part of the struggle -- and I'm glad we had the workshop on informational harms, is they all sort of fit generally into what we used to think of as an invasion privacy tort. But they're very hard to label. So with Ashley Madison, marriages were broken up and -

OHLHAUSEN: People committed suicide.

VLADECK: People committed suicide. So labeling that kind of harm is difficult. But I think partly, what we ought to focus on is the nature of the intrusion. So in Ashley Madison, it's intruding into very personal relationships, in DesignerWare and Aaron's, it was intruding into the home. I mean the real problem in those cases was that cameras can be activated remotely when people are sitting on their couch or doing whatever.

And so, I agree that it's important to try to see if we can come up with a taxonomy. But why would this really just sort of depends on context.

COOPER: Since David taxonomy, I don't know -- Daniel, if you'd like to jump in. Daniel is one of the taxonomy and privacy lawyers.

VLADECK: Right. That was not inadvertent.

SOLOVE: Well, I would say like to the -- there's obviously protection of consumers from harm, which I think is important, and a lot then depends on how we define harm. I tend to define harm broadly to also encompass risk, which I think is a very important concept.

There's also the broken promises. That it's very important that if a company makes a promise, that it be held to that promise. Otherwise, the entire self-regulatory regime collapses because the privacy policies are meaningless then. So it's nice that the FTC has a backstop to that and enforces.

I think there's also an important component to an enforcement regime that I think the FTC can and sometimes has gotten involved in, which is consumer expectations, even if it's a direct promise, consumers have expectations about how their data is going to be handled and used that are often -- and sometimes at variance with what's said in a privacy policy or with what companies do.

If you take -- there's been studies about like consumer attitudes about privacy and a vast majority of people agreed with the statement that if a company has a privacy policy, it does not share data with third parties. So there's definitely a lot of misinformation out there. Consumers have incorrect expectations. And the FTC can play a very important role in helping to make sure that faulty consumer expectations aren't exploited.

So companies knowing that consumers kind of already have this -- maybe unjustified trust in them don't exploit that trust, that what companies do that start becoming at great variance with the consumer expectations, that those outliers be stopped. The Sears case, I think, is a wonderful example of that where they installed spyware into people's computers.

And this was actually disclosed in the fine print in a very lengthy privacy policy. So it was actually there. But it wasn't very salient. It wasn't very noticeable, so most people missed it. And FTC said that it was not sufficiently disclosed and not conspicuous enough. And I think that's great, because what we had is a practice that was very unexpected to consumers that caught a lot off-guard.

And so, I think it's very important that consumers can use sites and engage in e-commerce and other commerce and know that their -- what they expect generally is going to be the case. And there aren't going to be unpleasant surprises down the road. And so, I think it's very important that the FTC police that, especially because we know from a lot of studies that a very, very small percentage of people actually read the privacy policies or privacy notices, something like less than 1 percent.

So we really are in a world that consumers come in with this baggage, these expectations. And I think we have to play in that world. I know that that's how people are going to make decisions on what -- how to share their data. And there should be some protection from that being exploited.

COOPER: Howard, did you want to jump in? One thing just to -- it may be completely orthogonal to what you're going to say, but maybe it'll be related. It sounds listening to David and Daniel, and I don't know if it's -- to what extent should a privacy regulatory framework -- should we think about privacy in sort of the rights-based framework? Or is it something that needs to be balanced with other values as well? Is it something that can be balanced or is it just a right? And I don't know -- it's something that's kind of I was thinking about it as David and Daniel were talking. And so anyway, Howard, I'll let you speak to that or whatever you want, whatever -

BEALES: I did want to comment a little on the discussion that's gone before it. Firstly, I wanted to take you to task for listing a Nobel Prize winners for the economics of information without listing the guy who founded the field, which was George Stigler, first and foremost. But he was one of my advisors too.

But I'll forgive you. I mean I think the attraction to me of the consequences based approach to thinking about consumer privacy, which is what we developed in that time that I was at the commission, was that it makes explicit

what ought to be there all the time, which is that particularly in the commercial context, this is a balancing issue.

There are tremendous benefits that come from the ability to use information, even if it's an unexpected use of the information. And we don't want to sacrifice those benefits because somebody didn't think to include that in the list of things that might be done with information in the privacy policy because it wasn't thought of at that time, that the privacy policy was written. We didn't know this was a possible use of the data.

Those kinds of benefits, we have an enormous number of services that are built on exactly those kinds of secondary uses of information that was collected for a different purpose that may or may not have fit with consumers' expectations.

What we want to make sure of is that that information is not being used in ways that are harmful to consumers, that's doing damage to consumers. And that's where privacy regulation and privacy enforcement really ought to focus. If there's not a harm, it's not something that the FTC in particular should be worried about.

Now, I also have a reasonably broad concept of harm, perhaps not as broad as some. I certainly think that the things that fit -- the kinds of subjective harms that fit within the traditional privacy torts are the kinds of harms that are actionable privacy harms. But I note that the torts standard in -- virtually all of the privacy torts is highly offensive to a reasonable person. Right?

If the intrusion or the putting somebody in a false light is something that would be highly offensive to a reasonable person, that's an essential element of the tort, not just any intrusion, not just any false light that might be held -- might be held out.

But including those kinds of harms, I make, I think makes complete sense. We've had two mentions of DesignerWare and Aaron's and there's a part of that case that I completely agree with. And that's the turn on the camera part of the case. There's a part of it that I've always found really troubling, and that is, this is a computer that -- when somebody stopped paying, you could activate the software and the computer would call home and tell this company that had rented the computer to somebody who was no longer paying for it where it was.

That's really useful. The complaint says -- well, this is location tracking, and location tracking is bad. But the complaint doesn't say why location tracking is bad, and especially when it's every two hours. And the remedy that's in the complaint or in the consent order is, "Well, if you disclose when you first turn this on and track continuously, that'll comply with the order."

So to fix tracking every two hours, we track continuously. I don't get what harm we thought we were fixing there, and that's -- it's that harm that really needs to be the focus. If we can't articulate why we think this is a problem, we're not going to be able to adopt sensible and low-cost ways to control that problem. We've got to think first about what's the harm we're trying to prevent.

COOPER: Thanks, Howard. So, after hearing kind of a high-level view of what sort of values we should be concerned about when we're thinking about a privacy program or regulatory framework, maybe it's important now to take stock of actually where we are. So I wanted to turn to Daniel, who as I mentioned before, has written a seminal textbook on this and lots of articles defining and thinking about what privacy is.

So Daniel, just kind of help us characterize the current U.S. system of privacy and data security regulation in about five minutes maybe?

SOLOVE: Sure. Well, at the high level, the bird's-eye view. My sophisticated way of synopsis of it is it's a mess. We have a sectorial approach with laws have risen in various economic sectors over a very long span of time. Then you have common law torts that have risen, the private torts. Plus, there's the forgotten breach of confidentiality tort that I'd like to mention too that doesn't require highly offensive.

There are all sorts of other common law torts that could apply in these contexts, such as negligence. That's making a resurgence and data breach cases. Then you have various state statutes in the states. You have dozens of federal

laws. Not as many recently, but certainly in the 1970s, 1980s, 1990s, you had a real series of laws that were passed to deal with various privacy issues in various economic sectors.

And then you have the FTC, kind of an overarching -- the broadest jurisdiction of any federal agency regulating privacy that regulates most companies, except for some carve-outs. And that's the U.S. approach. And there are inconsistencies in the various laws, some of them are a lot weaker than others.

On the stronger side, you have HIPAA, which is very, very broad. It has a broad reach. It follows the data through the chain of its custody. But you also have laws like FERPA that regulate schools, that buying large are kind of -- for lack of a better characterization, a bit of a joke that are not really enforceable. They lack a lot of the features that more recent privacy legislation has.

Contrast this to a number of other countries in the world, including especially the EU. They have a comprehensive privacy law baseline of protection, so they can articulate, "Here are the basic rules of the road that we follow." Here in the U.S., it's very hard to articulate, well, how is this particular data protected?

We really can't. It depends on -- well, who holds it, if it's held by certain entities and it's regulated by HHS, then it can also be regulated by the FTC, and it depends on new enforces. And it depends on what the sectors are. And one of the challenges with the sectorial approach is that the sectors change.

So, in the 1970s and 1980s, what various types of companies are doing in the sectors make sense then. But now, as we see, different companies are jumping into different areas. And so, when we build laws around sectors and -- they don't stay fixed. And now, there's a lot of overlap in company saying, wow, we're regulated by five different agencies and five different bodies of law, and we don't know what to do. There are so much.

Plus, and all the different state laws that are overlapping, and it becomes a bit of a nightmare. I'm not sure we can dial this back in the United States. I'm not sure we can kind of go and say, hey, we're going to do the other approach. But I think there are some sensible aspects to the other approach that are quite efficient, and to some extent I think could be particularly business friendlier than the U.S. sectorial approach, which I think the -- a lot of industries were happy with initially because they liked the idea of a law tailored to them or they liked the idea of a law that -- the fact that laws didn't apply to them and they fell through the crevices.

But those crevices have been largely -- a lot of them have been plugged up by the FTC which regulates. The other problem too with the U.S. approach is that we get no respect from the rest of the world. We're kind of the Rodney Dangerfield of privacy in the U.S.

But I think we have some very effective, some really good laws. I think the FTC has done tremendously effective work. We do have a lot of protection. It's just that it's inconsistent. It's hard to articulate. It's very hard to explain to other countries, especially the EU, how the U.S. system works and how information is protected here. It's so haphazard.

So I think the biggest challenge is what do we do going forward when we have so many laws that are locked into antiquated visions of the economy from 30 years ago, and a world that is increasingly been, the leadership role has increasingly been ceded by the U.S. Congress ever since I think around 2000, where we really haven't seen a tremendous amount of legislative activity on privacy. It really has tapered off. I mean, really seeing the states, especially California and the EU take the lead.

And I think if you ask most large multinational companies, what privacy law are they focusing on for their compliance efforts? GDPR, the new California law, hardly anyone will say anything about any other U.S. law. Maybe a little bit of HIPAA. FTC, I barely hear whispered these days. Although I think a few years ago, the FTC was spoken about it a little bit more.

But increasingly, what we're seeing I think is the companies, and these are U.S. companies, not really looking to the law here as to what they're doing and how they're building their privacy programs and practices. So, that's where we are. And I think the big question is what should we do in the U.S. for what's the next step.

Do we kind of say, hey, we'll just let the -- be regulated by Europe and California or will we have meaningful regulation at the federal level that reflects the balances and approaches that the U.S. would like to have.

COOPER: Well, thanks, Daniel. I'd like to invite anyone to react to that, and also kind of throw out there -- it seems as you -- when you think about the landscape of the U.S. privacy regime, it seems to be a mixture of ex-ante, sort of an ex-ante regulation with notice and choice in some areas, you know, HIPAA, COPPA maybe.

But then we also see -- we also see enforcement, you know, private and the FTC. I mean, what are the pros and cons in -- of those approaches, and what might be, you know, you think about whether -- there should be a mixture, we should hew to one, or another, or it makes sense to kind of mix it up, and in some ways the way that we have here in the U.S. So, throw that out to anyone as -- well...

VLADECK: Let me comment on that briefly, because, you know, until at least a few years ago, the difference between the EU and the United States was, we did a lot of enforcement, but we had this patchwork, this crazy patchwork of laws. On the other hand, in the EU, they had even before the GDPR they had a general regulation which was much more comprehensive than any U.S. privacy law but there was almost no enforcement.

And some scholars have done a lot of work looking at sort of privacy on the ground both in the United States and in the EU, and they found that the privacy commitments in the EU were met only to the extent that there was a real enforcement or culture of compliance, which left out large swathes of the EU

And so, I think that somewhere in the middle with the desired outcome, but strict rules without enforcement, at least according to the studies that have been done, didn't work all that well in the EU, and I think that was one of the major driving forces for enacting the GDPR and to basically base the new system on commitments of compliance and enforcement. And it will be interesting to see the extent to which the new GDPR is enforced by the data protection authorities in the EU who are not used to doing FTC-like enforcement cases.

COOPER: Anyone else like to jump in on the ex-ante versus ex-post question or in -- anything?

(UNKNOWN): I guess -- oh. Go ahead.

OHLHAUSEN: I was going to say, well, I, you know, I agree that regulation, very -- if there's clear regulation that says, like the Children's Online Privacy Protection Act. Congress drew the lines there and the FTC implements and enforces it.

But one of the things that I had -- I think has been a real strength of the FTC's approach has been its case by case enforcement, maybe a little less predictable in some ways, but it trades that from great flexibility, right? So, a focus on harm in case by case enforcement reduces the need for you to have, predict the future to design some overarching regulation that foresees all innovations, Howard mentioned this, and I think we all would agree consumers have got enormous benefits from a lot of these technologies.

And consumers have gotten a lot of free content, and they've gotten a lot of information at their fingertips, as you mentioned, and so that doesn't mean like, well, anything goes, but I think we need to be careful about coming up with a system that is too regulatory, because it can't predict what the new innovation's going to be and perhaps it's going prevent it from happening.

COOPER: OK.

BEALES: Yes, I just to -- just to pick up a little on the ex-ante versus ex-post problem, I think part of the -- I put -- I think part of the problem with the ex-ante regulation is that the we have now, and particularly the approaches that are embodied in the GDPR and in the California statute are really based on a premise that won't work. That people are going to read privacy policies and pay attention to these notices about what's going to be done with the information and make choices based on that.

And Dan says, and I think he's right, nobody reads privacy policies, it's probably a good thing because there's a study out of Carnegie Mellon that said that if people actually did read their online privacy policies, the opportunity

cost to the U.S. economy would be $787 billion.

It's just out of all proportion to what might be at stake in commercial privacy decisions. And with the ex-ante approach that difficult, if you will, the focus ex-post on where do -- where have things gone wrong that need to be fixed, and what can we do to keep them from happening again, seems like a much more sensible way to approach the problems.

OHLHAUSEN: Howard, I just wanted to weigh in a little bit on your point about people not reading privacy policies. I agree, probably the average consumer doesn't, but we have academics in the U.S., I bet Daniel reads the privacy policies, I bet David reads privacy policies, and academics, and consumer groups, consumer organizations, and competitors.

COOPER: I don't read them.

OHLHAUSEN: Right. So, James doesn't, I'm just kidding, but...

COOPER: Well, you said academics, I just want to make sure that you know that.

OHLHAUSEN: Well, I -- oh, academics other than James. But there -- I think there are mechanisms for if there is a problematic term in a privacy policy for it to get noticed and surfaced, and that's one of the things we've seen I think with social media that when something is discovered, that people don't like, that news get out there pretty quick.

BEALES: Well, I just, you know, I -- if that's the goal, then that points to a very different kind of a privacy policy, because you don't want something that's understandable to consumers, you want something that is understandable to geeks and competitors, who can figure out whether there's something wrong going here.

That's sort of not where we're headed, it's not where the Europeans are headed, it's not where California is headed, we want simple privacy policies that anyone can understand that tell you nothing, and mostly aren't read. I mean, no doubt, some people read them.

SOLOVE: A while ago I wrote a piece about privacy self-management, which is this idea that people manage their own privacy by reading these policies and making choices. I think this is a flawed approach, not just because people don't read privacy policies, and also I think the point that there's this tension, privacy policies are useful to regulators and advocates, and academics and others who can read them carefully, and they get a lot of information, but the average consumer really can't get all that.

So there's a tension, you almost need two different things, which is what, you know, Paul Schwartz and I have proposed in a -- in our ALI project, which is a transparency statement for the regulators and then something simpler for the consumers.

But as a consumer, reading the privacy policies is relatively meaningless, I don't -- I don't read them because it's too many, and the amount of entities I do business with, and the sites I visit, you know, hundreds, thousands, I don't have time, and then the choices I think, do I share this piece of information on Facebook? I don't know.

The implications for privacy depend on how that information is combined and aggregated with other information over time, and how that information might line up, and what someone might do with something, and what algorithms someone might create five years from now, and a whole litany of things that I can't even figure out, so I really can't make the judgment as a privacy expert on exactly what the implications and costs and benefits to me, especially the costs over time are going to be for me to release a certain piece of data.

So, it's very, very difficult, and now multiply that by a thousand, and have to make that decision all the time, just really, really hard to do for the consumer. So, I'm just not sure that that approach, it's great if there's like one company that you actually do business with, I mean, only on Facebook. But it's not, I'm on all the sites, like the professors who, you know, I give an amount of homework every night, and I think like, hey, it's reasonable for my students to read 30 pages a night, but what if they have 10 professors and each assign 30 pages?

And that's what the companies are doing, every company thinks, hey, you know, they can pay attention, we think this is a great mechanism, yeah, multiply it, it doesn't scale, that's the problem. And the consumer, if you say, hey, we protect your data with reasonable data security, well, what's that? As a consumer, I can -- how do I assess your security? How do I know how prepared your employees are to not be phished? I can't -- how do I know what kind of encryption you're going to use, and all these other things?

I can't really make an informed the assessment, which is why, you know, we need an agency like the FTC to be looking out for people, just like when, you know, I would travel abroad, and the taxi fares were -- they didn't have a meter, and I didn't know what the right fare was, and they would just say like it's X whatever, and I had to trust them or make some, I didn't know, it's nice to know that someone's looking out for me. And there's a meter in someone's thought of what the right there is going to be, and I don't have to worry about someone cheating me.

Or I can pick up a jug of milk and know that I can drink it, and I'm not going to be poisoned. They don't have to do research, imagine that, you know, you didn't have that food safety and actually have to go online and research like the safety conditions that each farm to figure out that you buy food from there. I just like to know like I pick up a product in the supermarket, it's safe. And I think we want the same thing for privacy.

VLADECK: It's amazing how whenever you use the phrase privacy policy, everybody watches into a diatribe. So, I'm going to take a minute and launch into my own. One is, they're not privacy policies, you know, the original sin was calling them something that they're not. None of them really deal with privacy, they deal with data daily use. And part of the problem is they misnamed.

The other problem, of course, and this gets back to the question that James started with, the difference between ex-ante regulation and something else, if you have a regulatory regime that is clear, so you know that everything you do on the internet is safe, or at least you have that promise, even if it's not enforceable, then the privacy policy where the data use statement becomes less important.

And part of the problem that we have and the FTC has done a lot of work on simplified notice and Dan and the ALI have done a lot of work in trying to figure out a better system for this. But these are really notice systems, and they need to be simplified, many of them are written by lawyers, so they're bound to be incomprehensible. And they're often designed to be incomprehensible. So this is an issue then that plagues us and I just, don't think we've collectively figured out a way to escape it.

BEALES: I think actually Mick Jagger had the answer to what's been happening here, in 1964, the technology was a little different but he said, the man comes on the radio, like, I said the technology is a little different, telling me more and more about some useless information supposed to fire my imagination. What happens, I can't get no satisfaction.

VLADECK: There we go.

COOPER: Nice. All right. So, David, well, I'll -- with that segue, thank you, Howard. To our, you know, what or now we've kind of set the stage for where we are in the U.S., what do you see is any of the problems, because the -- again, the headline picture of this, and the headline of this, this panel supposed to think about, what or kind of rethinking the current privacy data security regime, what are -- what are some of the problems, if any of the current status quo, are there any harms that you don't think are being addressed? Is there inefficient enforcement, either over-deterrence, under-deterrence? So what do you think, David?

VLADECK: So, let me just use a few examples, because we've, time does not permit me to go through the concerns that I have. But one is, I don't think we have effective tools to really understand what's going on with big data, let alone to regulate it sensibly. So, we all know the data collection is now ubiquitous, we bring it into our own homes through always on devices or sensors of the Internet of Things. We know that this data is being collected, but our laws really don't have any restraint on the sale or renting of this data.

We know it moves, we know it has a substantial economic value, but we don't have any real information on the velocity or volume of this kind of data aggregation. So, that presents risks. Paul Ohm, one of my colleagues both at

the FTC and here, wrote an article ten years ago, in which he sort of cast in dystopian light what would he called the database of ruin. Well, we don't know yet whether there are these kinds of enormous databases, but there's nothing in U.S. law that really restrains that development.

And these kind of databases pose risks to consumers, there's the risk of data breach, after all these would be honeypots, they'd be a magnet for identity thieves, and we know identity theft is still rampant. So, one question that the FTC I think is going to have to grapple with is sort of where is this data, what's it being used for, how is it being transmitted to whom, and for what purpose? So, that is one issue that I think the commission is going to have to grapple with going forward.

Second, the rapid, the rapid initiation of algorithmic decision making in the marketplace. Now, I said this morning, I'm not a fan of human decision making. You know, we generally don't do such a great job, and machines may help. But for regulators, these kinds of decisions are very difficult to oversee, they're not transparent, machine learning algorithms are impossible to interrogate, you can't put them under oath. It's hard to root out disparate treatment based on factors that are impermissible, age, gender, race, things like that. You know, nor is there necessarily due process at the end of the -- at the end of the decision making chain.

And so, I know the agency's already done a fair amount of work on this, but this is an issue that I think demands greater attention, because I do think it poses enormous risks to those who come out on the bottom, in terms of these kinds of decision making.

In terms of enforcement, my concerns are not really with over-enforcement, because the agency resources are too scarce for that. Indeed, when I was the director of the Bureau of Consumer Protection, I don't know whether Howard had the same concern, but I spent a lot of my time doing triage, deciding which cases to bring and which cases not to bring, even though many of those cases in the latter category were meritorious and we should have brought them if we could have.

So I don't think that's the problem. I do think they are enforcement challenges. So one is, how do you enforce against an industry like the mobile app industry, which is highly diffuse, diverse industry, thousands and thousands of app developers, many of whom either don't really know what the law requires, or just don't really care.

So the New York Times did a story yesterday about COPPA violations, violations of the Children Online Privacy Protection Act by app developers that were tracking kids 12 and under without explicit parental permission. Sure, the FTC could, you know, bring 20 or 30 enforcement actions against this kind of industry. But it's not at all clear to me that you get any of the kind of deterrent value that you really need.

So one question is, with respect to these kind of diffuse industries, how do you make them comply with the law? That's one problem. Another is, we have to figure out to what extent machine learning decision making tools are staying within the statutory guidelines. That is an enforcement problem.

And last, we have a lot of companies under order, and order violations are hard for the agency to detect and to deal with, simply because of the high volume of companies under order, that's a serious enforcement matter. I mean, for a company to violate an FTC order undermines the ability of the agency to do its work, it undermines the deterrent value of consent decrees or enforcement cases. And I think my -- the new -- sort of the new management at the FTC is going to have to grapple with that. There are many others, but I'll stop there.

COOPER: Yes, anyone else like to weigh in?

OHLHAUSEN: Oh, one thing, building on what David said, I want to -- I agree that one of the challenges for the approach that we have, and when I talked about privacy policies it was not certainly to say privacy policies are it and take care of everything, it's just that I don't think they are as totally is useless as some other people seem to think they are.

But the other problem is these kinds of harms that we, you know, you may have a lot of little bits of data that weren't sensitive, that weren't even person identifiable when they were collected. But through these new tools, they

can be assembled into a more complete mosaic and identified to a certain person. And then I think the question there is, is there a harm, is there a risk there? And that is where I think we need to start thinking, how do we address that?

Because a lot of those uses may be great, they may be very beneficial, we don't want to stop those, but for the harmful ones. And if we look at something like the -- going back to the pre-internet days, and the Fair Credit Reporting Act, it was trying to get at those kinds of issues, to allow some kind of balancing and use of this data, but to allow consumers to know if it was being used in a way that disadvantaged them in connection with an important decision like employment or insurance or some other -- some other ones blend in. And then gave them insight into what it was and the right of correction.

So I think that is where we see need to start thinking about like a kind of a risk -- a risk based approach, because I don't think we can necessarily foresee all the uses, I'm a little concerned about the data use specification requirements, because as Howard said, there may be great uses down the road that consumers would like. But they still need to be protected from some of these, you know, new abilities to use, these little bits of data in a new -- in a new way.

BEALES: But that, you know, I don't know why the -- I don't know why the more complete mosaic is itself a problem, I mean, the one -- the one part of that, there clearly is a problem is if the government to get that, but that -- there's another tool to control that problem. And it's the one we ought to use and not worry about the possibility that this might be put together.

I want to say two things about, I think big data is a really interesting question, and it does -- there are certainly potential costs there, but there's also been big benefits, I mean, that's where our fraud control tools come from, is data aggregations, often data that was collected for a different purpose that's put together in an algorithm that predicts the likelihood that a particular person is really who they say they are.

And if it weren't for those tools, there'd be a whole lot more identity theft than there is which is way too much. But that's a big data I think, you can't do that with little pieces of data one at a time, you got to aggregate the data in order to get a more comprehensive picture.

The other thing I wanted to say about algorithms which raise some potentially interesting questions. But I think the algorithms that ought to be of concern are the ones where the user of the algorithm doesn't face the costs of mistakes, because an algorithm is just basically a way to classify. You're a good risk, you're a bad risk, you're a good prospect, you're a bad prospect.

There is a really interesting example of Reuters, which wants to get scoops on international news, and it does that in part by following tweets, but there's a lot of bogus tweets. And so they built an algorithm to figure out whether this was likely a real story that they should follow up on or a bunch of fake tweets that they should ignore.

They face the costs of both mistakes, right? They're going to miss a story if they misclassify these tweets as false tweets and ignore it, they're going to waste resources if they misclassify these tweets as true and pursue it and they're false. So, they know what the tradeoff is, they know what the costs are of both kinds of mistakes, there's no reason to think they make the wrong tradeoff.

And I think that's true of a lot of marketing applications where if I screen out "bad prospects," I'm turning away business. I don't want to do that by mistake. I want to turn it away if it's bad business, but I don't want to turn it away if it really is good business. So, there's some fairly strong incentives within the system to make sure the algorithm works well. Where you don't have those incentives is where somebody using the algorithm only pays part of the costs and the rest of the costs are shifted to somebody else.

SOLOVE: What, suppose with the algorithms, I think there's a lot of concerns, because suppose especially a predictive algorithm, suppose the hotel chains, like, you know, get together or create an algorithm for determining when a particular hotel guest is going to damage the hotel room or treat the hotel room badly or do misconduct in a

hotel room. And they basically come up with the algorithm and it comes up and says that you're one of those people, and starts...you're booked.

(UNKNOWN): Yes.

SOLOVE: Along with Mick Jagger too. And, you know, you started not be able to get, rent hotel rooms or suddenly you're charged more. And what are your rights there? Because you're targeted in a predictive sense, it's like well, hey, I never did any damage. Well, we're not saying you did, the algorithm's just saying that we think there's a high probability that you might. So the algorithm -- there's something wrong with the algorithm, it's just taking into account factors, and, hey, it might actually be true, but you haven't done it. Should people have rights to say just because it says I'm likely to, how do I disprove that?

VLADECK: Or how do you even know it?

SOLOVE: Exactly, how do you know it? How do you disapprove it? How do you argue with the prediction? So the FBI says, our algorithms says you're going to commit terrorism, we won't let you the plane and so how do I prove it?

It's like, well, live your life and die. And then if you die and you haven't terrorism, then we'll take you off the list because we know you didn't do it. The algorithm was wrong. But there has to be something to say like who regulates, what are the concerns with the incorrect thing. How much transparency do we have? How can it be used? What about people's rights to challenge it and say the prediction is wrong and either inaccurate. I mean how do we -- but to just kind of leave it to industry to do whatever they want without looking to the harms that consumers might suffer from this I think is something that we definitely don't want to do.

We need this, why I think is very important that if we look into this and have good regulation on it.

VLADECK: Yes. Let me push back a little on Howard's point. And maybe that Reuters bears the risks on both sides of this. But in consumer finance or creditworthiness or anything else, the consumer who is misclassified by the algorithm bears the risk, may not be informed and there are no shortage of stories that have been publicly discussed where people have been disadvantaged based on correlations, not on their actuals.

So, American Express had a serious problem because it was reducing the credit limits for black customers who went to certain kinds of black stores that were deemed to be indicative of a credit risk. And when that became public, their answer was we screwed up but we relied essentially on an algorithm. And so, again, I know I'm not trying to suggest that we -- that machine learning can't help us make better decisions.

But there needs to be both some transparency and some due process here, particularly where it's not the company that bears both sides of the risks.

BEALES: Well, I mean I think in the financial transaction, it often is a company that bears both sides of the risk, because they're turning away business that would be profitable business and they -- there's an incentive to not do that. I mean, we can argue whether it's the perfect incentive or not. I think the other thing that we have to recognize and, is human decision-makers have all those same biases.

VLADECK: Right.

BEALES: And they're every bit that's hard to tease out. They are probably less transparent than algorithms. And I know when I was at the FTC in the 1980s, in the early 1980s, and we were bringing a lot of equal credit opportunity cases, every time we looked at a judgment creditor, right? The guy who sits down and looks at the applicant across the table and say, "You look honest. I'll loan you money." There was discrimination. It varied whether it was women or race or what kind of discrimination, but there was discrimination.

Credits scoring guys didn't have that problem. Credit scoring reduced the discrimination problems that were inherent in judgmental creditors. And that's the potential gain from algorithmic decisions. More data is usually better because it can challenge your preconceptions about what's going on and what's the right answer here.

SOLOVE: Sometimes. I mean I think that's true sometimes. But sometimes algorithms are no better than the humans that design them and there are hidden biases that can crop up in algorithms.

Not just the people who design them, in fact, the data being inputted into them. If you input data that is infected with human biases into algorithms, the algorithm spits out a data that also is infected as well.

So there's a lot of concerns all around, absolutely, algorithms can improve human judgment. Absolutely, human judgment can be problematic. But I do think that the cost of let's say for a business, just say, hey, I don't want this business, I'm going to turn a consumer away is not enough. It's not the same level of harm to the consumer.

Because the business can say on the aggregate we just think certain types of consumers are just not very profitable for us. So who cares if we don't -- if we lose a little bit of business, we ultimately gain.

For those consumers who can't have access to credit, who can't get a loan, it's a much, much bigger deal and a much, much bigger cost. So I actually don't think it's -- the market would always work itself out because I think that businesses might be, make a good economic decision. Hey, if we do this, yes, we lose a little business but we also lose some risk but that doesn't always look the same way on the consumer side.

COOPER: Maureen, do you want to...

OHLHAUSEN: Yes, I wanted to weigh in on this. I do think that there is the mechanism of the market, where if one company has a poorly designed algorithm, and it is leaving good business on the table, someone else has an incentive to try to capture that.

And that's one of the things I think we are seeing in the lending area. There are finer distinctions being made with better targeting tools that allow lending to occur at better rates than really going by the rough calculation of a credit score, that you kind of fall on this side of the line or that side of the line.

So, I want to certainly take into account the fact that there are competitive pressures to have a better algorithm to expand your business.

COOPER: Just to kind of follow up. It seems that a lot of this discussion is about the classifications obviously, to come out of algorithms. Is Section 5 the right way to address that?

I mean, when we think about Section 5 would it be, with at least three out of the four of you here on the table have been in the position of an enforcer and is this the -- leaving aside whatever statutory or regulatory authority Congress has given the FTC to enforce discriminatory, Is Section 5 should it be, address an algorithm unfairly classify someone as being getting subprime loans for instance. Is that stretching Section 5 beyond where you think it should go? Or is that the right place for Section 5 to be or should it, instead should it be Congress making cuts of what is unfair discrimination?

BEALES: It's beyond where I think Section 5 should go. It is the -- obviously, the FTC has a role in places where Congress has given it a role like equal credit opportunity.

COOPER: Right, yes.

BEALES: Where it enforces and that is -- it's reasonable and appropriate for them to do that. That's what it should do. But to look for discrimination even of the same sort in other places is a whole different set of considerations than what the commission knows about and has expertise in.

In one of the proposals that was kicking around at the time of the Unfairness Policy Statement was, well, maybe we should use Section 5 to say boards of directors should be more representative.

Elizabeth Warren, call your office. And that was the kind of thing that the commission and Congress were trying to get away from, and that's why the subjective kinds of values I think is something that the Unfairness Statement says in general, we can't do that. And even if it's something that we might do, it's probably more appropriate for a different agency to do it.

COOPER: David?

VLADECK: I have a slightly different answer. I agree with Howard that this kind of issue would rise mostly under ECOA or FCRA or some of the other statutes the agency enforces. But I think to the extent that there is some intentionality here, then it would fit under the unfairness doctrine.

That is if there was reason for the designers or the users of the algorithm to know that it somehow either inadvertently or because of the training data, systematically excluded X people based on gender or one of the suspect (ph) classes, I think the agency would have would have an unfairness case. But I think the burden on the agency in the case like that would be very high.

COOPER: I imagine you probably don't want to weigh on it, so. The...

OHLHAUSEN: It's been covered.

COOPER: Yes. It has been covered adequately. Just, while we're on this about and you had raised something, David, I think it's interesting about when we -- early on in your earlier response thinking about some of the problems.

Do you think that -- and really both David and Howard's people enforced and sat there and looked at the complaint recommendations and thought about what relief you should get. Do you think the FTC, its 13(b), equitable powers, I mean do you think it's hamstrung strong at all in its ability to get adequate relief in privacy cases?

Or do you think there should be -- I realize the commission I think on a bipartisan basis has been on record and saying that in data security cases civil penalties authority would be good and I could be wrong, but I think that's right.

OHLHAUSEN: That's right.

COOPER: But leaving aside that, I mean do you think that in privacy enforcement, do you think some -- there needs to be a bigger stick than what we have now, which it seems in many cases when these are apps that are free and collect data, it may be very difficult to get an equitable relief under 13(b).

VLADECK: Yes. I mean I do think that, I mean, in my view and I don't think this is the commission's view is that there ought to be original fining authority under 13(b). And take Ashley Madison, I mean, there's no way to do meaningful redress there.

Injunctive relief is not going to give much solace to peoples whose marriages ended or whose spouse committed suicide. So I do wonder about sort of the ability of the agency to forge any kind of effective remedy in those cases.

I also think that if you look back at some of the cases that we brought earlier on in -- during the Leibowitz era, I think that a civil penalty for example against Google or Facebook initially would have had a deterrent value.

Facebook is currently under investigation again. Google, it took only two years before it violated the consent decree. I do think there ought to be initial fining authority under 13(b). I think the commission would have to use it carefully, particularly where other remedies were just simply inadequate.

But I do think 13(b) cases ought to be -- I think civil penalties ought to be available in these cases.

COOPER: Howard, I don't know if you want to weigh in on that or ...

BEALES: Sure, yes -- no, I don't like the idea of civil penalties, I like -- and especially in an area like privacy, I like the original scheme of the FTC Act that was the -- essentially the one bite at the apple because the precise meaning of unfair and deceptive is not that clear.

And the way the act was set up, the commission could get an order and if you violated the order, you were subject to civil penalties for that. But civil penalties sort of presume a really clear standard I think of what's a violation and what's not.

And that's not so clear in a lot of privacy areas. I think it is a lot clearer in data security. I do think civil penalties there make a lot more sense. But I think in a lot of privacy and some other areas, I think it's not -- I think monetary relief is not appropriate.

COOPER: All right. So, Howard, I -- while I have you -- now turning to kind of how we -- or seeing a shift, we look at the GDP or some changes in the landscape of privacy regulation around the world and throughout the United States. We see GDPR, California, the FCC privacy rules is now at in funk. They all seem to be taking a -- like more of a FIPPs-based approach, a notice and consent, deletion rights, correction rights.

We see in the GDPR and California. On the other hand, we have the FTC which has been really based on demonstrating likely consumer harms or deception. And this tees off a little bit. We've discussed a little of this in the ex-ante versus ex-post discussion.

But do you have any thoughts on why you think we've seen a trend towards this at least in recent evolution, of these newer privacy schemes, away from a harm-based and more toward a consent-based.

BEALES: Well, I think two things. One is and I think this remains true. There's a remarkable unwillingness to articulate what are the harms we're worried about, or inability to articulate what are the harms we're worried about.

And if you can't do that then you can't -- then it's hard to do a harm-based approach, especially as an across the board regulation that applies to absolutely everything. You've got to think through the harms that you're trying to prevent first. And there's been to me a remarkable unwillingness to do that.

Second, I think the FTC in the last few years has -- it certainly hasn't abandoned worrying about consequences, but it's also moved towards a more what I would call FIPPs-plus in its enforcement actions. I mean the VIZIO case is a really good -- a good example.

There is just no way to tell a story about that case that doesn't come down to notice and choice. People were surprised to learn, did it violate their expectations to learn that their internet connected TV was connected to the internet?

Really? And did they think that it was making recommendations for the next thing they should watch without knowing what they had been watching in the past. Really?

OHLHAUSEN: It didn't make recommendations, Howard. It said that's what it was collecting the data for.

COOPER: But it didn't make recommendations.

OHLHAUSEN: But it didn't make the recommendation.

BEALES: Well, that's -- the complaint doesn't charge the failure to make recommendations.

OHLHAUSEN: No. But it charges that if it's collecting the data and sharing it.

BEALES: For ratings purposes. This was a completely inaccurate use -- innocuous use. There's no harm there at all. No harm there at all.

OHLHAUSEN: Wait, wait...

BEALES: People didn't know, it violated their expectations.

OHLHAUSEN: But it was also...

BEALES: Why is that there?

OHLHAUSEN: It was also collecting data like even if you weren't watching something streaming, you were watching a DVD or something. It was collecting and reporting that this television watched this DVD. That's not a ratings.

BEALES: Well, and again what's the -- I mean it is a rating purpose because it's how are people spending their time with the set which is what you, well, I mean, it's what the television rating services are busy measuring is how much time -- or is this set on that's what the boxtop is recording.

OHLHAUSEN: But that's not what was being collected.

VLADECK: Right.

BEALES: But this is complementary to that data. It is -- it would help you...

VLADECK: Well, in addition to that data.

BEALES: Yes. Well, this is competition for Nielsen, right? It's got a box that measures what the TV is on and what channel is it tuned to. And that's about it. It's additional information about whether people are actually watching a TV show on the channel that it's tuned to or watching something else. I mean there's -- you can say it was unexpected but I don't know why it's bad.

SOLOVE: Well, this is a lot of dispute about harm. This is one of the problems when it comes to harm is that you say, well, that harm is never articulated. Well, maybe the harms that you would think what harm is not articulated. I mean there are harms in some of these cases that don't necessarily mean that someone is out financially or their reputation is ruined.

And part of it is just consumer trust, that you buy a product. You think something is going to be used in a certain way and suddenly you discover, well, oh, all of this other stuff is going on.

And that doesn't just hurt the consumers. It also hurts other industry. People start to not trust it. Well, gee, I don't want to buy the nest things because they're going to do something with my data. I don't want to buy a Google home.

I don't want to go and use these new technologies because they are not -- I can't trust what they're going to do. Nothing they say, and it could be a different company that if consumers start losing faith that what's told to them, what they expect is not what they expect. All these products they're going to start to say why do I want to start bringing this stuff into my home when it seems like that everybody, the common story is they're doing something else with it that I didn't expect.

And that hurts other companies. It undermines the companies that are doing the right thing and are saying what they're doing with it and then doing that. And then if they want to use it for something else, tell people. Try to get their consent.

VLADECK: (inaudible) problem. This is why we have the Video Privacy Protection Act because someone went to -- they used to have stores where you could rent videos.

OHLHAUSEN: (inaudible) video.

VLADECK: And they got list of what -- and everyone was outraged because who knows whether he was sitting there at night watching Disney shows or porn.

BEALES: But VIZIO says, to me the VIZIO case seems to say the store can't keep the record.

VLADECK: No.

BEALES: That seems crazy. They're not publishing. They're not publishing this.

VLADECK: It's a TV set. It's not your content provider.

BEALES: Let me, let me -- yes.

VLADECK: It's not your content provider. It's a TV set. It's like a radio. It's not a content provider. It's, and what VIZIO was doing is keeping an account of what you watch and selling it not just, with no restraint on selling it and that's why, that's...

BEALES: But they're selling it -- selling it anonymized in aggregate.

VLADECK: Well, OK. That's why we have a Video Privacy Protection Act because Congress...

BEALES: No, there's nothing in the Video Privacy Protection Act that would keep the store from reporting the aggregate rentals by title.

VLADECK: That's true.

BEALES: That's what VIZIO wanted to do with this data, was the stuff by title. But I just wanted to say if we think about the problem the way Daniel just characterized it, then I think it's a problem that has no solution. I mean there are going to be -- this is an interesting article in the Wall Street Journal today that I didn't read closely about 5G and why it's important to be first that predicted among other things, we're going to have internet connected tennis shoes. OK?

Now, imagine having to read the privacy policy for your shoes and your light bulb and everybody else. If we -- there are going to be things that happen in this new world that consumers will not know about, right?

Their cars will do things now that they don't understand how it happens or that it happens. If the goal is for consumers to understand at a technical level what's going on and how all the information is being used, we're not going to get there, guys. Let's think about what's second best.

SOLOVE: Well, I think the consumer -- I totally agree with that point, consumers aren't really going to understand the technical thing, that's why I think the FTC plays a great role here as a backstop to say, "Look, someone's got your back." If the uses are going to start to get so far afield, so unexpected, we're going to stop that. We're going to keep that in check. And I think that it shouldn't be like OK, wow, you're going to be totally ruined, that that shouldn't be the standard or else then I think it should just be obviously, if there is a small variation in use and it's very innocuous, it's not a big deal. I don't think we should go after trivial things.

But I think like significant variances in use aren't totally trivial. And it's not like it's impossible, and you can also look at circumstances, how hard would it have been just to try to shape expectations a bit better about what this product is going to do.

Companies should have an -- some kind of an obligation not to just hide the ball and secretly do things. Not saying it has to be in a fine print of a privacy policy, but the more people understand a little bit about like, OK, what are these new products doing and what are the consequences, it's an education that needs to happen as we make these changes. And it's not happening because there's no incentive to do it. So like, great, I can get away with just doing it on the sly and no one is going to come after me.

BEALES: I think the important backstop though is not that there's something that I know there's nothing surprising happening with my data, because I'm sorry, whatever your data is there's something that would surprise you that's happening with it almost for sure. And even if you're quite sophisticated about what's being done with information and how it's being used, that's probably true.

The question should be is there something that's being done with that data that's creating a problem? But the mere fact that I didn't know it was there is not the problem.

COOPER: Well, now that Daniel and Howard agree on the role of consumer expectations in privacy, great, that we solved that problem.

I want to -- we are going to -- I want to make sure we have time for some of the questions we got, but I want to turn back to David and in my introductory remarks I kind of posited that we're at an inflection point, that there is

something out there seems to be at least have a lot of people talking or suggesting that we need to rethink privacy here in the U.S., maybe moving us closer to the EU, we see this in California.

So, I -- to David, do you think that the pressure for national and international conformity is going to drive federal privacy law closer to these other models whether we like it or not?

VLADECK: I think that -- well, first of all, I think that the California -- the enactment of the California statute and the, sort of the slow implementation of it, deliberately slow implementation has created an interest in many other states to see if they can replicate what California has done.

And so, I don't think that Congress is going to immediately race to enact federal privacy legislation, but many of the most important statutes that we have the environmental protection laws, the occupational safety and health laws, these were all enacted basically in response to an emerging -- emergement of state law.

And so, my guess is that unless the business interests that are unhappy with the California law succeed in either scuttling it back in the California legislature, or attacking it successfully in court, you'll see other states moving to adopt a regime based on the California statute, which is to some extent based on the GDPR. And so, the other force that is very much at work in the privacy lawyers in this, either here or watching this on the web, they know this because they spent the last six months advising clients nonstop, compliance with the GDPR.

So I do think it's going to have an influence on United States. I think that that's problematic in and of itself. I think there are many laudable goals in the GDPR. I think for the United States to adopt that kind of approach would be very difficult. I mean we are not based on a code system of laws. And the GDPR reads a little like Napoleonic Codes updated.

So I think there is some friction in the joints, but I do think that particularly California has got 37 million people. It's the fifth largest economy in the world. It is the locus for much of the development of the tech community. And I think it's going to be highly influential. And I think the FTC has to sort of be very conscious about what's going to take place as a result.

And I do think that Congress has basically made itself irrelevant in this debate. And that may be a good thing.

COOPER: Howard?

BEALES: I agree with that. I would point to a slightly different example of what I actually think is probably the most likely outcome. There's a lot of -- and California is big enough to sort of drive things substantively.

It turns out, so is Vermont. Vermont passed a law requiring labeling of anything that had genetically modified organisms. That provoked industry support for a preemptive federal law that says you've got to label if it's got genetically modified ingredients. But you can label by a QR code that people can scan and go to a website to figure out whether it's genetically modified or not.

Now, it is -- there will be pressure for preemptive federal legislation. What that federal legislation will look like is not so clear. But I think there will be that pressure.

SOLOVE: In the early days of breach notification, I remember I testified before Congress right after the ChoicePoint breach, this is 2005. And there was interest, very strong interest in Congress, look, all these states are starting to pass breach notification and industry was all behind it. We have to comply with all these different standards and this is going to be very complicated and expensive and, you know, we really need some federal pre-emptive law. There was even a couple of bills kicking around. Nothing happened.

So I have very little faith that this Congress really can -- can pass a law let along tie its shoes. So I think that it -- it really -- I'm not expecting, even though I think that some of these laws could benefit consumers and benefit industry to have some in these areas, I just don't think it's likely. And so I think, you know, Congress just will have not have the role unless it somehow gets it act together. Really won't.

I mean, the most significant privacy legal change that was passed was passed as part of Obama Care. It was the HITECH Act's updating of HIPAA and passing the notification rule and -- and that's really the big accomplishment for Congress in the last, you know, since 2000 really. Not much has gone on.

So yeah, I don't hold out much hope, so I think it's going to be what it is and I think there's some problems with that approach, when we're going to have a lot of different varying state legislation on privacy, breach notification's at least something that's more, you know, focused on one thing, you have variances. And all the different -- you know, all sorts of different laws like California's with different variations is really going to be a big nightmare for industry to comply with and I don't necessarily think that's a good thing.

BEALES: I will say when I started at the FTC in 2001, everybody said the Internet legislation and privacy legislation is going to pass right away and you guys better get behind it, but well.

VLADECK: Well, we said that at the beginning of the Obama Administration too.

OHLHAUSEN: Well, I was just going to point out that Congress isn't the, and the FTC aren't the only actors in this drama or the states. And so NTIA, and NIST and the Department of Commerce and the White House are all considering paths forward, do we look at some sort of approach that would allow more of a uniform privacy framework to be put in place. So I would encourage people to pay attention to that process as well.

COOPER: I just got a card that, I was going to wait for the audience, but it says point of fact, HR 6743 Federal data breach is going to the full House and it was just voted out of committee today, so breaking news here. So I'm guessing it was prompted by this panel. Taking immediate action, immediate action.

So we're, I want to -- we're talking here about the pressure on the U.S.. One -- one thing that we have here in the U.S. that is the first amendment then, that seems to push back against privacy regulation, so I wanted to, Daniel turn to you and I know you've written and thought about this, the international or at least the comparative privacy law a lot, do you see any problems with extraterritorial application of elements of the GDPR?

For instance, we see that the European Court of Justice is now considering the extraterritorial application of the right to be forgotten. We saw a Canadian court deal some of that early this year with Google. So do you see that as a potential push back?

SOLOVE: I mean there are definitely certain problems with that. I mean a lot of laws including U.S. laws have extraterritorial application as well, including the California law. And yes, I think that to some extent every country in every region has a right to regulate those who do business in its borders.

And I guess one thing is good luck enforcing that over in the U.S.. If a company is not in Europe, GDPR says it applies, but I don't see what they're going to do to really enforce it. So it's there in paper. It looks scary on paper, but in practice, it's kind of a joke. They really can't enforce it.

There are certain aspect of GDPR that wouldn't fly under the first amendment, but there are a lot of aspects under it that are fine under the first amendment, that are embodied in various laws. I can look to a lot of different provisions of GDPR and find analogs and similarities in U.S. laws including even rights to be forgotten. There are already right to be -- COPPA has one for example. So a lot of these aren't like foreign, radical concepts. There are certain things about GDPR that just will not fly in the U.S. for first amendment reasons as well as just general U.S. approaches.

So the idea that you need to have a lawful basis to process data, that you have to be somehow authorized to do it. And there's only justifications that allow you to even use or collect data. I don't think that would really work in the United States. It's just so contrary to the U.S. approach which is generally a permissive approach. Like you can use it unless there's a problem that's caused by it, and it's generally U.S. approach is not to just say, you know, you need authorization. Do something unless what you're doing starts creating an issue.

So I don't see that being carried over. But I think a lot of the things that GDPR does and a lot of things these laws do are not so radical and foreign and different to the U.S. You look at HIPAA, you look at GDPR, there's a lot of

similarities, actually much more than the California law. HIPAA has a lot of similarities. A lot of GDPR is just having a privacy program, doing basic risk assessments and other things all of which HIPAA requires.

And the GDPR often doesn't say a lot about like what those things should entail. It just say, hey, do privacy by design and do it early, but it doesn't say what you're supposed to do for that, it's largely empty. It says do a privacy impact analysis, but it doesn't have a lot of specificity on these things. And sort of how HIPAA is in a lot of ways too.

So in a way, I don't think there is like -- things are so radically at odds with each other and that the GDPR approach is radically incompatible with the United States. I think there are certain things that are -- that won't transfer over, but I think the things that transfer over, the commonalities and the things that could work are more than the things that can't.

COOPER: Anyone else want to jump in on that? All right, well so with a little bit of time, I've gotten lots of great questions, I unfortunately we don't have time to ask all of them, but I want to direct one to Maureen because it's right in your bailiwick. It has to do with the FTC taking advantage of it dual role as both having consumer protection and a competition side and using that to examine the impact of data, not just in the consumer protection dimension but on the impact on small business competition and entry.

And I know you've written about that and thought a lot about the mixing privacy and competition.

OHLHAUSEN: Certainly in a competition analysis, data could be considered if it is an asset that is being combined in a merger in a way that is going to reduce competition in some way. I mean much like combining two distribution systems or combining two factories. I think one of the questions though is really a lot of times concerns about privacy are really what's it driving, concerns about trying to use privacy in a competition analysis, so it's not really about hurting competition, it's about hurting privacy. So I think there certainly are examples one could think of, right?

So say there were two very privacy-protective handset manufacturers, right, and they sort of have that big part of the market and say you can say that was a separate part of the market than other handsets, and they were going to merge, right, and then they were going to have a high market share of handsets that compete on privacy attributes. That could be in any trust case just like you could have two manufacturers of super premium ice cream who want to merge, right?

COOPER: Just hypothetically.

OHLHAUSEN: Just hypothetically, super premium ice cream, that was the case. And anyway, so I -- so I think it's not that data cannot be a part of it. It just has to be -- the concern has to be about competition. Now on the other hand, we have had situations where one company is buying another company and they're going to be combining data sets. They're not -- it's not -- they're not horizontal competitors, right? It's not that it's taking the competitor out of the marketplace, but that data that is going to be transferred over to the merged company was collected with a certain set of promises.

And so what we've said through the head of Bureau of Consumer Protection is that the promises travel with the data, right? So if you collected this data and said we're not going to use it for marketing and they're going to combine it and then use it for marketing, they would have to get a new set, well basically a new consent from the consumers. So if consumer says well no, no, that's not what I wanted, then they would have to take them out of that data set.

And so I think that's -- that's the way it has been handled. I mean there are merger cases where you do -- you're combining two very unique datasets, like we had a case about mapping use for insurance. And we had a competition remedy, because it was going to reduce competition and so we actually had a remedy that required sort of replication and sharing of this data set.

But so often, these types of mergers that involve a lot of data are, they're being combined to create what we would consider in antitrust like a new product, like a new efficiency as long as it's not harming consumers as a consumer protection matter and that wouldn't be considered a negative kind of thing.

So I actually have an article about this, called Competition, Consumer Protection, and the Right Approach to Privacy.

COOPER: She'll be outside signing it on the way out.

OHLHAUSEN: Right, it's in the Anti-Trust Law Journal in 2014, but -- so it's not to say these values aren't important. It's to say what tools you use are, that's an important consideration. If you are concerned just about, you know, someone is going to use data in a way that harms consumers, that's a core consumer protection issue and you might -- you should use those tools. If you are concerned that this transaction that involves data sets is going to reduce competition, either competition on privacy or competition in another -- some other form, then antitrust is the right tool.

COOPER: Anyone else? Yes.

BEALES: Yes. I just think there's a different perspective on it that is also important. As we -- as we look at it and as states and Congress look at additional regulatory requirements, those often have differential effects on competitors, and in particular in the privacy world, it is a whole lot easier for a consumer-facing company like Google or Facebook to get consent than it is for the behind-the-scenes somebody that does exactly the same thing using exactly the same information, but they collect it via cookies, planted by a host of different publishers participating in an advertising network.

But that is the competitive fringe in the online advertising market, and regulations that make it harder for them helped to entrench Google and Facebook and that's not necessarily a good thing, but it's very much a competitive concern.

COOPER: Okay, so here is a question in our 2 minutes and 21 seconds left, about the -- the -- it didn't come up surprisingly, but we kind of touched around on it, the privacy paradox. You know, maybe Daniel, I'll aim this one at you first, but the audience member says, how do you reconcile the fact that consumers readily value privacy highly even asked, but they tend to do things that contradict these stated values and I think we all know that as the privacy paradox, that stated preference seems to diverge from revealed preference in the privacy space.

SOLOVE: Yes. Alessandro Acquisti, an economist at Carnegie Mellon, has done some really great work on this and studied this very effect of, you know, people and what they say and what they do are at variance. And that's often the case. And part of it is that, you know, the choices that people have and the way that they make those choices are shaped by how those choices are presented to them and a bunch of other factors that could lead them to make choices that are not always consistent with their stated attitudes.

And so we might say, well, what is true? Do you say the behavior is the truth about what they really value or is it what they say? I actually think it's neither. I don't think what they say is actually reflective of how they actually value something, but I don't think behavior is always a good metric either, because there're a lot of things skewing the behavior. And Acquisti does a great job of pointing out all the different skewing things on behavior.

So in a way, it's very difficult to measure what consumers actually value, because I think both metrics are problematic for doing that, because a lot of it is how informed the consumer is and what information they're given and so on. And you get very odd effects. One of his studies is very interesting. He had two groups and one group, he told like they're going to collect very sensitive data and one group he said, we're going to protect it, we're going to give all sorts of privacy protections and security protections on it and the other group, he said nothing.

And guess which group disclosed more, the group he said nothing to. And so it's almost figuring out like punishing you for actually doing the right thing, and that's because when you told people all the privacy and security protections, people's minds suddenly woke up, oh my gosh, maybe there are these risks that I didn't think about and that made them more cautious.

So a lot of interesting effects and I just urge you to read his work. It's very illuminating, and he'd do a much better job than I did at tackling this issue.

COOPER: I'm sorry David.

VLADECK: Yes, I'll make one other -- you know, people are generally presented with take it or leave it offers. I mean either of you are on Facebook or you're not, or you use Google Search or not and, you know, we did some research when I was at the FTC about these issues and part of it just -- and this is, just sort of echoes what Dave says, how the choice is presented.

COOPER: Yes. Howard?

BEALES: I think how you frame it clearly matters, but, you know, consumers have all sorts of preferences where it's a perfectly valid preference and a perfectly real preference, but when they confront the cost of satisfying that preference, they make a different choice, and that's -- there are issues of how you pose the question and how you define it and what consumers know, but there's also these choices have costs and consumers may make them differently.

An example I like is organic foods, something like 48 percent of consumers say, "yes, I prefer organic." Organic's market share is about five percent.

COOPER: All right, well I wish we could go on forever. I'm sure the rest of you all do, but we are out of time by the 6-0s on the clock up here. So join me in thanking this great group to -

(APPLAUSE)

COOPER: I will await my instructions from below.

SAYYED: If -- we have one more little end note, if Howard Shelanski, professor here will give closing remarks and here he comes now. The Price is Right style.

SHELANSKI: All right great, thanks very much to all. And thanks to all of you for being here. I'm used to at academic conferences saying I'm standing between the audience and cocktail hour, there're no cocktails here, so you guys are stuck. I will nonetheless keep things brief.

I want to start by just reiterating what Dean Treanor said this morning, it's a real honor for us here at Georgetown to be able to host these first days of these series of hearings that the FTC is hosting. It's really -- we have a deep connection to the FTC as Dean Treanor explained and it's really just wonderful to have such a vibrant debate and so many of you here today and special props for my antitrust students who showed up, I appreciate that, former students so they're not getting any benefit from this since I'm not teaching at this semester.

One of the things that I think has been particularly heartening about today's discussion is we really see the full integration of the agency's consumer protection and competition missions. I think both of those are front and center, certainly the last panel makes that very clear, in the issues that these hearings are tackling. And you heard Bilal say earlier that the Bureau of Competition and the Bureau of Consumer Protection are really complementary.

I might add Bilal left one thing out of his formulation which was the Bureau of Economics, and it's my view that with a small handful of FTEs, the Bureau of Economics could actually be completely substituting of both of those other bureaus, but that's perhaps a chauvinistic view from someone who spent some time at that agency and in that bureau.

The importance of these hearings really can't be understated. I think one of the great things of the American regulatory system writ large and one that, sort of a distinguishing set of characteristics that one sees when one goes around the world and sees how regulation and law enforcement is done in many other very sophisticated jurisdictions, is the level of transparency and accountability that characterizes the way our federal agencies act.

And to be sure, one could be cynical about certain actions that those agencies take, but when one takes a broad view, it really is quite impressive. Agencies have to justify their decisions. Agencies have to have a coherent framework and they have to have evidence, and those agencies don't get to make those decisions on their own because they are subject to accountability through the courts, and you just have to open up the paper today to see an example of a court overruling a federal agency that did not meet those standards.

So the agencies have a real obligation. These hearings fall into that framework of transparency and accountability. An agency that fails to justify its actions in a particular case to a court loses the case. An agency that fails to justify its program and its approaches and framework loses its -- loses its relevance before the public, and that is I think a very damaging and harmful thing to have happen.

So for an agency periodically to hold sustained public hearings where it examines both the sets of problems on which it is focusing and the analytical framework with which it's approaching those problems is really a very important aspect of maintaining that relevance, maintaining that legitimacy with the public, and that is exactly how I see these hearings and what I see the FTC as doing.

The FTC has always been an agency that cannot stand still and rest too comfortably with the problems it's focusing on or with the tools with which it's analyzing its approaches to those problems. Indeed, that was the spirit which Chairman Pitofsky launched the hearings nearly a quarter century ago. We were in a time of very interesting economic turmoil with the rise of high technology industries, economics and other tools for assessing where there were competitive harms, where there were harms to consumers, were changing and developing.

And it was his judgment as chair that the agency needed to go out and make sure that it was well understanding what problems the public is focused on, that it was understanding the industrial changes that were before it and that it was understanding the state of the art of the knowledge with which it would assess those problems.

Well, I think all of those forces are even stronger today. And when Chairman Simons came into office, he came into office at a moment that most of us in the antitrust field and many of us in the consumer protection field recognized as a sort of a historic moment. I think there was sort of unprecedented debate, but I don't want to say unprecedented but certainly unprecedented for the last 40 years, debate over some of the fundamental framework and conventional understandings of how antitrust should be enforced.

There is a recognition that we have much sharper tools out there for understanding how consumers behave and process information. It's time for the agency to step forward and make sure that it is fully taking account of and understanding that public debate, because if it doesn't, it will keep looking over here and the public will be thinking about problems over there.

So if you open up again, the paper over the past week, you'll read that there is a lot of public debate, a lot of debate in academia, a lot of debate in think tanks about whether the consumer welfare standard and as conventionally conceived in antitrust enforcement is adequate to address some of the concerns about market structure changes or wealth distribution changes, things that the first panel this morning talked about.

I had people come up to me and say, can you believe the FTC invited so and so? Those are flaky ideas. They shouldn't be giving air time to those. And the FTC and I firmly disagree. These are things that people are thinking about and they are motivated by the problems that everyday consumers are perceiving. And if the agency turns its back on those voices in the debate and doesn't take into account what might be legitimate in those arguments, the agency will lose its transparency and it will fail the test of accountability before the public.

So recognizing that, we see on all of the panels today and on the panels that we will see in the other 19 days of hearings that I think are scheduled, are real diversity of views that explore the outer boundaries of what would traditionally be thought of as competition enforcement or consumer protection enforcement. And only by taking into account that thinking at the outer boundaries, of hearing about the problems that might be novel or different in form from the way we've seen them before given the rise of large digital industries and AI and new kinds of technology, only by fully exploring them and doing what Chairman Simons said we should do and that he would do in his opening remarks, follow the evidence, follow the evidence to identify where there is really a problem, follow the evidence for where we have a good understanding of tools that can resolve those problems.

In that way the agency will do two things. The agency will modernize its thinking. It will better be able to explain its actions even where the action is inaction, it will better be able to say action is not warranted or we don't know enough to have action. And we're making that decision having taken into account the state of the art thinking and

having really heard from the public, from stakeholders of all kinds about what the problems are that they are feeling and that they are sensing out there in the marketplace.

By doing that, the agency will become more effective, it will modify its framework as it needs to to be more effective, but it will also be more effective and transparent in justifying what framework it eventually arrives at after these hearings.

So these are more important as events than the one-off kinds of conferences that very often characterize a field. They are a sustained and iterative process over 20 days where some of the same issues will come up again and again. Everything is documented, everything is public, and at the end, there will be reports very transparently explaining what evidence the agency is crediting, what arguments it's crediting, what arguments it doesn't feel it can credit, and the technology if you will of consumer protection and competition enforcement under Section 5 at the agency will all be the better for it.

So this is an important enterprise. It's an important enterprise not just for the people on the different panels, but it's an important enterprise for all of you to participate in, commenting, sending your comments to the agency, the agency has got an open window for those comments right now, because it is a unique moment that we might not get again for another 20 or 25 years, or else it will occur only incrementally though the case by case kinds of transparency and accountability. So this is a critically important moment. I think this is a really auspicious start today to that moment. I look forward to following and participating in some of at least the remaining 20 days, I would encourage all of you to do so as well. Thank you.

(APPLAUSE)

SAYYED: So I'm just going to say thank you and say five percent down. And then our next session, September 21st, Constitution Center, so not very far from here and that will get us I don't know, 10 percent down. Thank you, thank you to the panelists. Thank you, everybody.

(APPLAUSE)

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