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President Trump and Competition Policy

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I am honored to be with you today. As you may know, I founded the American Antitrust Institute twenty years ago, to be the first public interest advocacy group in United States history that would focus solely on the competition laws from a pro-enforcement, pro-consumer perspective. I served as President of the AAI from 1998 to 2014, and am now a Senior Fellow of the Institute. The views I express are my own, however, and should not be attributed to the Institute. Given that virtually every issue in America that relates to politics is now extremely polarized, you will quickly see where my political inclinations lie.

ANTITRUST AND COMPETITION POLICY DISTINGUISHED

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Let me begin by making a distinction between Antitrust and Competition Policy. I view "Antitrust" as a subcategory of "Competition Policy". Antitrust relates to several specific laws; in the U.S. these are the Sherman Act, The Clayton Act, and the Federal Trade Commission Act, and they deal mainly with *preserving* competition in narrowly defined geographic and product markets. Competition Policy, on the other hand, includes all laws that *preserve, promote, or otherwise regulate* competition. Examples are sectoral regulation involving specific laws and agencies for sectors of the economy like energy, banking, transportation, and telecommunications, as well as taxation, trade, and intellectual property. I will try to give you the flavor of what is happening today in the U.S. in both the subcategory of antitrust and the larger universe of competition policy. I will also touch on the topic of so-called non-economic values that may come up later in this conference.

THE PRESIDENT AND THE GOVERNMENT

Let me make a further distinction at the outset between President Donald Trump, the elected head of our executive branch, and the rest of our government, which includes the legislature, the judiciary, and the bureaucracy. According to some of the "tweets" that are President Trump's uniquely chosen mode of communication with his political base and the world at large, the federal bureaucracy is a conspiracy known to Mr. Trump's political base, the far right wing of the Republican Party, as "the Deep State". Its sole purpose, they seem to say, is to make former President Barak Obama look good and to make the incumbent, Donald

Trump, look bad. The Deep State's allies in this endeavor are supposedly the major national newspapers and virtually all television and cable media except for Fox News; any court or judge that stands in Mr. Trump's way; the U.S. intelligence agencies, even though he appointed their heads; Attorney General Jeff Sessions whom Trump also appointed and the Justice Department's Federal Bureau of Investigation; the Special Prosecutor, Robert Mueller, who is investigating alleged Russian interference in the 2016 election and possible Russian collusion with the Trump campaign; all Democrats and certain more moderate Republican heroes like Senator John McCain; and scientists and experts both inside and outside the government who overwhelmingly disagree with Mr. Trump on everything from nuclear policy to climate change, global trade, diplomacy, gun control, and huge public deficits.

My job, fortunately, is only to advise you on what all this has to do with Antitrust and Competition Policy.

THE POLITICAL CAMPAIGN

Although antitrust was not discussed in the Republican Party's campaign platform, candidate Trump gave hints of a surprising economic populism. He said, for example, that Amazon is a monopoly that would be in big trouble if he were elected. He even claimed that Jeff Bezos, the head of Amazon, had purchased the Washington Post newspaper so that he could attack Trump if Trump were to go after Amazon. So far, the Post has not spared Trump in the least, but Amazon

has not yet been attacked by the government on antitrust grounds, and it even completed its acquisition of the Whole Foods grocery company without much hassle from the antitrust authorities.

Trump also said during the campaign in October, 2016, that the proposed merger between ATT and Time Warner is an example of the power structure he is fighting. Not incidentally Time Warner owns the CNN cable network that was and is highly critical of Trump. Candidate Trump said this would be "a deal we will not approve in my administration because it's too much concentration of power in the hands of too few." [2]

In fact, the Justice Department has brought a suit to stop this merger and one of the defenses that ATT has raised – unsuccessfully so far—is that Mr. Trump's statements have made the litigation a political matter rather than a legal case. The judge granted a motion to quash discovery on communications between the White House and Antitrust Division because the defendants "[fell] far short" of showing selective, discriminatory enforcement.[3]

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[2] Steven Overly and Josh Gerstein, *Trump administration sues to block AT&T-Time Warner merger,* https://www.politico.com/story/2017/11/20/trump-lawsuit-att-time-warner-merger-250956 (Nov. 20, 2017).

[3] Colin Lecher, *Judge rules AT&T can't see Trump White House communications about the Time Warner merger,* https://www.theverge.com/2018/2/20/17032956/att-white-house-justice-department-lawsuit (Feb. 20, 2018).

During the campaign, Candidate Trump met with several business leaders who were planning to make acquisitions, including SoftBank's Mr. Son,[4] and there were reports that Trump said he would support them if the mergers would create new jobs. Nothing further has developed on this front, but the prospects of presidential intervention in merger cases was disturbing.

It has been rare for candidates to take positions on the propriety of antitrust cases, and at least equally rare for presidents to intervene in cases once they have been initiated. Indeed, such intervention by the executive branch into actual cases is widely condemned and greeted as scandalous.[5] Consequently, many of us in the antitrust field were concerned that a Trump administration would carry out a politically-motivated populist form of antitrust that would represent a major deviation from the past.

ANTITRUST: AFTER ONE YEAR

After one year, I can report that so far as we know this has not happened. The record thus far tends to be consistent with the mainstream, neither populist nor laissez faire. Economic populism has manifested itself, however, in ways I will address in due course.

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[4] *When Billionaires Meet: $50 Billion Pledge From SoftBank to Trump,* Wall Street Journal (Dec. 7, 2016), https://www.wsj.com/articles/donald-trump-says-softbank-pledges-to-invest-50-billion-in-u-s-1481053732.

[5] For instance, see the discussion of President Richard Nixon's intervention in a highly publicized merger in 1971 in CHARLES R. GEISST, MONOPOLIES IN AMERICA 229 (Oxford University Press, 2000).

First, as to personnel decisions, we all know that there is much discretion in the enforcement of antitrust, so the key leadership appointments by the President are critical. The appointment process of this administration has been remarkably slow, and this generalization also applies to the antitrust positions.

Mr. Trump has the opportunity to appoint all five commissioners of the FTC, but thus far none of the nominees put forward has actually taken office. The FTC governance model gives the chairperson great influence. The nominated next chairman, Joe Simons, is a seasoned antitrust expert with proven law enforcement inclinations. The other three nominations include a conservative with antitrust expertise, a conservative not known for such expertise, and a liberal known for expertise in consumer protection but not antitrust.

At the Justice Department, the new leadership is in place, led by Makan Delrahim, an experienced antitrust expert with high-level government experience and a generally mainstream conservative orientation. He is supported by a group of capable deputies. The big question overhanging his regime will be whether the President becomes all a-twitter after hearing complaints from business executives who patronize his hotels and country clubs about what harm the Antitrust Division is allegedly doing to their companies. We don't know how much independence the Antitrust Division will be allowed by the White House or whether the Attorney General, whose position within the

administration is considered unusually weak, will stand up to political interference if it occurs.

Thus far, the DOJ has distinguished itself by bringing the pending case to stop the ATT/Time Warner merger. The trial was scheduled to begin on March 19.

The ATT/Time Warner case can be important because it is primarily of vertical significance in a world of platforms and networks, where vertical issues are paramount. For years the dominant "Chicago School of law and economics" has treated vertical issues as essentially off-limits and while the Democrats have brought several substantial vertical merger cases, they typically settled for rather insignificant, difficult-to-enforce behavioral consent orders. Mr. Delrahim has repeatedly stated a policy that in vertical merger cases such as this, the preferred remedies are to be structural rather than behavioral. I believe the case itself and the position on remedies are both sound.

DOJ has also taken a strong position on enforcing consent orders in settlements, with specific new conditions to strengthen the orders.[6] DOJ has also brought three cases involving consummated mergers. This too reflects a serious commitment to merger enforcement.

[6] See *Remarks of Assistant Attorney General Makan Delrahim Delivered at the New York State Bar Association*, Jan. 25, 2018.

To date, the number of merger cases and their substantive standards are comparable to prior years. Similarly, civil and criminal enforcement appear to be consistent with prior administrations. The priority remains on anti-cartel enforcement.

An issue that has come up recently is whether agreements by employers not to poach employees of competitors should be treated as criminal violations. Mr. Delrahim said the answer is yes.[7] This, too, reflects strong enforcement intent.

A key civil case, *Ohio v. American Express*, was recently argued in the Supreme Court. The decision and the opinion will likely be of huge importance for the future treatment of platform industries. A platform industry has at least two sets of customers with related commercial needs, with the platform itself trying to meet those needs by matching them together in helpful (and profitable) ways. For instance, American Express offers to add convenience and benefits to retail transactions and tries to make its credit cards appealing both for merchants to accept and for consumers to use. The case is about whether the American Express card company, whose price to merchants is higher than that of either Visa or Master card, can contractually prohibit merchants from steering customers to use the lower-priced (for the merchant) alternative cards.

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[7] Eleanor Tyler, *Justice Dept. Is Going After 'No-Poach' Agreements,* Bloomberg Law Bib Law Business, https://biglawbusiness.com/justice-dept-is-going-after-no-poach-agreements/ (Jan. 19, 2018).

The basic question involves the extent to which antitrust analysis can focus on competitive effects in one market (*i.e.*, merchants) or whether both markets must somehow be considered at the same time. If American Express wins, in practice it may become extremely difficult for antitrust to deal with anti-competitive abuses in platform markets. The Obama administration originally supported the plaintiffs. After an appellate court over-ruled the trial court's decision in favor of the merchants, the Trump Administration surprised many of us by urging the Supreme Court not to take up the case. But the Supreme Court nevertheless agreed to hear the case, and the DOJ then reversed its reversal and argued in support of the merchants.[8]

One of President Trump's achievements in his first year was the successful nomination of Neil Gorsuch to the Supreme Court. Although Justice Gorsuch is perceived to be extremely conservative, he has experience with antitrust in private law practice, has taught antitrust in a law school, and he served as a plaintiff's lawyer in an antitrust class action that resulted in an unusually large verdict. What effect will he have on antitrust cases? Based on the questions he asked from the bench in the American Express case, many observers think he will be strongly defense-oriented. Of course, all Supreme Court observers

[8] See the AAI's amicus brief in Ohio v. American Express, Dec. 18, 2017, http://www.antitrustinstitute.org/content/aai-urges-supreme-court-reject-special-antitrust-rules-interdependent-markets-ohio-v.

agree that you cannot predict how a Justice will vote based on his or her questions, but that doesn't stop the speculation.

Also to note with regard to the Supreme Court, is the pending Vitamin C international cartel case, in which the Chinese government advised the American court that it had compelled its defendant companies to cartelize export trade to the United States. This poses an important question as to how much weight must be given to a foreign government's interpretation of its own laws when a U.S. court is deciding whether to stay its hand based on comity principles.[9]

In the area of monopoly litigation, perhaps the main matter is the FTC's pending case against Qualcomm. Specifically, the FTC alleges that Qualcomm used its dominance in chipsets to coerce cell phone manufactures (OEMs) like Apple and Samsung to pay excessive royalties to license Qualcomm's cellular standard essential patents (SEPs), which in turn raises the costs of rival chipmakers. Qualcomm also allegedly extracted exclusive dealing arrangements from Apple, which further solidified Qualcomm's monopoly.[10]

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[9] See the AAI's amicus brief in Animal Science Products v. Hebei Welcome Pharmaceutical, March 5, 2018, http://www.antitrustinstitute.org/content/aai-warns-supreme-court-against-shielding-foreign-export-cartels-antitrust-scrutiny-animal.

[10] See the AAI's amicus brief, http://www.antitrustinstitute.org/content/aai-supports-ftc-qualcomm-case-ftc-v-qualcomm (May 16, 2017).

A hot issue in recent years has been the intersection of antitrust and intellectual property. This is one area in which Mr. Delrahim has a track record that lies outside of the recent mainstream. He is more favorably disposed than the FTC or the DOJ, or the EU (for that matter), to licensor interests, especially in areas of standard essential patents, patent holdups or ambushes, and remedies that might raise concerns about buyer cartels.[11] How these stated positions may affect government policy remains to be seen.

Why is it that there seems thus far to be so much continuity in antitrust while the Trump revolution has been so much more in evidence in many other fields? Perhaps Mr. Trump has been too busy with other matters to give antitrust his attention. I haven't heard any better explanation.

COMPETITION POLICY: THE LARGER CONCERN

International trade is always an important part of competition policy, and traditionally it has been seen as two-handed. On the one hand, low entry barriers to trade creates more domestic competition as

[11] https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center (Nov. 10, 2017) ("In particular, I worry that we as enforcers have strayed too far in the direction of accommodating the concerns of technology implementers who participate in standard setting bodies, and perhaps risk undermining incentives for IP creators, who are entitled to an appropriate reward for developing break-through technologies".)
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foreign firms can compete on a relatively level playing field against domestic firms. On the other hand, high entry barriers, such as tariffs and quotas, tend to reduce domestic competition. Donald Trump has for many years been critical of trade and multilateral trade agreements and both his rhetoric and his recent actions in regard to increasing tariffs on steel and aluminum suggest that his mercantilist perspective of "America First" and the aggressive use of trade laws to penalize foreign competitors will be used to protect favored domestic industries from competition.

This has upset many of his Republican supporters, among others, who predict that retaliation from foreign countries will lead to trade wars that can only damage the domestic economy, the world economy, and U.S. relations with foreign countries including our closest allies. Even Democrats who have questions about globalization but who are already outraged over Trumpian ideas like building a wall against Mexico and telling the Mexicans that they must pay for it, see this attack on free trade as going too far. It is unclear, however, whether opponents will be able to stop or even moderate this frightening direction.

In the past, one of the functions of the Antitrust Division was to engage in commenting on the likely anti-competitive effects of actions of other federal and state agencies. This often brought the antitrust authorities into behind-the-scenes conflict with other departments and independent agencies, and especially the Commerce Department or the U.S. International Trade Commission when their protectionist decisions

were questionable. We will have to watch to see whether the Antitrust Division continues to use this advocacy function in defense of free trade.

Relatedly, we are now hearing more of CFIUS. This strange-sounding word stands for the Committee on Foreign Investment in the United States, a little known committee of top White House administration officials who meet in secret with the power to kill large global deals on national security grounds--while they are pending or even after the transaction has been completed. It is led by the Treasury Secretary and includes the DOJ and other agencies. According to one banking industry expert, CFIUS "is the No. 1 weapon in the Trump administration's protectionist arsenal, the ultimate regulatory bazooka."[12] In fact, CFIUS this past week killed the Broadcom-Qualcomm deal before it could undergo an independent antitrust analysis. Other countries have their own methods for bringing national security concerns into what would otherwise be antitrust investigations, assuring that, for better or worse, more than traditional microeconomic effects will be taken into account. The lack of transparency in these national security contexts can open the door for unfortunate decisions. One might suggest that it would be better policy to have the antitrust authority carry out a normal investigation and only utilize CFIUS if the authority has concluded there is no antitrust reason to stop it.

[12] Kevin Granville, *How Cfius Rides Herd on Major Global Deals*, New York Times, (March 7, 2018) (Hernan Cristerna, co-head of global mergers and acquisitions at JPMorgan Chase).

A more traditional role for competition policy is to determine the extent to which governmental institutions will intervene in the economy. In American presidential campaigns, the candidates do not typically talk about antitrust policy, which would (quite frankly) put too many listeners to sleep, but candidates do say whether they generally support more governmental intervention or less. Candidate Trump promised less intervention. Thus, policies toward deregulation and even privatization honeycomb the work of government, affecting environmental protection, energy, labor, consumer protection, banking, net neutrality, and many more areas. The Trump administration has appointed leaders in the relevant agencies who earned their reputations fighting against regulation by the same agencies, and they have already been very active in reducing both long-standing and newer regulations. The White House has even said that guidance issued by agencies to help businesses understand enforcement policies, will no longer carry any weight, basically undercutting one of the regulatory tools that give predictability to decision makers in both the public and private sectors.[13] The DOJ issued "Antitrust Guidance for Human Resource

[13] See Cheryl Bolen, *Trump Administration Offers Relief from Administrative Guidance,* Bloomberg Daily Report for Executives, March 2, 2018, https://www.bna.com/trump-administration-offers-n57982089503/. ("Agency guidance or sub-regulatory guidance, which broadly includes memorandums, letters, manuals, and other types of documents, is supposed to clarify or interpret a statute or regulation and is not legally binding. In practice, however, guidance is used in enforcement actions…
Now, instead of being held accountable for all of the sub-regulatory guidance out there, a company may choose to come up with its own reasonable interpretation of what the statute or regulation means, [a legal expert] said.")

For an example in the education field, see Michelle Diament, *Trump Administration Rescinds Special Ed Guidance,* DisabilityScoop (Oct. 17, 2017),

Professionals" in October 2016.[14] It reminded companies that repercussions from agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal. Apparently, even after this guidance, there have been many violations, so now, as I mentioned earlier, the DOJ is preparing some cases. I imagine that a defense might be something like, "Previous poaching cases resulted in civil liability only. We didn't know that poaching would be considered a criminal offense, and the guidance document carries no weight." This doesn't make sense to me, but we will have to see what the implications of the new anti-guidance policy will be.

As a more blatant example of how competitive issues can be affected by deregulatory policies, take the question of whether those who control the Internet can discriminate in their policies of providing access. The Obama administration's Federal Communications Commission adopted a set of Open Internet rules that would require service providers to follow network neutrality principles. The Trump FCC has cancelled that mandate. Basically, problems of network neutrality have been handed over from the realm of administrative law, which can provide rules and protections *ex ante*, to the realm of *ex post* antitrust and consumer protection litigation, which can take years to try

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https://www.disabilityscoop.com/2017/10/20/trump-rescinds-special-ed-guidance/24323/.

[14] See Bloomberg article cited in note 7 *supra*.

to cope with abuses after the fact, often after the victims of discrimination have been buried.

THE RISE OF ANTITRUST POPULISM

Many questions need to be answered with respect to the high tech giants-- Amazon, Google, Facebook, Netflix, Apple, and Microsoft—to name the obvious American conglomerates, all of which depend on the development of platforms that are intended to become essential for certain areas of commerce. What should be our policies toward platforms? How can we protect data and privacy? Are these companies really more like public utilities and natural monopolies, requiring regulation rather than antitrust? Do we have the capability to regulate them? And what about the fact that antitrust in the U.S. has no method for dealing with conglomeration, the growth of super-large companies through acquisitions that are neither illegally horizontal nor illegally vertical? It is difficult to believe that these complex questions can be answered without an active governmental role. [15]

As a result of the financial crisis of 2008-09, competition policy has wakened to the fact that some firms are "too big to fail" and their leaders are "too big to jail." A reformist anti-monopoly movement has risen up in the United States and has gained definite voice in the face of the Trump administration's reversal of so many policies that could be described as progressive. For one example of the anti-progressive

[15] See editorial leader, *Taming the Titans*, The Economist 11 (Jan. 20, 2018).

direction I am talking about, consider that the administration is moving rapidly to substantially cut back the 2,300 page Dodd-Frank Act, which was the principal legislative effort to keep the next financial crisis from getting out of control.

There is today much political concern over economic inequality, data privacy, and corporate economic power and political influence, reflecting dissatisfaction with the results of an economy in which the government has, I would argue, played too small a role. Two of our leading antitrust economists, Steve Salop and Carl Shapiro, have written about the triumph of the 1%, pointing to the increased concentration of wealth that has expanded the chasm between an economic elite and the rest of American society.[16] The University of Chicago, the home of the Chicago School, held a conference in March, 2017, on the threat that monopolies may pose to the world's biggest economy, a turn from the Chicago School's position that big firms are not a threat to growth and prosperity.[17] These are among the signs that the national mood may be changing.

So, today there is a lot of talk, articles are being written, conferences are being held, and political candidates for Congress are beginning to pay attention to the ever-louder call for reform. As yet, there is no consensus on what is needed or what can be practically

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[16] Steven C. Salop and Carl Shapiro, *Whither Antitrust Enforcement in the Trump Administration?* The Antitrust Source, www.antitrustsource.com (Feb. 2017).

[17] See Schumpeter, *The University of Chicago Worries about a Lack of Competition,* The Economist, April 12, 2017.

espoused. Some believe the antitrust laws are flexible enough so that wise agency leaders committed to more aggressive and creative enforcement of existing laws can suffice. But this will depend on wise judges who will be inclined to support such enforcement, and the Trump administration is well-along in its program of appointing young, conservative judges who are not likely to be antitrust progressives at any time in the foreseeable future. Others therefore seek legislative reform, which simply cannot happen with the current makeup of Congress, but might well have a chance if the 2018 and 2020 elections reflect a popular rebellion against the Trumpian leadership.

Legislative proposals run the gamut from adding a public interest standard to the antitrust laws to breaking up large companies or subjecting them to new forms of direct regulation. The phrase "public interest" is too vague; it needs to be spelled out in terms of more specific objectives, such as promoting labor peace or protecting existing jobs or expanding the economy or assisting small businesses. These objectives may seem more appropriately pursued in some countries through specialized agencies. On the other hand, objectives such as limiting concentration by changing the standards and burden of proof for merger approval could be helpful, especially if connected with various non-antitrust "nudge" policies providing incentives for large firms voluntarily to grow smaller.

In this regard, the U.S. should consider filling a gap in its law that provides no relief to a smaller company that is abused by a larger

company having a superior bargaining position.[18] This is a subject in which Japan and a number of other of our trading partners have experience from which we in the U.S. could learn. I hope to learn more during this visit and I note that the JFTC has just raided Amazon on the basis of the abuse of superior bargaining position law.[19] Legislation would be needed if the U.S. were to move in this direction, but the concept of abuse of superior bargaining position could be a way of restraining the power of very large buyers like Amazon and Google as they deal with suppliers who are practically constrained to utilize platforms that are technically neither monopolies nor monopsonies, but nevertheless have coercive power that can be used unfairly but which today's antitrust laws cannot reach.

Another direction that could be useful would be to recognize that the Chicago School has led us to focus too centrally on what they call "economic" values, which means that "non-economic" values get excluded from any antitrust analysis. The effectiveness of the Chicago School's campaign to eradicate normative values like "fairness" is seen in the way the US Federal Trade Commission has voluntarily adjusted the statutory prohibition against "unfair methods of competition" to

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[18] See Albert A. Foer, AAI Working Paper #16-02, *Abuse of Superior Bargaining Position: What Can We Learn from Our Trading Partners?* http://www.antitrustinstitute.org/search?keys=working+paper+16-02.

[19] Reuters, Times of Japan (March 15, 2018), https:www.japantimes.co.jp/news/2018/03/15/business/corporate-business/ftc-raids-amazon-japan-suspected-antitrust-violation/#.WqqtW2aZM3h.

mean little more than that "inefficient methods of competition" are illegal.

But the field of economics has grown broader since the Chicago School formulated its paradigm, taking in not only the purity of neo-classical economics, but behavioral economics, institutional economics, complexity economics, strategic management, and so on. With a broadened understanding of what is economic and in the light of technological change, we need to take another look at what should count in an antitrust analysis. Even a subject as valued but seemingly non-economic as "free speech" is becoming more of an economic value in a world economy where information is perhaps the most essential product, one that is increasingly central to commerce and the competitive controversies that arise in commerce.

The field of antitrust and competition policy is very much alive and bubbling with new energy and ideas. That there is a huge political challenge is undeniable. The intellectual task ahead is no less difficult but it is essential not only for growth and prosperity but also for democracy and the quality of life. We must expand our horizons to take what we still call non-economic values into greater account, but at the same time we need to minimize subjectivity, unpredictability, and the temptations of corruption that are ever-present in big-money decision-making where competitors win and lose advantage. The worries I have shared with you about corporate power and an administration whose policies seem to be as unpredictable as the President himself all

emphasize what is at stake if we get policy wrong by erring too far in either direction.

I look forward to the discussion today. Thank you for your kind attention.