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## "A NEW DIRECTION FOR COMMUNICATIONS POLICY: LESS REGULATION, MORE INVESTMENT AND INNOVATION"

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# "THE VIEW FROM THE FTC: OVERSEEING INTERNET PRACTICES IN THE DIGITAL AGE"

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* This transcript has been edited for purposes of correcting obvious syntax, grammar, and punctuation errors, and eliminating redundancy in order to make it more easily readable. None of the meaning was changed in doing so.

P R O C E E D I N G S

MR. COOPER: So we are going right into the next panel, which is "The View from the FTC: Overseeing Internet Practices in the Digital Age." It's a panel that looks to be incisive from a policy perspective. And keeping in mind our C-SPAN audience, we promise a panel discussion that is TV and family friendly, as always.

So you have biographies in the printed brochure, which is also available at our website, freestatefoundation.org. In the interests of time, I will keep the introductions short.

Seated here with me, is Tad Lipsky, who is Acting Director of the Bureau of Competition at the Federal Trade Commission. The Bureau of Competition addresses matters such as mergers and premerger clearance, as well as anticompetitive practices.

Tad is a recognized expert in the field of antitrust and competition law and policy, with an extensive background as well in private practice and historic service at the Antitrust Division of the

Department of Justice.

I also have here on the panel Tom Pahl, who is Acting Director of the Bureau of Consumer Protection at the Federal Trade Commission. The Bureau of Consumer Protection involves matters such as advertising and marketing practices, privacy, as well as enforcement actions.

And then finally, we also have with us today Daniel Lyons, who is Associate Professor of Law at Boston College Law School, where he specializes in matters such as property, telecommunications, and administrative law. Professor Lyons is also a member of the Free State Foundation's Board of Academic Advisors.

So as we proceed along here, we are going to have our distinguished FTC officials speak each for about 10 or 12 minutes. After that time, Professor Lyons will be offering some responsive comments or any other life-changing insights that he wants to impart to us today.

So I will begin by turning things over to Tad Lipsky, Acting Director of the Bureau of Competition at the FTC.

MR. LIPSKY: Thanks very much, Seth. And thanks

to the FSF for this opportunity to speak.

I should probably begin by saying that my colleague, Tom Pahl, is really the star of this show for a variety of very simple reasons. The FTC is, by far, the most experienced and expert agency anywhere on the planet in terms of consumer protection, which is Tom's responsibility.

MR. PAHL: Thanks for the plug.

MR. LIPSKY: The Bureau of Competition of the Federal Trade Commission, even though we have some very considerable authority and also regard ourselves as great experts, we have a truly unbelievable recent won/loss record in antitrust litigation, and we are a fearsome fighting machine. But we share antitrust responsibility with a number of other institutions in the American legal system.

Of course, the Antitrust Division of the Department of Justice would be the first to identify in that respect. We have concurrent jurisdiction in most respects, in terms of our antitrust jurisdiction. And, of course, the Antitrust Division also enforces laws against exclusionary and monopoly conduct, cartels, and we share

merger review responsibility with the Division as well.

But such was the affection of the Benjamin Harrison administration for antitrust remedies, we also have what is called a private right of action, also referred to as the private attorney general provision of the antitrust laws. Anyone injured in his business or property is entitled to bring a lawsuit in a federal district court in the United States to recover damages for any injury suffered on account of an antitrust violation, which are automatically trebled, and the plaintiff also gets his attorneys fees paid by a losing defendant. If the plaintiff loses, he doesn't have to pay the defendant's attorneys, so it's kind of a one-way fee-shifting provision that has always acted as a very significant subsidy for antitrust litigation in the United States and it is therefore no accident that the Section of Antitrust Law's spring meeting is invariably attended by thousands of antitrust lawyers from all over the United States and this is a model that has also been repeated around the world.

Antitrust litigation is one of the most prolific species of litigation in the federal courts. And there is

also antitrust litigation on behalf of state attorneys general under what we call the baby Sherman Acts and the baby FTC Acts, the state laws that are analogous to the federal laws. So it has made American commerce a kind of a free-fire zone for antitrust litigation.

And I haven't even mentioned class action procedures and a number of other broader features of the civil litigation picture in the United States that also make it very easy for an injured party to bring an antitrust lawsuit. This would include notice pleading, extensive pretrial discovery, and on and on. And that's why, as I used to say to my younger colleagues looking to join a law firm. I said, if you are successful in the antitrust defense bar, you can look forward to a pretty good life, but you will always fly commercial. If you want to own your own Gulfstream, you want to be on the side of the plaintiff's bar.

The reason I'm going through all of these tremendous features of the U.S. legal system that make it so easy for the antitrust laws to be enforced is that this is what awaits those who would engage in any anticompetitive conduct as an ISP or as a

telecommunications carrier, out beyond whatever security is provided by a regulatory breakwater.

We do have some doctrines that protect regulated parties from antitrust suits. But the burden for establishing those immunities is rather severe. If you don't have an explicit antitrust immunity under statute, and I think there are little or no areas for explicit antitrust immunity under the Federal Communications Act, you have to find a plain repugnancy between the regulatory system and the antitrust laws before any of these other implied immunities can be invoked.

Antitrust is a powerful system. It is used for condemning and bringing very severe remedies to bear on those who engage in anticompetitive activities. So to the extent this debate about how to treat the Internet to make it neutral or whatever is based on the idea that a lessening of the regulatory burden on the FCC side would lead to a situation in which anticompetitive conduct was free to occur without fear of further consequences that is, I think, demonstrably unrealistic.

The FTC is waiting. We recently brought a case for anticompetitive exclusionary conduct, a case called

*McWane*. The Department of Justice has brought cases for exclusionary conduct, thinking of the *Dentsply* case, and, of course, the *Dentsply* case was followed on by extensive private litigation. So that's why there are a lot of antitrust lawyers.

That's why most significant companies are very careful to have actively administered programs of compliance policies for antitrust law, and why I think the public need have no fear that anticompetitive practices occurring in the free market of Internet services are going to be detected and punished.

So that is, in a sense, that's kind of in my wheelhouse. What does antitrust enforcement have to do with the provision of Internet services and the things that are under consideration now at the FCC?

Now I'm going to get slightly editorial and, of course, in everything I say, I'm not speaking for the Commission, I'm speaking for myself. You need to keep that especially in mind for the next comment.

Which is, I was very interested by the remarks of David Cohen on the morning panel, who observed that he didn't understand why we would even be seriously

discussing the application to an industry as dynamic and growing and technologically complex and shifting as Internet services -- why should we even be considering applying a form of regulation that goes back to the 1930s. Well, I didn't think that he was intending that remark as a compliment to Title II regulation. But to put the origins of Title II regulation back in the 1930s is, in a sense, a bit of flattery.

This form of regulation was actually modeled on the first economic regulations that were entrusted to an administrative agency -- this is going back to Grover Cleveland. And not the modern, state-of-the-art Grover Cleveland of his second term, after the Benjamin Harrison term, this was his first term, during which this regulatory authority was given to the Interstate Commerce Commission, the first economic regulatory administrative agency in the U.S. And it is a fact that the FCC Title II regulation is a direct descendant of that form of regulation.

The Interstate Commerce Act and the Interstate Commerce Commission has been the model for all of the economic regulatory agencies at the federal level in our

history. The Civil Aviation Authority, which became the Civil Aeronautics Board, the U.S. Shipping Commission, which became the Federal Maritime Commission, the Federal Power Commission, which became the Federal Energy Regulatory Commission, and the FCC, which actually, if you draw the line back from Title II regulation, you will ultimately get back to, I believe it was, the Interstate Commerce Commission itself, which was the original repository of the first regulations of the electromagnetic spectrum that were enacted in the 1920s in the U.S.

So I am a cheerleader for the light regulation approach and I endorse the philosophy that the temptation to look at the problems of a dynamic and quickly developing industry and to immediately apply this structure of economic regulation as a way of anticipating and making sure that future problems don't arise has largely been a failure. The Interstate Commerce Commission no longer exists. It was eliminated in 1996. The Civil Aeronautics Board no longer exists. I believe it was eliminated about 10 years earlier. It is, in many respects, a dubious and highly questionable and, in many industries, a failed system of regulation.

So I am a light-touch regulator. I am a fan of antitrust as the way of ensuring that dynamic, free competition gives the consumer what he wants. And in that endeavor, we also need consumer protection. And so I am going to turn the mic over to Tom.

MR. PAHL: Good afternoon, everyone. Thank you for asking me to come here today and discuss the FTC's future consumer protection role with regard to online data security and privacy. Before I begin, like Tad, I have to give a disclaimer that the views I express are my own and do not necessarily represent the views of the Commission or any individual commissioner.

In one generation, the Internet has transformed our lives. When I was a kid, I used to use encyclopedias to look up information, and used a paper map to find my way. I shared a landline with my parents and I could only talk to one friend at a time on the telephone. My parents used travel agents to book vacation plans, endured interminable waits to be on hold to buy concert tickets, and hired people to perform home improvement tasks that we didn't know how to perform ourselves.

Today, my teenage son cannot even imagine living

under those kinds of circumstances. He can look up historical trivia, current events, and song lyrics at the touch of a button, anywhere and at any time. Through group chats and social media, he can communicate with dozens of friends at the same time. He can book concert tickets through StubHub and find discounts on Groupon. He can look at YouTube videos to learn how to mow the lawn, cook dinner, or fix bathroom tile. Being a teenager, of course he doesn't actually do any of those household chores, but the know-how is out there online if he were so inclined.

In the 2010s, technology has moved even faster with the rise of the Internet of Things. Almost any product you can imagine is being made right now as a connected or smart version, from refrigerators and cars to home security systems, baby monitors and even lightbulbs, pillows, and clothing. Yes, smart clothing.

Just last month, Amazon announced the new Echo Look, a hands-free, voice-controlled camera that records your looks from every angle and then gives you fashion advice. I'm not sure whether that's a good thing or not for the technological development, but it's out there for

those of you who really would like to have some thoughts on your fashion.

In any event, these Internet developments have transformed and will continue to transform our lives. In large part, a free market, limited regulatory approach has fostered this transformation while protecting consumers from harm. My boss, Acting FTC Chairman Maureen Ohlhausen, has described her approach to governing as regulatory humility. And that is what we are trying to implement at the Federal Trade Commission.

What this means is we must recognize the inherent limitations on our own knowledge and our ability to predict the future in addressing public policy issues. These limits counsel not abdication but prudence when it comes to the use of governmental power.

Let me discuss why I think the FTC applying such an approach to online data security and privacy would serve consumers very well. It helps to start by going back to the future, specifically turning the clock back to 2014. The FTC was the federal government's leading privacy and data security agency. The agency was an active law enforcer, bringing more than 500 privacy and data security related cases prior to that

time. We challenged those who violated the prohibition on unfair and deceptive acts and practices under the FTC Act. We also challenged those who violated other laws that specifically addressed privacy or data security, such as the Children's Online Privacy Protection Act, the Fair Credit Reporting Act, and the Graham-Leach-Bliley Act.

The FTC's privacy and data security cases involved offline and online information in companies large and small. They covered all parts of the Internet ecosystem, including social networks, search engines, ad networks, online retailers, mobile apps, and mobile handsets. In 2009, for example, the FTC shut down a rogue ISP that alleged knowingly recruited, hosted, and participated in the distribution of spam, child pornography, and other harmful content. Another example is we investigated Verizon for issues related to the security of its routers.

The FTC supplemented its enforcement activity with extensive business guidance, consumer education, and policy research and development. For example, in 2014, the FTC hosted a three-part spring privacy series to examine the privacy and security implications of new technologies involving mobile device tracking, alternative scoring products, and connected

health and fitness devices. The FTC staff also hosted a workshop on issues such as big data in 2014, the Internet of Things in 2013, and mobile security in 2013, as well.

And Commission staff throughout this period of time released countless consumer and business educational materials to provide tips for consumers and businesses on how to avoid potential privacy and data security harms.

In 2015, however, the FTC's role changed somewhat. The FCC issued its *Open Internet Order* to classify broadband service as a common carrier service under the Communications Act of 1934. Under the longtime views of both the FTC and the FCC, including articulated in a brief, I believe, that was filed yesterday in a case in the Ninth Circuit, the FTC and the FCC have always viewed the FTC as lacking jurisdiction under the FTC Act with regard to the common carrier activities of common carriers. The FCC's *Open Internet Order* therefore effectively prevented the FTC from engaging in enforcement, rulemaking, and other consumer protection activities concerning ISPs' online data security and privacy.

In 2016, as many of you know, the FCC followed its

*Open Internet Order* with the issuance of rules restricting and limiting ISPs' data security and privacy practices. In doing so, the FCC chose a more rigid and prescriptive approach to broadband data security and privacy issues than the FTC's traditional case-by-case approach to these topics. The FCC's rules also set data security and privacy standards for broadband providers separate and apart from the standards applicable to others in the online space, eschewing the FTC's more holistic and comprehensive approach.

Under the leadership of Chairman Pai, however, the FCC has recently begun to take a different tack. As many of you know, in March the FCC stayed its privacy and data security broadband rules, after which Congress used the Congressional Review Act to invalidate them and preclude the FCC from adopting substantially similar rules in the future.

Earlier this month, the FCC also issued a notice of proposed rulemaking, under which it proposes to no longer classify broadband service as a common carrier service. As we have heard today and I'm sure all of you know, this proceeding is ongoing. But if the FCC were to

make its proposed change final, the FTC likely would then be able to use its enforcement, rulemaking, and other activities to once again address broadband data security and privacy.

I'd like to talk about what that would look like if that were to come to pass. The FTC is ready, willing, and able to protect the data security and privacy of broadband subscribers. The FTC continues to be the federal government's leading agency on data security and privacy issues. We have a wealth of consumer protection experience and expertise which we would bring to bear on online data security and privacy laws. We would apply data security and privacy standards to all companies that compete in the online space, regardless of whether the companies provide broadband services, data analytics, social media, or other services. Our approach would ensure that the standards the government applies are comprehensive, consistent, and pro-competitive.

At the heart of the FTC's approach to online data security and privacy is tough but measured law enforcement, focused mainly on combatting unfair and deceptive acts or practices in violation of the FTC Act.

We hold companies responsible for the privacy promises they make to consumers. We hold companies accountable for their misuse of sensitive information. We hold companies responsible for not having reasonable data security practices. As aptly illustrated by the FTC's track record, we use effective case-by-case enforcement to protect consumers, including those online.

Some have argued it would be better for the government to address online data security and privacy through regulation rather than proceeding case by case. Rulemaking imposes standards based on a prediction that they will be necessary and appropriate to address future conduct. Case-by-case enforcement, by contrast, involves no such prediction because it challenges and remedies conduct that has already occurred. Of course, such enforcement also has a prophylactic effect as companies look at past enforcement to guide their conduct.

The Internet has evolved in ways that we could not have predicted, and is likely to continue to do so. Given the challenges of making predictions about the Internet's future, we need case-by-case enforcement which is strong, yet flexible, like steel guardrails. We do not need

prescriptive regulation, which would be an iron cage.

Some of the advocates of regulating online data security and privacy emphasize the clarity and certainty that rules purportedly would bring. Yet I think this underestimates the guidance that companies can derive from other FTC activities. The complaints and orders in the FTC's more than 500 data security and privacy-related cases provide firms with critical information about what conduct is appropriate and what is not. The FTC also has a long and successful history of educating businesses about their data security and privacy obligations. We continue to build on that work, particularly focusing on helping small businesses get guidance as to what their obligations are.

For example, we are creating a one-stop shop on our website with data security and privacy materials that are specifically designed for small businesses to help them come into compliance with the law. In addition, in the coming months, we will expand our business outreach on data security issues with a focus on helping businesses identify risks to their companies. Given the FTC's demonstrated ability to inform companies what the law

requires of them, there is no need to issue prescriptive rules governing online data privacy and security to convey guidance.

The call for rules to provide guidance on online data security and privacy also overestimates the guidance provided by prescriptive regulation. Prescriptive regulation, of course, can provide some certainty in the short term. But in fast-changing areas like online data security and privacy, regulations would need to be amended very often to remain current. Amending regulations is cumbersome and time consuming, even where agencies can use APA notice and comment rulemaking procedures. And so such amendments by agencies are very unlikely to keep up with the pace of change. Out-of-date rules can be very unclear in their application to new technologies and cause confusion and unintended consequences in the marketplace.

The FTC knows that its approach to online data security and privacy must be very forward looking. Because the Internet continues to evolve, we must evolve with it. At the FTC, we have demonstrated our commitment to learning about newer technologies, including new online technologies. We recently established an Office of

Technology Research and Investigation, also known as OTech. Its technologists work with our investigators and prosecutors in developing and bringing cases involving newer technologies. They also encourage researchers to undertake projects at the intersection of technology and consumer protection law, including many projects that involve online issues.

We also have an active research agenda on data security and privacy. Just last week, we hosted a workshop on identity theft, where we explored new types of harms related to identity theft, and we encouraged stakeholders to conduct new research to help us deal with these problems. Next month, we are hosting a workshop with the National Highway Transportation Safety Agency on connected cars, where we will discuss technology, privacy, and security issues. Finally, over the longer term, the FTC is conducting and encouraging new research into the economics of privacy.

Note that this is the FTC's current data security and privacy research agenda. It's not carved in stone. Our agenda will respond to changes in technology in the marketplace, including those related to online privacy and

data security.

In conclusion, the law, the markets, and the technology relating to online data security and privacy are always evolving. The FTC is ready, willing, and able to act to protect consumers who are online, including broadband subscribers, without imposing unnecessary or undue burdens on industry.

Thank you very much for having me here today, and I'm happy to answer any questions you may have.

(Applause.)

MR. COOPER: Thank you, Tad, and thank you also to Tom. And let me just take a moment to recognize Tom's service to the FTC, which is very distinguished and goes back to as early as 1990. He has also served at the Consumer Financial Protection Bureau and has great experience in private practice of law as well. So we're honored to have you here.

MR. PAHL: Thank you.

MR. COOPER: And now I would like to turn things over to Professor Daniel Lyons for his comments and his response.

MR. LYONS: Thanks. I'll try to be as brief as a

law professor can be.

So I'm really glad that the Free State Foundation has added an FTC panel, and I am really looking forward to the FTC playing a greater role in Internet governance going forward. I think they're doing great work already, not just in the data privacy realm, which Tom had mentioned, and I think is probably their highest profile entry into our area, but also for the stuff that exists under the radar, like a case last year, I think, against revenge porn operator and extortionist, Craig Brittain, who needed to be shut down and the FTC was the entity that had the tools to stop him.

So on these and on many other issues we see in cyberspace law, legal issues are increasingly cutting across multiple business models and they are affecting a number of different players online. And I think it's better generally to have a regulator who can view these issues from the perspective of the entire Internet ecosystem rather than a small part of it. I think that was one of the big issues that we saw with the privacy debacle.

With regard to net neutrality in particular, I

think although there is a lot of rhetoric in net neutrality about speech and quasi-First Amendment issues and things like that, I think when you strip back that rhetoric, at base net neutrality is an antitrust and a consumer protection issue. The argument goes that consumers have few choices, at least among wireline providers, and that the companies in that space might use their position to shape upstream edge markets in ways that might harm consumers or competition.

Well, that sounds to me like a classic antitrust problem, and the FTC has robust tools to deal with that. They know how to test for market power, whether your position in the Internet ecosystem is, in fact, one that could raise questions. And if it does, they have a legal standard that can evaluate these vertical foreclosure agreements, which is what economists call them, and a standard that has been developed over time that recognizes some vertical foreclosures are anti-consumer and some can actually be pro-consumer.

The earlier panel discussed the fact that we have a consensus developing around a no-blocking and a no-throttling rule and a no unreasonable discrimination rule.

But where the rubber hits the road, I think, as Randy May mentioned earlier, is on the question about paid prioritization, which can be good, but can also have anticompetitive effects.

The FTC is well equipped to evaluate on a case-by-case basis whether a particular agreement is one that might harm consumers, using robust law that's been developed from a number of different cases elsewhere in the economy. And so they have a broader scope informed by a lot more history than the Federal Communications Commission. And I agree that the *ex post* review and the attendant flexibility that the FTC brings is a lot better in a dynamic marketplace than more rigid FCC ex-ante rulemaking.

On the consumer protection side, one thing that really opened my eyes recently was the way that the D.C. Circuit evaluated the FCC's net neutrality rules. In response to an argument from the dissent that the imposition of common carriage on ISPs foreclosed the ISPs' First Amendment right to editorial control, the majority responded, and I think interestingly, that, yes, ISPs have First Amendment right of editorial control. But when they

are holding themselves out to consumers as offering access to all Internet end points, then the D.C. Circuit said it's okay for the FCC to impose net neutrality rules in order to make sure that they're fulfilling the promise that they make to consumers. And that sounds to me an awful lot like what the FTC's consumer protection office does. Whatever you put in your terms of service, we're going to hold you to it and make sure that you do it. That's what Section 5 authority has always done. Not just enforcing terms of service, but promises made in advertisements and also evaluating for inherent unfairness, unfair practices.

Now, giving the FTC authority to regulate unfair practices of ISPs sounds a lot like the general conduct standard that was pilloried earlier today. But there's a huge difference. The difference, I think, is that the FTC's unfair conduct standard has been informed, again, by a number of cases that have been developed over time. And the FTC has a test built into its statute as to how you determine unfairness. You look for substantial injury to consumers, one that's not readily avoidable by consumers themselves, one that's not outweighed by some

countervailing benefit to consumers or to competition. These are important distinctions from the catch-all, general roving conduct that the FCC has tried to give itself. And it's important because it, A, focuses on consumers -- which is a thing we seem to have lost sight of in the FCC's world -- B, focuses on the need for a cost/benefit analysis. It's not enough just to allege there might some harm, we should also look at what the offsetting benefit might be. And C, it's ex-post review. We allow companies to experiment with different models, throw stuff up against the wall and see what sticks. And only if there's actual harm will we intervene and potentially take action.

So I think my time is almost up. I want to close just by saying Tom mentioned that we're in the world of the teenager, and I think that's right. The teenagers' world is moving and it's moving quickly. I think it's important that ISPs be allowed to innovate just like any other company in the Internet ecosystem.

I think of Sprint, which, a couple years ago, had offered up the possibility of getting an unlimited talk and text and social media phone. And I was thinking, this

would be fantastic for my daughter, who blows through my data cap every month in Instagram. She doesn't do anything else online except Instagram. If I could get a phone that gives her unlimited Instagram and get her off of my shared data plan, that would be a benefit to me and to her, so I'm not always bugging her and she's not always costing me money.

Unfortunately, Sprint felt that it couldn't introduce that differentiated business model because they feared that it might run afoul of the FCC's net neutrality rules. I think the FTC is better equipped to evaluate that particular business model and decide, is this anti-competitive or is it pro-consumer? And to decide on a case-by-case basis whether to allow that experiment to go forward, rather than to announce sweeping rules that prevent companies from wanting to experiment at all.

MR. COOPER: Thank you, Professor Lyons.

We're going to allow just a moment or two for questions. And then please stick around, because immediately after that we will have closing remarks from Professor Michelle Connolly to close out our conference.

So if someone in the audience has a question,

there is a microphone that is going around, and you could be recognized and pose a question to our panelists.

My colleague has a microphone there.

QUESTION: Thank you. Lydia Beyoud with the Event Driven News. I have a question for the two of you.

Are either of you concerned that the FTC is currently hamstrung with a split commission?

MR. PAHL: No.

(Laughter.)

MR. PAHL: No. I mean, I think it is more of a theoretical problem than a practical, real-world problem. Most of the matters that have come up, at least in the three months or so that I have been an acting director, the commissioners have found a way to discuss them and move forward on behalf of the agency. And so, yes, I think in theory the idea that you have two commissioners who could have diametrically opposed views could keep the agency from doing some things, but I haven't seen it have that kind of a practical effect at this point.

MR. LIPSKY: A famous antitrust scholar talks about when he was a young associate at a Washington, DC firm and going to a hearing at the FTC in the 1960s, and

he came back and said, "I had the feeling that despite all of the legal firepower in the room, nobody could state with clarity what the objective of the antitrust laws was or which result in that particular case would best serve the objective." That was in the 1960s.

Well, that gentleman became the Assistant Attorney General for Antitrust under Ronald Reagan and announced that the policy going forward for antitrust enforcement would be, if it doesn't make economic sense, it doesn't happen.

Fortunately, that has allowed a bipartisan consensus about antitrust enforcement to gel, a consensus which has remained essentially unchallenged down to the present day. So on the vast majority of questions that come before the Commission relating to its competition jurisdiction, there is tremendous unity in the way that problems are approached.

I won't say that the decisions, the recommended decisions are always identical. But the consensus is the overwhelming rule, even now with a split commission.

MR. PAHL: Yeah, actually to expand a little bit, I agree with Tad, I think the same thing is found on the

consumer protection side of the aisle. A large percentage of the cases that we bring are cases involving fraud, scam artists, and the like. And, frankly, it doesn't matter whether you are a liberal Democrat or a conservative Republican, nobody is in favor of fraud. And so a lot of those cases going forward, you really don't have the kind of split you may have on more sensitive policy issues.

So there is a corpus of agreement on core consumer protection principles and the kind of cases that are not likely to give rise to splits, much like there is on the antitrust side through some of the emphasis that Tad discussed.

MR. COOPER: Thank you both.

Are there any other questions from the audience? We are taking questions right now.

MR. BOLEMA: Yes, a question for Tad Lipsky. The SMARTER Act has been making its way through Congress --

MR. COOPER: And please introduce yourself.

MR. BOLEMA: Yes, this is Ted Bolema from the Free State Foundation.

About the SMARTER Act, it stands for Standard Merger and Acquisition Reviews Through Equal Rules.

What's not standard about merger reviews and should they be more standardized with or without this legislation?

MR. LIPSKY: Well, the legislation is a response to a specific divergence in the way that FTC cases -- merger cases and Department of Justice merger cases have been handled. The Department of Justice has no authority whatsoever to determine that any party has violated the law. The only thing that the Antitrust Division can do when it believes a merger is illegal is present a case to a federal district court by way of complaint. The court makes the decision, subject to appeal, of course.

Now, the Federal Trade Commission has the same options. But they also have the authority to conduct their own administrative procedure where an administrative law judge hears the case from the FTC and the parties respond, and then makes an initial decision which is then reviewed by the Federal Trade Commission itself and then there's an appellate process. So it has given rise to a tremendous difference or potentially tremendous differences in the way the procedures are handled, the length of the proceeding and so forth.

And then in more recent years, we have had this

additional problem. There's been a kind of a dissonance that, because the precise statutory provision that sets the standard for the award of a preliminary injunction in an FTC case has kind of drifted away from the traditional equity standard that applies to the Department of Justice cases.

The SMARTER Act is addressed very narrowly, as I understand it, and not talking about any specific embodiment of the legislation or any particular bill, but the idea of the SMARTER Act has been to narrowly target that difference, so that two parties who want to engage in a transaction, they're not subject to this tremendously disparate treatment as to the injunction standard and the procedures and the length of the proceeding that applies, depending on whether the Department of Justice or the FTC reviews their merger. Because, as you know, there are essentially no fixed rules on which agency reviews. There is an informal clearance process, the outcome of which cannot really be predicted in any particular case. So that is, I think what the SMARTER Act is all about.

I am a supporter of the SMARTER Act. I know that Acting Chairman Ohlhausen is in favor of what I just described

as the main features of the SMARTER Act, but I don't think the Commission has specifically said anything about any particular bill or piece of legislation.

MR. COOPER: Thank you. And that will conclude this panel. And we are going to move right into our closing remarks. So please stick around.