

Interview with William E. Kovacic, Chairman, Federal Trade Commission

Editor's Note: In this interview with The Antitrust Source, FTC Chairman William E. Kovacic discusses in great depth and with impressive candor the FTC as an institution and the on-going FTC self-assessment project, laying out his priorities for the FTC and the challenges he sees the FTC facing in the future. Among other topics, in this interview, Chairman Kovacic discusses his views on what the FTC has learned from recent merger challenges, the level of cooperation with the DOJ's Antitrust Division and with state attorneys general, and the FTC's dual role as a competition authority and a consumer protection agency. He also discusses the progress that has been made over the past several years on international convergence and the opportunities that he sees for additional on-going efforts on this front in the future. The interview was conducted on June 30, 2008, by Editorial Chair Patrick Thompson for The Antitrust Source.

This is Bill Kovacic's third time serving the FTC. From 1979 to 1983 he worked with the Bureau of Competition's Planning Office and later as an Attorney Advisor to Commissioner George W. Douglas. He served as the FTC's General Counsel from 2001 to 2004. In January 2006, he was appointed as an FTC Commissioner and in March 2008, he was designated to serve as Chairman. Prior to his appointment as an FTC Commissioner, Kovacic was the E.K. Gubin Professor of Government Contracts Law at George Washington University Law School, from which he has a leave of absence.

Kovacic has written countless articles related to antitrust and consumer protection. He is the co-author, with Stephen Calkins, of the 5th Edition of Ernest Gellhorn's *Antitrust Law and Economics in a Nutshell* (2004), and is a co-author, with Andrew Gavil and Jonathan Baker, of *Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy* (2d ed. 2008). In addition to being a noted scholar, Kovacic has advised numerous foreign governments on issues related to antitrust and consumer protection. Since 1992, he has served as an advisor to Armenia, Benin, Egypt, El Salvador, Georgia, Guyana, Indonesia, Kazakhstan, Mongolia, Morocco, Nepal, Panama, Russia, Ukraine, Vietnam, and Zimbabwe. Among his many achievements and antitrust-related activities, he was the public face of much of the televised commentary during the height of the Microsoft case.

—ELIZABETH M. BAILEY



William E. Kovacic

THE ANTITRUST SOURCE: On behalf of the entire Editorial Board we want to thank you for participating in this interview. We last spoke to you in January 2004 when you were the FTC's General Counsel. In March 2008, you were designated the Chairman of the FTC. My first question is: As Chairman, what priorities do you have for the Federal Trade Commission?

BILL KOVACIC: In general terms, three stand out. The first is to continue and enhance the many good competition and consumer protection programs that the Commission is pursuing and, in many instances, has built progressively over the past three decades. The FTC's work has yielded great returns for consumers. By the time my period of stewardship comes to a close, I hope to hand over to my successor an agency that is in still better shape.

The second goal is to engage the agency in a basic self-assessment. The project we are calling *The FTC at 100: Into Our Second Century* will be what a university department facing an

accreditation renewal would call a self-study.¹ The FTC will ask what sort of agency it wants to be when it reaches its centennial in 2014. We will take a longer term perspective than typical Presidential election transition reports, which often are somewhat shallow in substance and short-sighted in their orientation. When I speak of shallowness and short-sightedness, I speak with authority because I have been involved in such exercises in the past.

The traditional transition reports can be helpful to a point, but the real question for the long term for the FTC is how to achieve the continued enhancement of the institution. We need to ask what kind of agenda, what types of programs the Commission should pursue over the next six years or so. By focusing further ahead, we can decouple the inquiry from any single electoral cycle and assess more deeply how the agency can fulfill the destiny that Congress intended when it founded the FTC in 1914.

The third aim is to improve cooperation and partnerships with institutions outside the Commission both at home and abroad. That's a major path to improved performance for any organization, like the FTC, that shares responsibilities with many other public bodies and whose effectiveness depends heavily on contributions from non-government institutions. There are large possibilities for improved policy making through better cooperation with government and non-government bodies. This is so for at least two reasons. First, the FTC has a budget of about \$240 million in the current fiscal year. It is a long way from being a billion-dollar-a-year agency. The FTC and other public institutions with competition or consumer protection duties are unlikely to receive massive increases in resources. If the FTC and related public authorities are to become more productive, they must do better to pool their efforts. Second, there also are strong capabilities relevant to our duties outside the public enforcement authorities—for example, in university research centers, think tanks, and a variety of other not-for-profit institutions. We need to find ways to draw more extensively on these capabilities to improve our work.

So the three main priorities on my list are to sustain and enhance the many strong programs that the Commission has going already, to engage in a probing self-assessment by means of internal reflection and external consultation about the kind of agency the FTC wants to be when it reaches its centennial, and to improve the institutional framework through which the FTC operates by improving cooperation with government and non-government bodies at home and abroad.

ANTITRUST SOURCE: Let's start with the first priority that you noted. Thinking about how you would like to work toward continuing and enhancing the programs at the Commission, what types of specific programs do you have in mind? Is there any difference between your program priorities and those of your predecessors?

BILL KOVACIC: In many ways my priorities are quite similar to those the FTC has embraced over the years since I first came to the agency in 1979. Most of the things I have in mind have antecedents in the Commission's modern experience. I hope to continue and extend them.

Here are some specific examples. On the competition side, one of the best investments the FTC has made has been in the field of health care. This includes pharmaceutical and non-pharmaceutical issues. No FTC competition initiative has been more important than the health care program. The FTC's modern health care initiatives have deep, long-lived roots. The early foundation for the modern program was set with Commission's case against the American Medical

¹ Information on *The FTC at 100* is available at <http://www.ftc.gov/ftc/workshops/ftc100/index.shtml>.

Association in the 1970s concerning restrictions on advertising and pricing and with the agency's case against Pfizer involving monopolization of tetracycline in the 1960s. The FTC's health care work has been enormously important in building a jurisprudence concerning the application of antitrust law to the professions, and it has delivered vast economic benefits to consumers.

In the pharmaceutical sector, the Commission began to focus in the 1990s on the competitive consequences of the entry of generic pharmaceuticals as alternatives to branded pharmaceuticals. The first generation of FTC cases resulted in a number of settlements in the late 1990s. The second generation of FTC cases, including matters such as *Schering*,² was launched early in this decade. This collection of cases yielded a defeat for the FTC in *Schering* and favorable settlements in cases such as *Bristol-Myers Squibb*.³ The FTC today is engaged in what be called a newer generation of pharmaceutical cases that seeks to develop doctrine that governs the relationship between branded producers and generic producers and attempts to provide good economic results for consumers in an extremely significant sector.

When I became the FTC's General Counsel in 2001, the agency undertook a careful assessment of how the Commission could invest its competition resources to have the greatest positive economic effect. One area chosen for attention was the pharmaceutical sector. This area featured imposing doctrinal risks but also offered the possibility of achieving extraordinary economic results. A noteworthy element of this success story is the FTC's settlement with Bristol-Myers Squibb (BMS) in 2003 to resolve allegations that the firm had engaged in illegal monopolization by improperly manipulating the Food and Drug Administration's "Orange Book" process for the registration of pharmaceutical products. The successful prosecution of that case has yielded cumulative benefits to consumers of at least \$3–\$5 billion, and the number is still growing. No single FTC monopolization case going back to the agency's origins has yielded greater, immediately observable results for consumers. If we assembled a list of the Commission's most effective antitrust interventions of all time, *BMS* would be on any list of the top five, and it may be at the top. The decision in 2001 to expand the FTC's commitment of antitrust resources to the pharmaceutical sector flowed from an assessment of the successful work the agency had done in the past, from a sense of what rate of return the FTC might realize for consumers, and from a well-considered understanding of where the Commission could clarify doctrine by prosecuting cases. The modern elaboration of the program demonstrates good practice in the form of identifying a promising area for intervention and undertaking continuing refinements over time in light of experience and changing industry conditions.

Another area where I expect the FTC to continue to make competition policy investments is the field of standard setting. Like the pharmaceutical antitrust issues I described earlier, this subject has been a matter of longstanding concern for the Commission. The FTC's current program is an extension of measures first set in motion with policy studies undertaken in the 1970s and enforcement initiatives, such as *American Society of Sanitary Engineering*⁴ in the 1980s and *Dell Computer*⁵ in the 1990s. In the stocktaking that took place in mid-2001, this was another area where it was apparent that the FTC could make an economically significant and doctrinally influ-

² *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert denied*, 548 U.S. 919 (2006).

³ *Bristol-Myers Squibb Co.*, No. C-4076, 2003 WL 21008622 (FTC Apr. 14, 2003), available at <http://www.ftc.gov/opa/2003/03/bms.shtm>.

⁴ *Am. Soc'y of Sanitary Eng'g*, 106 F.T.C. 324 (1985).

⁵ *Dell Computer Corp.*, 121 F.T.C. 616 (1996).

ential contribution. The *Unocal* case,⁶ which resolved allegations that the respondent had engaged in illegal monopolization by abusing the State of California's process for establishing standards for gasoline, is one noteworthy extension of these efforts. The *Unocal* experience underscores the gains to be achieved in this field. The settlement in that case in 2005 has resulted in savings to consumers of gasoline in California of about \$500 million per year. Despite the adverse litigation outcome we have realized to date in our *Rambus* case,⁷ I expect the FTC to continue to look for good cases involving standards.

Other areas of particularly acute interest for the FTC on the competition side include energy policy. The agency is engaged in a rulemaking process involving the authority Congress established in December 2007 to address market manipulation of petroleum products.⁸ The Commission also continues to look carefully at mergers in the energy sector.

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I also expect the Commission to continue its efforts to clarify doctrine governing relationships among competitors. In this decade, the FTC has pursued a series of cases that include *PolyGram*⁹ and *North Texas Specialty Physicians*.¹⁰ In both of those cases, the courts of appeals upheld the FTC's finding of liability and endorsed the Commission's efforts to develop a methodology for analyzing matters that fall within the broad framework of the rule of reason. The FTC's efforts to clarify doctrine continue today, and I expect they will receive still greater emphasis. Other key areas of concern for nonmerger enforcement include the scope and application of the state action and *Noerr* defenses.¹¹

In recent years, inspired by setbacks in such cases as *Arch Coal*¹² and *Western Refining*,¹³ the Commission has devoted substantial attention to its approach to analyzing mergers and litigating challenges to individual transactions. The successful result the FTC achieved in the *Inova*¹⁴ hospital merger reflects extensive work we have undertaken to refine our internal analysis and litigation preparation methods. I expect the Commission to continue to develop merger jurisprudence through our administrative process in cases such as *Evanston*¹⁵ and to devote substantial resources to federal court litigation. Thanks to the exceptional work of Bill Blumenthal, our General Counsel, and his appellate litigation team, recent decisions, such as *Chicago Bridge* in the Fifth

⁶ Union Oil Co., No. 9305, 2005 WL 2003365 (FTC Aug. 2, 2005), available at <http://www.ftc.gov/os/adjpro/d9305/index.shtm>; see also Union Oil Co., No. 9305, 2004 WL 1632816 (FTC July 6, 2004) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf>.

⁷ Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008). As of July 31, 2008, the FTC's Petition for Rehearing en banc is pending and available online at <http://www.ftc.gov/os/caselist/0110017/080606rambusrehearingpetition.pdf>. Information on the Commission's administrative proceedings in this matter is available online at <http://www.ftc.gov/os/adjpro/d9302/index.shtm>.

⁸ See generally Petroleum Industry Market Manipulation Rulemaking Information, <http://www.ftc.gov/ftc/oilgas/index.html>.

⁹ PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

¹⁰ N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008) (affirming Commission's analytical approach and conclusions but remanding for minor modification of order). Additional information on this case, including the Commission's final opinion and order is available online at <http://www.ftc.gov/os/adjpro/d9312/index.shtm>.

¹¹ See generally FEDERAL TRADE COMMISSION STAFF REPORT CONCERNING ENFORCEMENT PERSPECTIVES ON THE NOERR-PENNINGTON DOCTRINE (Oct. 2006), available at <http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf>; see also Federal Trade Commission, Report of the State Action Task Force (2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

¹² FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

¹³ FTC v. Foster, No. Civ. 07-352, 2007 WL 1793441 (D.N.M. May 29, 2007).

¹⁴ Complete information on the *Inova* case is available on the Commission's Web site at <http://www.ftc.gov/os/adjpro/d9326/index.shtm>.

¹⁵ Evanston Nw. Healthcare Corp., No. 9315, 2007 WL 2286196 (FTC Aug. 6, 2007). Additional documents relating to the administrative proceedings are available online at <http://www.ftc.gov/os/adjpro/d9315/index.shtm>.

Circuit¹⁶ and *Whole Foods* in the D.C. Circuit¹⁷ have provided useful foundations for future FTC merger enforcement.

On the consumer protection side, a similar philosophy of sustaining and enhancing successful FTC programs shapes my preferences. The top of the list of priorities includes privacy, data protection, and financial services. For example, the FTC's financial services program today, including recent subprime market cases such as *CompuCredit*,¹⁸ covers the full life cycle of financial services transactions—from the advertising and the marketing of financial services products through scrutiny of debt collection and debt relief programs. In all areas of the FTC's consumer protection program, serious fraud—such as identity theft—is an especially high priority, which the agency addresses with enforcement matters, research, and education programs directed to consumers and the business community.

A necessary foundation for all competition and consumer protection activities will be an expanded commitment of resources to improve the FTC's base of knowledge. The depth and quality of knowledge we develop through our own research and through external consultations in the form of conferences, hearings, and workshops go a long way to determining the agency's ability to devise effective consumer protection and competition programs, especially to address ever more complex commercial phenomena. Our knowledge is a vital capital asset, and we must treat the enhancement of this asset as an absolute imperative. To a growing extent, the FTC's future success will depend on the level of our capital investments in research and analysis. I expect the level of our investments in policy research and development will expand in the months and years ahead.

ANTITRUST SOURCE: You've identified a lot of very exciting areas and we're going to explore many of them as we talk today. Let's start with merger policy and refining techniques in light of recent litigated outcomes. What kinds of changes have you seen in general, and what is your perspective on the transaction that was proposed between Inova Health System and Prince William Health System?

BILL KOVACIC: The Inova/Prince William Health System transaction is a good example of how the agency has learned and applied very useful lessons through a process of critical self assessment concerning experience with such cases as *Arch Coal* and *Western Refining*. For example, in the Inova transaction, the FTC did a better job of working with our experts and in identifying the questions that most required their attention. The agency was more effective in how it examined evidence collected through the Hart-Scott-Rodino premerger review process and through other information-gathering tools. The members of the Commission took a more aggressive role in evaluating and testing arguments early in the merger review process. The Commission was involved earlier than past practice in assessing the quality of the staff's evidence. More than it had in the past, the agency used an internal "devil's advocate" team to develop and present arguments that the merging parties were likely to raise, to make sure that no argument would be presented during litigation that would come as a surprise. We spared no effort to ensure that we had identified the best arguments and evidence the parties might offer.

¹⁶ Chicago Bridge & Iron Co. N.V. v. FTC, No. 05-60192, 2008 WL 2600965 (5th Cir. July 2, 2008).

¹⁷ FTC v. Whole Foods Market, Inc., No. 07-5276, 2008 WL 2890688 (D.C. Cir. July 29, 2008).

¹⁸ Press Release, FTC Sues Subprime Credit Card Marketing Company and Debt Collector for Deceptive Credit Card Marketing (June 10, 2008), available at <http://www.ftc.gov/opa/2008/06/compucredit.shtm>.

All of these preparation techniques improved our development and presentation of the case. Although we don't know, of course, how the district judge would have responded to the agency's arguments, Jeff Schmidt and his litigation team in the Bureau of Competition were particularly well-prepared to present the Agency's case for the preliminary injunction. That preparation was informed substantially by the result of very careful learning from our recent litigation experiences.

As a matter of process in the Inova matter, the FTC also undertook some innovations to assure the district court about how swiftly the Commission would conduct its administrative process if the court issued a preliminary injunction and referred the matter back to the FTC for administrative proceedings. The FTC wanted to make clear that the agency would conduct its administrative proceedings in a highly expeditious manner.

In taking the steps I have just outlined, the FTC had some uniquely capable resources at its disposal, particular in the person of Commissioner Tom Rosch. Commissioner Rosch is a highly experienced and accomplished trial lawyer and appellate advocate. The Commission provided assurances to the court that the agency would move the administrative process in the expeditious manner that Congress seems to have anticipated when it established the 13(b) preliminary injunction mechanism.¹⁹ What specific effect that commitment had on the resolution of the matter is very difficult to say. The Commission thought carefully about objections that have been raised about the 13(b) process and about the agency's administrative process, and we were prepared to address them. I anticipate that in future matters the agency will strive to find ways to improve its administrative process to achieve the interaction that Congress intended between the preliminary injunction process in federal court and the Commission's administrative process.

ANTITRUST SOURCE: You noted that Commissioner Rosch was identified as the Administrative Law Judge in the Inova matter. What was the rationale for appointing him the ALJ in that case and what are the FTC's rules or standards that allow for Commissioner Rosch to serve in the capacity of both a Commissioner and an ALJ?

BILL KOVACIC: The technical possibilities for taking this approach have existed for many decades. The foundation is the Administrative Procedure Act (APA). The APA allows an independent regulatory commission to designate one of its members to serve as the trier of fact. The FTC's administrative regulations reflect the framework contemplated in the APA. The central objective of taking such a step was to ensure that the Commission would expedite its administrative process. To ensure fairness in that process, Commissioner Rosch did not participate in the decision to prosecute. He would not have participated in the appeal of any decision he issued as the administrative law judge to the Commission. With Commissioner Rosch, the FTC had an especially capable, experienced individual to conduct the first stage of the administrative proceeding. The convergence of those factors led us to try this out.

ANTITRUST SOURCE: Let's talk about the FTC self-assessment and the FTC as an institution. In your view, what are some of the current challenges that the FTC faces?

BILL KOVACIC: The question of how to assess the quality of performance of the FTC or any other public institution often receives closer attention during the run-up to a presidential election. The issue arises in our interactions with the legislature and in broader discussions about the Commission's

¹⁹ 15 U.S.C. § 53(b).

work. What often gets lost in these debates is the basic question of how to define what constitutes good performance. When someone asks whether the FTC is a good agency, an adequate agency, a great agency, or an inadequate agency, it is impossible to answer intelligently without first establishing the criteria by which we are to assess the quality of performance. Is the measure of what the FTC does simply the number of cases it brings? Is it the litigation outcome of those cases? Is it the actual demonstrated economic impact of those cases? Is it the skill with which the FTC applies its non-litigation policy instruments—for example, the nature and quality of reports, or the agency's use of public consultation mechanisms such as workshops, seminars, conferences?

How important a measure of the FTC's performance is the skill with which the agency cooperates with other public bodies at home and abroad to reduce the cost of executing the Agency's competition and consumer protection responsibilities? How much should an evaluator weigh the quality of the investment the FTC has made in the international competition and consumer protection policy infrastructure—in institutions such as the International Competition Network (ICN), or in the competition and consumer committees of the Organization for Economic Cooperation and Development (OECD)?

Is another measure the quality of the FTC's investments in building knowledge—capital investments that make the agency wiser? Is it the quality of our human capital and the steps the agency has taken to make this a good place for its employees to work?

So often discussions about whether the FTC is doing a good job fail to come to grips with the basic question of how to write the report card by which we should grade an agency and assess its performance. I want to inspire an internal and external debate about this basic question. In reading the many general and specific assessments about the FTC, I am intrigued by how infrequently commentators address the necessary, initial question of how to identify good performance. So often I find that this fundamental question is ignored. Maureen Ohlhausen, who directs our Office of Policy and Planning, is leading our efforts in the *FTC at 100* project to address it.

A second basic challenge is to find effective techniques for measuring good performance once we have decided what the appropriate criteria are. Suppose we examine decisions to initiate cases or decisions not to prosecute. How best are we to measure the actual impact of those policy choices? Answering that question can force one to face some very difficult methodological challenges, but getting convincing answers to those questions and tackling the hard methodologies issues are indispensable to resolving so many of the policy debates that today take place in a empirical vacuum.

A third major challenge is to figure out how to recruit and retain the human resources that we need to do a good job and to obtain adequate physical resources in the form of facilities and equipment. As a nation, we have made the deplorable decision to pay our skilled administrative staff, economists, and attorneys astonishingly less than competing rates in the private sector. We are going to have to find creative ways to keep good people here and bring talented individuals in. One way we do that is to give our employees work that they find uniquely stimulating and highly fulfilling at the deepest emotional and professional level. We can do things to make the workplace environment more attractive by offering flexible work schedules and good telecommuting options. We have an excellent daycare center in our headquarters building at 600 Pennsylvania Avenue. Beyond these measures, we need to explore more deeply how to amass the requisite human capital in the years ahead. Our Executive Director, Chuck Schneider, is taking the lead on these issues in the *FTC at 100* project. We face increasingly difficult policy challenges that place ever greater demands on our institution. We will succeed only if we recruit and retain a professional and administrative staff that is equal to the challenge.

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Another major challenge is to determine how best to go about deciding what we're going to do. What are best techniques for planning the allocation of our resources? To some extent we have very specific statutory mandates that dictate how we're going to use resources. Notwithstanding these statutory commands, we still have substantial discretion to set policy and determine the agency's effectiveness by our distribution of resources. There is no greater responsibility for top FTC management than deciding what the agency's strategy is to be and to have in place a good mechanism for allocating resources wisely to carry out that strategy.

A major reason to conduct a thorough self-assessment is to study how the FTC has generated good programs in the past. The Federal Trade Commission today is far superior to the institution I first encountered when I came to the agency as a junior case handler in 1979. The FTC's ascent to the front ranks of government agencies did not take place by accident. I would like for us to learn from our past success in formulating good programs and to replicate that success.

Another inspiration for launching this initiative comes from my experience in watching our counterpart government agencies abroad. Many of our public agency counterparts on the competition and consumer protection side have engaged in enormously productive exercises to ask what they are all about and to pose the hardest questions about how they can get better. In the course of watching many of those experiments close at hand, I have wanted to find an opportunity to commit the FTC to this kind of process in the hope of realizing the good policy results that rigorous self-assessment has yielded overseas. I would like to see the FTC be no less aggressive in seeking the same benefits from an ongoing process of institutional improvement.

The quality of institutional design, institutional infrastructure, and institutional process has a great deal to do with determining the quality of substantive outcomes. The same energy that's dedicated to asking what's the right doctrine or what's the right conceptual framework has to be applied to questions concerning optimal institutional design and operational arrangements. These institutional considerations are fundamental to achieving good policy outcomes. The urgency for a public agency with the FTC's responsibilities to conduct a rigorous self-assessment as a means toward continuous improvement has never been greater.

ANTITRUST SOURCE: The first two factors that you identified in discussing this self-assessment concern how many cases the FTC brings and the outcomes of those cases. The FTC recently appointed Robby Robertson as its Chief Trial Counsel in the Bureau of Competition. Is this appointment a signal that the FTC plans to increase its litigation activity?

BILL KOVACIC: I'm not sure that the rate at which we initiate new cases will increase dramatically. When you look at the profile of the agency's case generation and, more specifically, its use of administrative litigation, you have to go back to the 1980s to find a comparable number of new matters. If you focus on non-merger litigation in the district courts, the FTC's pattern of competition and consumer protection litigation in this decade is particularly robust if measured by any historical norm going back to the enactment of Section 13(b) in the 1970s.

Robby Robertson inherits an office that Michael Bloom ably established several years ago and managed very well. Robby brings extraordinary skills and experience to this endeavor. He will help us address two important needs. The first is for the agency to become more proficient in how we select and frame cases for litigation. Robby will help us improve our case selection and preparation. Second, Robby will be instrumental in improving the skill with which we litigate the cases we do bring. These improvements in the preparation and prosecution of cases promise to make the FTC more efficient and to open up possibilities for doing more. If we can become more efficient

in preparing and presenting cases, we will have more resources to apply to new matters. So I expect that Robby will help make us better at what we're already doing and to give us the capacity to do more things, as well.

ANTITRUST SOURCE: Focusing on the issue of the infrastructure of the Federal Trade Commission, there are a number of Bureaus within the organization including the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics. Do you think the mandates of any of these Bureaus will or should change in light of the FTC self-assessment?

BILL KOVACIC: I can imagine a continuing process of adjustment with respect to the organization and roles of our main internal units: Competition, Consumer Protection, Economics, Executive Director, General Counsel, International Affairs, Policy Planning, Regional Offices, Public Affairs, Congressional Relations, and Secretary. One of Debbie Majoras's most important steps as Chairman was to pursue significant enhancements of our organizational infrastructure.

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On the consumer protection side, Debbie took a single office that previously had dealt with a variety of financial services and information issues and created two more specialized bodies. Under Debbie's leadership and the guidance of Lydia Parnes, who heads the Bureau of Consumer Protection, the FTC formed a Division of Privacy and Identity Protection under Joel Winston's guidance and established a Division of Financial Practices under the supervision of Peggy Twohig. This restructuring has permitted the agency to do a better job of addressing concerns in both areas. Another institutional reconfiguration that has been quite valuable for us was to take international functions that previously had been distributed throughout the agency and to create a single Office of International Affairs, which is now headed by Randy Tritell. This measure has provided greater coherence for our international activities. These and related steps stem from a continuing imperative on our part to improve our organizational framework as one way to strengthen our capacity to devise and deliver substantive programs.

A further example in the Bureau of Economics involves the recognition that one of the FTC's greatest strengths is the ability of our economists to spot important topics and to develop a research agenda to analyze them. With the support of Debbie Majoras, Michael Baye, the Director of our Bureau of Economics, placed Pauline Ippolito and Dan Hoskin in charge of a new research unit to ensure that we would have an office dedicated to overseeing the Bureau's research and development activities. This was another step to see that the FTC's organization matches the agency's policy priorities and program demands. If the FTC is to fully embrace superior practices that have been proven in other jurisdictions and in the Commission's own experience, the agency will need to undertake a continuing reassessment of how to shape its structure to best address operational needs. This reassessment never ends. The pursuit of institutional innovation is a major focus of *The FTC at 100* self-assessment.

ANTITRUST SOURCE: As General Counsel, you spoke about the importance of international convergence as a policy matter. What is the level of cooperation that you currently see and what are some of the opportunities for international convergence that you see in the coming years?

BILL KOVACIC: The need to devote growing resources to processes that facilitate international convergence and cooperation grows all the time. The FTC's efforts in this respect are likely to expand on several fronts. One is the dedication of more resources to the larger multinational networks, such as the OECD (Organization for Economic Cooperation and Development) and the ICN

(International Competition Network). The ICN came into being in the Fall of 2001 and has attracted a massive commitment of efforts from the FTC and the Antitrust Division of the Department of Justice. As it approaches its seventh anniversary, the ICN has been highly successful in providing a focal point for identifying superior practices and in promoting a process of voluntary opting-in to superior practices by individual competition authorities.

The good results achieved in the ICN have been possible only because the U.S. competition agencies and many of their foreign counterparts have committed substantial high quality resources to the endeavor. The FTC has assigned some of its very best people to this process. It is important to realize that the rough classification scheme by which organizations are evaluated ordinarily would depict the ICN and related international cooperation activities as “overhead” rather than “operations.” The FTC professionals who have had much to do with the success of the ICN usually are not directly working on the index of activity that most observers treat as the measure of agency effectiveness: prosecuting cases. Through the work of attorneys, such as Russ Damtoft, Liz Kraus, Cynthia Lewis Lagdameo, Maria Tineo, and Randy Tritell, the FTC has contributed the type of indispensable human talent that makes a cooperative multinational venture such as the ICN effective. The ICN and other multinational competition cooperation and convergence efforts will fall flat unless the FTC and other competition agencies commit especially good people to them.

A major frontier for the future is to continue this commitment and expand where necessary our dedication of resources to these initiatives. The same can be said about bilateral relationships with institutions, such as the European Union’s Directorate for Competition. With the EU and our other major partners abroad, I hope that we will take the type of intensive case-related cooperation we now carry out on merger matters and extend it to non-merger matters. That would be a valuable supplement to what we do now, but it would involve an expanded commitment of resources.

A third extremely important area is technical assistance. In recent years the Congress has put our technical assistance program on a much better footing by providing a specific appropriation for this kind of effort. As a result, the FTC is now carrying out programs in Peru and South Africa in which Commission employees serve as full-time resident advisors. We now have resources to do an expanded program of technical assistance in the form of short-term and long-term missions. These projects succeed only if the FTC sends its very best people. You cannot send rookies or people whom the agency regards in some sense as being dispensable. If you do not send your best professionals, the technical assistance projects are a waste of time and can engender enmity on the part of the recipient nation.

Another measure that promises to enhance international cooperation is the SAFE WEB legislation that Congress adopted in December 2006.²⁰ Among other provisions, this enactment greatly expands the possibilities for the FTC to have foreign governments send their officials to work inside our agency and to have our employees work on assignment inside foreign agencies. Under the supervision of Jim Hamill in the International Affairs group, the FTC has developed an initiative called the International Fellows Program. By virtue of this program, the FTC now has a number of superb professionals from foreign agencies working at our offices in Washington. They work on cases, policy projects, and activities relating to the FTC’s participation in international networks. At the same time, we have begun seconding the FTC’s professionals to work overseas in other agencies. I look forward to the time when, at any one moment, we have 15 to 20 professionals from foreign governments working with the FTC in our offices in the United States, and we have 15 to

²⁰ Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers Beyond Borders Act of 2006, Pub. L. No. 109-455, 120 Stat. 3372.

20 of our professionals working with our competition and consumer protection counterparts overseas. The best way to build this program is to grow incrementally—to do prototypes to show that the project works. This endeavor has enormous capacity to increase the transfer of know-how between competition agencies, to improve cooperation on specific matters, and to provide the human glue that is really indispensable to forming good relationships with other agencies over time.

I would emphasize that, for the most part, the commitment of FTC resources to international cooperation and convergence activities contributes only indirectly to the better development and pursuit of cases. These commitments are best seen as capital infrastructure investments. A system for evaluating the performance of the FTC or any other competition authority that focuses simply on how many cases the agency has brought isn't going to pick up or credit these types of investments. Our competition policy system requires acceptance of a norm that says these capital investments deserve serious attention, and that the willingness of an agency to make them is one of the key indications that it's doing a good job.

ANTITRUST SOURCE: Are there specific achievements or notable accomplishments related to international convergence that have resulted from your pursuit of these efforts over the past several years?

BILL KOVACIC: We see excellent results in a number of areas for both competition and consumer protection. These include the formation of the ICN and the improvement of programs at existing bodies, such as the OECD and the International Consumer Protection Enforcement Network, for multilateral international collaboration. Other prominent illustrations include the enhancement of region-wide initiatives, such as the work that we do with our NAFTA counterparts in Canada and Mexico, the improvement of bilateral relationships, and expanded technical assistance programs. In all of these measures, the FTC and its international counterparts have taken long steps towards reaching a better understanding of how our individual systems operate. Without that kind of understanding, I don't think we will get very far in achieving the adoption of common analytical frameworks or procedures. At a very minimum, these initiatives have greatly increased interoperability across systems. The systems talk to each other much more effectively now because they now understand better how other competition and consumer protection systems operate.

A further useful consequence is a great deal of success in achieving international agreement with respect to specific types of procedures or processes. From the very creation of the ICN, Randy Tritell played the central role in orchestrating the formulation of the network's recommendations concerning merger review. The ICN's progress in promoting the acceptance of better practices for merger notification is directly attributable to the investment that the FTC and other competition authorities have made in building a consensus around superior standards. For the best example outside the merger context, one sees much greater cooperation and consistency of processes and techniques in the enforcement of prohibitions against cartels. In this regard the Department of Justice has played the leading role.

The most noteworthy area of substantive divergence at the moment is the treatment of single firm behavior. Even there the international networks are laying a necessary foundation for getting beyond the slogans and clichés that too often substitute for a deeper understanding of why individual jurisdictions have done things the way they have. The ICN unilateral conduct working group and the OECD's competition committee have devoted greater attention to the discussion of substantive standards and analytical methods related to dominant firm conduct. It's a long, long

way to Tipperary to get general agreement on what some of those techniques and standards ought to be, yet progress toward achieving broader agreement cannot begin unless there are frameworks in which difficult substantive issues are going to be discussed. Those frameworks are now coming into being, and that is a promising development for the long term.

Another area in which I see demonstrable progress involves operational issues—questions such as how do you design your agency; how do you evaluate the effects of past intervention; how do you choose the programs you're going to pursue; by what means do you select a strategy; how do you communicate information within your agency to outside constituencies; and how do you engage in good competition advocacy? These issues weren't even on the table for most competition authorities in the context of bilateral or multilateral discussions a decade ago. They're on the agenda now in a powerful way. For example, the key question of how to evaluate programs and individual interventions now routinely appears in discussions of what competition agencies ought to do. We're seeing not just a discussion of broad analytical concepts, but also key operational issues that are crucial to applying the concepts in practice.

If you look at the mix of what competition agencies did in the major multinational gatherings in the past, there was an enormous emphasis on what might be called the physics of competition and consumer protection policy. There was far too little discussion of the engineering by which the concepts were going to be implemented in the routine operation of a competition or consumer protection agency. The mix of concerns addressed in international networks now shows a far more appropriate balance between physics and engineering, or between architecture and plumbing—whatever metaphor one wants to use. The public agencies are now spending much more time in this decade talking about key practical issues of how you actually get things done.

ANTITRUST SOURCE: Let's shift back to the domestic sphere and talk about the issue of domestic coordination. What are your views on the level of coordination between the FTC and the Department of Justice's Antitrust Division?

BILL KOVACIC: Not a day goes by when the Antitrust Division and the FTC aren't working together on a significant project. Those things take place routinely, they take place with a great deal of success, and they produce good results for the U.S. and international competition policy systems. There are a number of opportunities to expand and improve that cooperation. To take one example, the clearance process by which the agencies avoid duplication of effort with respect to the specific matters is quite worthy of a rethink. There will have to be a three-way negotiation between the Antitrust Division, the FTC, and the Congress. Nothing will happen without the blessing of the congressional committees that oversee the two federal agencies. That's an area in which an important source of friction in the relationship between the FTC and the Justice Department can be reduced dramatically. The number of smash-ups in the clearance process is relatively small, given the total volume of matters that the agencies clear to each other, but the individual smash-ups are costly to the parties that deal with us, and they diminish effective cooperation between the agencies. So that's a valuable area for improvement.

Another pursuit that appeals to me is to take greater advantage of the experience that resides in each agency, and to pool it with respect to matters of common concern. The agencies' case handlers should work together to address a number of frequently encountered questions: What are you finding to be effective methods of investigating a specific merger? What are good techniques for doing interviews? What information sources tend to be the most illuminating? How should conceptual issues associated, for example, with defining markets and measuring market

power be treated? At the moment, if you take the example of merger enforcement, you have two institutions that look at hundreds of transactions during an individual budget cycle. They accumulate a lot of experience about how to analyze a merger in terms of substance and to investigate a merger in terms of technique. The two agencies spend far too little time pooling that experience and discussing how our individual experiences in looking at specific matters can be linked together to improve the results. There are tremendous opportunities for improved performance between the agencies by teaming to conduct that kind of regular assessment.

ANTITRUST SOURCE: What kind of coordination, or changes in the level of coordination, do you see with state attorneys general?

BILL KOVACIC: For the last couple of years, the FTC and the states have been experimenting with deeper forms of collaboration. One can see some of the results of these efforts in our recent successful effort to block the Inova/Prince William County Hospital System transaction, with the Attorney General of Virginia joining the case side by side with the FTC.²¹ I regarded the support of the Virginia AG to be enormously valuable, and the insights of the Virginia antitrust team greatly strengthened the case against the merger. I can tell similar stories of effective cooperation between the FTC and the states involving pharmaceutical products.

On the whole, I would say the case-by-case cooperation between the FTC and the state governments has never been better. The examples of recent cases I just mentioned are powerful illustrations of how important that cooperation is. For years I have thought there are important frontiers for greater federal-state collaboration. The United States should have the equivalent of the European Competition Networks by which the European Commission works with the Member State competition authorities. We should have a domestic competition network that facilitates deeper integration of effort across a variety of the areas—litigation, case formation, research, and advocacy.

As a rough precursor for this type of measure, for the past two years the FTC and the states have conducted a day-long workshop in the fall. The first workshop focused on petroleum products and the second dealt with pharmaceutical sector issues. The FTC and the states are preparing another workshop for the coming fall to examine issues associated with mergers in the retail sector. In these projects, there is an enormous possibility for improved performance by having the FTC and the states building a more elaborate network that looks at common analytical concerns and addresses practical needs, such as training and investigative techniques. Over time, it is a network in which a variety of other public authorities at the federal and at the state level might participate.

Why do I think this is so important? This is a key frontier on which individual agencies can improve productivity. This type of cooperation offers a useful path to pool resources, to get smarter, to devise a common research agenda, and ultimately to pursue cases and advocacy more effectively. This is an area in which the public agencies collectively can improve their performance. Our experience in the area of consumer protection shows the way. Earlier this year the FTC, many state attorneys general, the Department of Justice, several U.S. Attorney's offices, the U.S. Postal

²¹ Press Release, Virginia Office of the Attorney General Joins FTC in Motion for Preliminary Injunction in Proposed Inova Health System and Prince William Health System Merger (May 9, 2008), available at http://www.oag.state.va.us/PRESS_RELEASES/NewsArchive/050908_Inova.html.

Inspection Service, and the Government of Canada jointly announced the results of a collaborative enforcement effort to attack fraudulent telemarketing. Called Operation Tele-PHONEY, the multi-agency enforcement sweep generated 120 enforcement actions.²² The sweep was the fruit of elaborate cooperation among law enforcement authorities in the United States and Canada. This was the first time the U.S. consumer protection enforcement authorities had cooperated so extensively with Canada to carry out a sweep and prosecute individual cases. That couldn't have happened ten years ago. It took place this year because of elaborate, long-standing efforts between FTC consumer protection officials, Canadian consumer protection officials, the Department of Justice, the U.S. Attorney's offices, and state governments to pool resources to achieve better results.

There is an unmistakable lesson from the FTC's recent experiences. For competition policy and consumer protection, deeper integration among the public institutions, rather than having individual agencies act alone or with limited cooperation, is going to be crucial to improving performance.

ANTITRUST SOURCE: On the Consumer Protection front, one of your major priorities as the FTC's General Counsel was to continue to develop the FTC's role as both a competition authority and a consumer protection agency. As Chairman, how have you modified, if at all, your perspective on advancing those dual roles?

BILL KOVACIC: I am even more convinced than I was four years ago that the FTC can improve its performance significantly by building stronger links between the competition and consumer protection dimensions of its statutory mandates. Several examples come to mind. A better understanding of the demand side—a better understanding of how consumers behave—of the typical competition problem is going to be valuable to us. Efforts to focus more closely on how consumers respond to information and how they absorb information will be increasingly valuable to the FTC in analyzing the correct competition policy response.

At the same time there are ways in which a fuller joining up of competition and consumer perspectives can improve the FTC's treatment of variety of issues that traditionally have arisen on the consumer protection side of the agency. The FTC is becoming more skilled at asking questions about whether the market failures we observe stem from information failures associated with the disclosure or non-disclosure of information to consumers, or result from too little competition among individual providers that supply certain product offerings or information to consumers.

Another respect in which the FTC is seeing how the greater unification of the two areas can provide good results is in the understanding of the role of intermediaries which assist consumers in navigating difficult transactions. That is where information is very dense and complex, where intermediaries can act to educate and guide consumers in their choices. The FTC can play a valuable role in protecting competition among those intermediaries and removing artificial barriers to their participation in the market. An early prototype of this kind of approach appears in the FTC's lawsuit in the 1970s and 1980s against the Indiana Federation of Dentists.²³ The boycott in *IFD* was

²² Press Release, FTC Announces "Operation Tele-PHONEY," Agency's Largest Telemarketing Sweep (May 20, 2008), available at <http://www.ftc.gov/opa/2008/05/telephoney.shtm>.

²³ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986).

designed to deny consumers the benefit of efforts by insurers to explore whether or not certain dental services were being provided at an optimal price.

More than ever, having a conscious process by which individual observed problems are evaluated both from the supply side—which is traditionally the competition portfolio—and the demand side—which has been the province of consumer protection—becomes important to what the FTC does. Recognition of this condition compels the agency to take more steps internally to ensure that connections between our competition and consumer protection capabilities are drawn. I detect an international trend toward having government agencies combine both functions. Over thirty jurisdictions around the world do so today. Many, such as the United Kingdom's Office of Fair Trading, are engaged in exciting experiments to explore how best to exploit synergies between these two areas of concern.

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ANTITRUST SOURCE: Are these two roles ever at odds with each other?

BILL KOVACIC: The cultures of the two fields sometimes conflict. For example, with respect to advertising and marketing, traditional consumer protection perspectives might lead an agency to impose increasingly powerful limits on what firms can do out of fear that anything short of representations that are pristine in their accuracy and precision may mislead consumers. From this perspective, consumers can come to be seen as especially fragile and prone to manipulation. The competition policy discipline provides an important challenge to this perspective. It warns that if an agency imposes ever more restrictive standards concerning advertising and various forms of marketing practices, it is possible that the agency will stifle the rivalry and new entry that are important sources of protection for consumers.

So there are instances in which the analytical perspectives and the culture of the different disciplines can sometimes create friction between them. To recognize the limitations of each perspective and to see that those perspectives are joined up in shared analytical processes is a good way to ensure that neither becomes blind to considerations that the FTC ought to take into account.

ANTITRUST SOURCE: There have been various activities, including testimony before Congress and a recent conference hosted by FTC staff economists, related to subprime mortgage borrowers and strategies for effective mortgage information disclosure. What role do you see the FTC playing in the current subprime mortgage crisis?

BILL KOVACIC: One critical dimension is enforcement. Going back over several decades, the FTC has had an enforcement presence with respect to what I earlier referred to as the complete life-cycle of financial services transactions. At the front end of the life cycle are the advertising and marketing of financial services products, including subprime mortgages, and the formation of agreements with respect to the provision of specific financial services. At the other end of the life-cycle, for transactions that go poorly, the FTC examines practices related to debt collection, debt relief, and mortgage rescue plans. Perhaps there is no more important application of the FTC's consumer protection authority today than the enforcement of legal commands relating to this whole life cycle of activity.

Our top priority is to challenge fraud, misrepresentation, and related forms of overreaching by applying the deception and unfairness components of our consumer protection authority. For example, the FTC today has a significant portfolio of enforcement matters that allege misrepre-

sentation in the provision of financial service products, including our recent case with the Federal Deposit Insurance Corporation involving CompuCredit.²⁴

The second critical dimension is the process of building knowledge about developments in the financial services sector. We do this through our own research efforts and by using public consultations in the form of conferences and workshops to learn more and to stimulate public debate and discussion about the phenomena in the subprime market. The conference convened by the FTC's Bureau of Economics earlier this year on disclosures and mortgage lending was an extraordinary useful contribution to our understanding about commerce in the subprime market. A trademark of the modern FTC is its proficiency in convening public discussions that shed more informative light on specific phenomena and draw attention to research performed inside the agency and by scholars from other institutions.

We have a number of ongoing research projects that deal with financial services. One of the most important questions for us is how individual consumers absorb information? How do they understand disclosures embodied in a dense thicket of information? The recent report that Jan Pappalardo and Jim Lacko of our Bureau of Economics issued on mortgage disclosures presents highly important empirical work to test how people interpret and perceive disclosures associated with routine financial transactions.²⁵ Efforts to invest in building knowledge about the subprime market and other features of the financial services sector assume increasing importance, whether in connection with the FTC's contributions to the consideration of legislative proposals, to inform the FTC's rulemaking activity, or to guide the Commission's enforcement work.

ANTITRUST SOURCE: You've talked about the Bureau of Consumer Protection and the initiatives that you see taking place with respect to enforcement. Do you see any specific initiatives concerning policy or enforcement with respect to the Bureau of Competition?

BILL KOVACIC: I anticipate a continuation, and perhaps expansion, of our efforts in several areas. Areas in which we have significant matters currently in litigation involve agreements between producers of branded pharmaceuticals and producers of generic equivalents to delay entry by the generics; litigation involving standard setting, including the prosecution of the appeal in the *Rambus* case; and the development of new cases involving standards.

I also expect to see the continued pursuit of cases involving services in critical economic sectors such as real estate. I see the FTC sustaining and perhaps expanding our litigation presence in all of these areas. Other areas where I expect the FTC will continue to have significant involvement in the months and years ahead involve services such as health care. I foresee a continuation of FTC efforts to clarify doctrine involving merger policy through our administrative process and in the courts.

A further significant area involves exemptions and immunities. Keen areas of concern for me include the role of the state in displacing competition through the state action doctrine, the scope of immunity for efforts to elicit government intervention that suppresses competition, and the boundaries of jurisdictional limits to the FTC's authority.

²⁴ See *supra* note 18.

²⁵ James M. Lacko & Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms* (June 2007), available at <http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf>.

ANTITRUST SOURCE: Looking at today as well as into the future, what are some of the lasting influences of the policies and agendas for which you advocated as General Counsel of the FTC?

BILL KOVACIC: One concern I mentioned four years ago was the use of our administrative process to clarify doctrine. That continues to be a very significant application of the FTC's resources. On the whole, I am pleased with the results the agency has achieved in this decade. In the past seven years, the FTC has been before the courts of appeals in non-merger matters on six occasions. Four generated results that the agency finds satisfying. Those are *PolyGram*,²⁶ *Kentucky Movers*,²⁷ *South Carolina State Board of Dentistry*,²⁸ and *North Texas Specialty Physicians*.²⁹ The FTC lost its case in *Schering*,³⁰ and *Rambus* remains on appeal.³¹ To my mind, administrative litigation continues to present tremendous opportunities for the FTC, applying its own distinctive institutional capabilities, to develop antitrust doctrine.

I also anticipate that the FTC will make a greater investment in improving links across government agencies at home and abroad, and exploring additional partnerships with non-government organizations such as university research centers.

A second aim we spoke about in the interview four years ago is to gain acceptance for a norm that encourages the FTC to make substantial, continuing capital outlays for research and development. I see that happening in everything the FTC does today. Sustaining this norm is a key priority of mine, especially with respect to outlays for empirical studies. This includes more expenditures of resources to evaluate past initiatives, and investments in gathering knowledge by means of seminars, workshops, hearings. All of these activities require a significant commitment of resources by the FTC and acceptance by the larger competition policy community as being necessary elements of good agency practice

As mentioned earlier, the deeper synthesis of our competition and consumer protection work is something I also see as continuing. I also anticipate that the FTC will make a greater investment in improving links across government agencies at home and abroad, and exploring additional partnerships with non-government organizations such as university research centers. Better ties to academic institutions could improve our access to the knowledge we need to do a good job and help strengthen our human capital. How to sustain the quality of our workforce is a critical question in the FTC's self-study.

Will the types of steps I have described here last? My hope is that new management at the FTC, whoever it is, under the new president will see these measures as valuable. Since 1950, the history of the FTC is that new presidents from either party, when they inherit a vacancy on the Commission, tend to appoint their own Chairmen. I hope that a new chairman and new commissioners will see that all of these investments serve to improve the agency and are critical to the institution's future success. I hope that they and the larger competition community will recognize these undertakings as being indispensable to building a strong substantive foundation for the agency in the decades to come.

I see it as my obligation in the months ahead to seek to persuade our larger community and new agency leadership that this is the path to institutional success for the Commission.

²⁶ *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

²⁷ *Ky. Household Goods Carriers Ass'n, Inc. v. FTC*, No. 05-4042, 2006 WL 2422843 (6th Cir. Aug. 22, 2006).

²⁸ *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006), *cert denied*, 127 S. Ct. 1123 (2007).

²⁹ *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

³⁰ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert denied*, 548 U.S. 919 (2006).

³¹ *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

ANTITRUST SOURCE: Over your long career, you've been a student, teacher, adviser, and analyst for many non-U.S. competition authorities, including developing competition authorities. Based on your deep experience with so many institutions, is there anything that you haven't talked about today in terms of how you build an institution, how you bring an institution into the future, or how you continue to keep an institution important to a society that you'd like to mention?

BILL KOVACIC: One of the most important lessons is that so much depends on building a good institution and that the quality of the substantive results that a competition or consumer protection agency delivers hinges so much on the design of the institution and refinement of the operational techniques and methods by which the agency carries out its work. Good institution-building requires an agency to bring the same intensity of effort that it applies to the development of substantive doctrine to the continuous improvement of capacity. Good agency structure and operations count for just as much as skill in deciding what conceptual framework provides the best approach for deciding whether a merger will have anticompetitive coordinated effects.

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There's an overwhelming tendency in our antitrust history to focus on key questions of doctrine and broader conceptual issues at the expense of assessing the skill of the institutions that execute the policy commands. The main lesson I derive from my experiences in transition economies, and the huge amount of time I've spent with our more experienced counterparts in other countries, is that this imbalance must be corrected. I am convinced to the point of moral certainty that a crucial determinant of the quality of the substantive results that an agency generates over time is the level of attention given to institution-building itself. The requisite commitment to institution-building, for agencies old and new alike, takes the form of investments in building knowledge, investments in evaluation, investments in accumulating and retaining good human capital, and investments in improving cooperation and collaboration with other public institutions. Without a conscious effort to build these institutional foundations, good programs and good substantive results will not be routinely attainable. As one academic colleague has put the point, you can't hope to deliver broadband quality policy results over dial-up institutions. It cannot be done.

The dilemma for our public policy-making system is that the criteria by which agencies typically are evaluated and assessed focus almost entirely on rates of enforcement and rulemaking activity: How many cases have you brought, and how many new rules have you issued? In this scheme of assessment, capital investments that increase institutional capacity don't count for much. The traditional case- and rule-centric report card gives incumbent leadership little incentive to make capital investments. The decision to invest in building knowledge, the decision to improve organizational form, and the decision to build better networks with other government authorities at home and abroad are all decisions about making capital investments. The investments in question generally yield returns that are invisible to many observers on the outside, and the returns they generate often are realized after the managers who ordered the investments to be made have left office. The returns will not be appropriated by the incumbents who make the investments; they will flow mainly to future management.

The FTC has prospered in recent decades because individuals with relatively short-term political appointments made long-term investments. This commitment to the agency's long-term success is an act of faith, a belief that laying a foundation for success tomorrow matters as much as victories achieved today. Few good things that the FTC does today are not the products of investments that my predecessors—Debbie Majoras, Tim Muris, Bob Pitofsky, and Janet Steiger—made over the past two decades. The key question that ought to be pressed upon me and others who hold this job is, what are you doing today to enhance your successor's capacity to do

good work five years from now? Our political culture does not provide strong incentives for those matters to be considered.

And if you look at popular discourse today about whether the Federal Trade Commission or Department of Justice is doing a good job, it typically is distilled to a single variable: what's the output of cases?

ANTITRUST SOURCE: Is there anything else that you would like to add for our readers as it relates to the FTC as an institution?

BILL KOVACIC: In our competition and consumer protection work, a further objective that interests me is to explore additional ways to address conditions of economic disadvantage. This is partly a consequence of having spent many years working with competition and consumer protection agencies in transition economies, where the aims of poverty reduction and economic growth are paramount policy concerns.

When I look at much of what the FTC has done well in my most immediate experience at the Commission, a great deal of that effort is involved in what I would call assisting economically disadvantaged populations. In the *South Carolina State Board of Dentistry* case,³² the Commission's intervention made fluoride treatments more widely available to children who attend school in poor school districts in South Carolina. In its advocacy efforts, the FTC has challenged unjustifiable restrictions on entry that ostensibly are established to bar the unauthorized practice of law. The FTC's intervention has made vital professional services more broadly available to those with lesser incomes. The FTC's Hispanic Language Initiative challenges fraudulent schemes that target Spanish speakers, many of whom have lower incomes.³³

I think a useful question for the FTC looking ahead is how these very useful projects might serve as models to develop other initiatives that promote consumer welfare, with special benefits to populations beset by economic hardship. How can the FTC extend and develop projects that have uniquely powerful advantages for the less affluent members of our society?

As a consequence of time spent in transition economies, I ask more generally what sorts of things the FTC can do to address conditions of economic disadvantage? How can our advocacy programs, our competition enforcement, our consumer protection enforcement program, and our public education efforts contribute to the reduction of poverty? When you look at the portfolio of work that this agency has pursued over time, a striking number of matters have advanced this objective. I think something quite useful that we can do is to continue to explore these possibilities. Inside our own house we have a number of matters under consideration that would serve that purpose. If the United States can devote useful efforts to poverty reduction through the delivery of good consumer protection and competition programs overseas in transition economy environments, there are lessons we can learn from that experience to do the same thing at home.

ANTITRUST SOURCE: One of the things that you talked about earlier is trying to decouple the FTC's longer term planning horizon from the electoral cycle. Depending on what happens in November, do you anticipate any significant changes?

³² *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006), *cert denied*, 127 S. Ct. 1123 (2007).

³³ Press Release, FTC Continues Campaign to Stop Scams Aimed at Hispanics (Jan. 24, 2006), available at <http://www.ftc.gov/opa/2006/01/ohiorelease.shtm>.

BILL KOVACIC: A new chairman and new agency leaders in the FTC's operating units and support groups inevitably bring new ideas, either to refine existing programs or to begin new projects. This tends to provide a useful infusion of new perspectives into the FTC. That's a healthy part of our system. For this reason alone, with any change of leadership, there will be some change in the mix of what the FTC does.

Beyond these types of changes, I expect a new president and the FTC leaders he will appoint to look at the portfolio of what the Agency has done in this and earlier decades, study this experience carefully, see the incremental development and adaptation of its work, and will say, "That's an extraordinarily good program." I hope the president and his appointees will see that the FTC is second to none globally as a competition authority and as a consumer protection authority. I hope they will understand how the agency has strived across the tenures of several chairmen to become the kind of agency Congress intended it to be. I hope they'll look at the programs that have given the FTC an exceptionally strong reputation and say, "These are excellent programs. They would have been excellent programs ten years ago, and they will be seen as excellent programs ten years from now. Our job is to sustain, enhance, and extend them in addition to bringing new ideas to the agency."

So I generally expect, because I have looked from every possible direction at what we do, and I have studied the record of achievement that the FTC has amassed through policy innovation and a skillful incremental improvement in its programs over decades, that new leadership will examine the FTC and say, "That's a great institution with many outstanding programs. I want to continue that excellent level of performance. I've got some new ideas, as well. In pursuing them, I realize that I'm building on an extraordinarily good foundation."

I expect the vision I have described here ultimately will come to pass. One development occasionally causes me to question this prediction. In some discourse about the FTC, I detect a felt need to depict what the agency has done, especially in this decade, as being severely deficient. I think that's a horribly misguided, exactly wrongheaded assessment of what the FTC has done. If that theme is repeated often enough with enough conviction, time and time again, it could create the expectation on the part of new leaders that they have to turn FTC upside down in order to make it effective. That would be a tragic development.

ANTITRUST SOURCE: You have provided superb insights on where the Agency is going and what we can anticipate in the future. Thank you very much for talking with us today. We are very appreciative that you've chosen to share your thoughts, yet again, with *The Antitrust Source*.

BILL KOVACIC: I am most grateful to have the chance to do this. Thank you for the opportunity to contribute. ●

Required Reading for the New Antitrust Administration

At the ABA Section of Antitrust Law 2008 Spring Meeting in Washington, Section Chair Kathy Fenton asked participants in the Chair's Showcase Program—Doug Melamed, Mario Monti, Tim Muris, Hew Pate, and Bob Pitofsky—the following question: “If you were asked to give a reading list to the [new administration] transition team members—a book they should read, a scholarly article, a judicial opinion—what would your list look like?” The responses of the panelists are printed below.

The Editorial Board of The Antitrust Source decided to pose that same question to other leading lawyers, judges, professors, and economists. Responses to this broader inquiry produced a remarkable and diverse summer reading list. The recommendations should be thought-provoking and of great value to members of the transition team as well as to others who simply have an interest in antitrust law and are looking for a good read.

A list of all the recommendations is included at the end of the responses.

—BARBARA BRUCKMANN

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*Wilmer Cutler Pickering Hale and Dorr LLP; Former Acting Assistant Attorney General,
U.S. Department of Justice Antitrust Division*

To learn about antitrust, I would recommend the Louis Kaplow and Carl Shapiro working paper, *Antitrust*, available at http://www.law.harvard.edu/programs/olin_center/papers/575_Kaplow_Shapiro.php. To provide a context for antitrust enforcement, I would recommend Michael Porter's *Competitive Advantage of Nations*. As an exemplary case, I would suggest the D.C. Circuit's en banc decision in *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001), not only because it covers a wide range of issues, but because it is a model, in my view, of a sound way of thinking about antitrust—very fact-based, very analytical, without ideology, and without presumptions.

Timothy J. Muris

*George Mason University School of Law and O'Melveny & Myers LLP; Former Chairman,
Federal Trade Commission*

I've worked full-time in three transitions, and hope to work in a fourth. If the head of a transition team wanted to read something on antitrust, I would suggest that he be fired. It's just not that important in the grand scheme of what it means to run a government. What's crucial is who the President picks to head the agencies and on whom he relies to help pick.

What would I recommend reading? Bob Bork's *The Antitrust Paradox*, to remind people of where we were and how far we have come. Moreover, I'm a follower of what's called New Institutional Economics, and recommend that literature. It is neither pure Chicago nor Modern IO [Industrial Organization]. One problem with the latter is that if you came from Mars and read widely in Modern IO, you would think monopoly is everywhere in our economy. There is little or no sense of the relevant institutions, and to do antitrust well you need institutional structure.

The next leaders should be grounded in knowledge of the institutions of government and business. That's what the New Institutional Economics teaches, and it has many proponents on both sides of the political aisle.

R. Hewitt Pate

Hunton & Williams LLP; Former Assistant Attorney General, U.S. Department of Justice Antitrust Division

I would recommend *The Antitrust Religion* by Edwin Rockefeller, though not because I agree with everything in the book. I disagree with a lot of the book, and I'm happy to confess that I am a believer in the antitrust religion and think it has a lot of good to do for consumers. But the book is just so good, that if you're in this business, you should read it.

For example, in talking about the need to take ourselves seriously in this business, Rockefeller writes that there's a requirement to learn arcane terms, but that delivering these terms must be "done with sufficient pomp that it is difficult for the listener to avoid taking them seriously. And to be taken seriously one has to take oneself seriously. That skill is acquired not by listening, but by talking when others are forced to listen. In that respect, there is no substitute for government service."

This is good stuff, and there are a lot of more serious things in the book, too. His basic premise is that the antitrust community, as he calls it, has not done anything to prove empirically the benefits that antitrust conveys and therefore it ought to be seen as a religion. He doesn't state this, but I think you can certainly construe the book as an attack on antitrust. The book is a call to do some things to quantify and to put facts and research behind the premise that what we're doing is accomplishing something. For that reason, I think it's worth reading.

Robert Pitofsky

Georgetown University Law Center and Arnold & Porter LLP; Former Chairman, Federal Trade Commission

I have been asked to provide a reading list for people in the next transition who will address the future of antitrust enforcement. My suggestions are offered regardless of which side wins the 2008 election.

For starters, I would advise transition members to read the Sherman Act and the Clayton Act (and maybe a few key Supreme Court opinions like *Socony-Vacuum*, *Sylvania*, and *Aspen Ski*), and disregard suggestions that the statutes have been repealed by material in the *Journal of Law and Economics*.

More specifically, Areeda is authoritative but at fourteen volumes is somewhat unwieldy. Richard Posner's 2001 edition of *Antitrust Law* is essential, not only because of its influence on antitrust in the past but its continuing influence for the future. Since global competition is the wave of the future, I think the best introduction would be the third edition of *Antitrust and American Business Abroad*, now edited by Atwood, Brewster, and Waller. Finally, I would like to suggest a one-volume summary of antitrust that is balanced, moderate, fact-oriented, and knows and acknowledges economics but is not blown away by that discipline. These days, Herbert Hovenkamp's book, *Federal Antitrust Policy*, is as good as it gets.

Finally, the only required reading is the soon to be published collection of essays entitled *How the Chicago School Overshot the Mark: The Influence of Conservative Economic Analysis on U.S. Antitrust*, with contributions, among others, from Schmalensee, Kauper, Hovenkamp, Goldschmid, and Shapiro and Baker—all edited by a fellow named Pitofsky.

Jonathan B. Baker

Washington College of Law, American University; Former Director, FTC Bureau of Economics

I would recommend William W. Lewis, *The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability* (2004), and Michael Porter, *The Competitive Advantage of Nations* (1990).

Nothing is more important to economic growth and prosperity than new products and improved production processes, and nothing is more important to innovation and productivity improvements than competition among firms, which the antitrust laws protect. These best-sellers each draw on decades of experience by leading business consultants to demonstrate how competition fosters innovation.

Roxane Busey

Baker & McKenzie; Former Chair, ABA Section of Antitrust Law

I would strongly urge the new administration to consider and implement the recommendations of the Antitrust Modernization Commission that are directed to the agencies. The Commission's recommendations are the result of three years of careful study and debate on the current status of antitrust enforcement. These recommendations—directed at clearance, the merger review process, substantive merger analysis, state and federal cooperation, increased role of competitive principles in regulated industries—provide a roadmap for agency self-study and reform.

Stephen Calkins

Wayne State University; Former General Counsel, Federal Trade Commission

For general recommendations, it is hard to improve on the lists offered at the Spring Meeting. Not being able to improve on those lists, I can't resist the opportunity to point to sources of personal advice—(1) to litigate; (2) to think about institutional structure and the interaction between remedies and legal standards; and (3) to appreciate the special role of the FTC:

- *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S U. L. REV. 1 (1998);
- *Coming to Praise Criminal Antitrust Enforcement*, in EUROPEAN COMPETITION LAW ANNUAL: 2006, at 343 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2007); and
- *Report of the ABA Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43 (1989) (*Kirkpatrick II*).

And if the new administration is Republican, its top appointees would be well-served by seeking to emulate Tim Muris's setting out of a positive agenda two months after taking office, in *Anti-trust Enforcement at the Federal Trade Commission: In a Word—Continuity* (Aug. 7, 2001), available at <http://www.ftc.gov/speeches/muris/murisaba.shtm>.

Daniel A. Crane

Benjamin N. Cardozo School of Law and Paul, Weiss, Rifkind, Wharton & Garrison LLP

I nominate two books of legal history—Martin H. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (1988), and Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (2d ed. 1995). These books

provide in-depth studies of the two most creative and ideologically charged moments in the history of U.S. competition policy—the Progressive Era and the New Deal. In an era in which antitrust is a relatively modest and technocratic enterprise characterized by broad consensus on both means and ends, it is important to remember the widely divergent roads not taken.

Andrew R. Dick

CRA International, Inc.; Former Acting Chief of the Competition Policy Section of U.S. Department of Justice Antitrust Division

My recommended “must read” would be Joseph A. Schumpeter’s book, *Capitalism, Socialism and Democracy* (1942). Schumpeter pioneered the economic principle that the “perennial gale of creative destruction,” or what antitrust practitioners today recognize as “dynamic competition,” inevitably leads monopolies and dominant firms to be overtaken by nimbler and more innovative competitors—whether through merger, entry and exit, innovation, or other competitive forces. While not an antitrust practitioner or enforcer, Schumpeter understood that the best way to promote efficiency and sustain long-term economic growth is to protect the competitive process.

Ky P. Ewing, Jr.

Former Chair, ABA Section of Antitrust Law; Former Deputy Assistant Attorney General, U.S. Department of Justice Antitrust Division

The following are items I think would be useful background reading for the transition team and the new administration’s antitrust law enforcers.

1. The Report of the Antitrust Modernization Commission (2007), showing a consensus (i.e., compromised) view of practitioners on ways to improve antitrust enforcement by expanding its overall reach, some of which (such as repeal of the Robinson-Patman Act and elimination of exemptions) make sense. The report does not, however, acknowledge the growing skepticism about the effectiveness of what we are doing and its international ramifications and refused to follow Hew Pate’s advice to conduct or commission studies of the effectiveness of enforcement efforts.

2. Richard A. Posner, *Antitrust Law* (2d ed. 2001), the work of a great intellect who dares to suggest that:

- “our elaborate statutory edifice is almost entirely superfluous” (p. 259);
- “Section 1 of the Sherman Act is sufficiently broad to encompass any anticompetitive practice worth worrying about that involves the cooperation of two or more firms” (p. 259);
- “Antitrust is deficient in . . . mechanisms [‘that ensure, at reasonable cost, a reasonable degree of compliance with the law’]” (p. 266); and
- “We really don’t know what the effect of applying antitrust principles to the new economy will be, except when applied to stop horizontal price fixing or mergers of major competitors in highly concentrated markets. . . . Clearly . . . the byword of a prudent enforcement agency and a sensible court will be: caution.” (p. 286).

No transition team or antitrust enforcement official should act without having pondered Judge Posner’s considered views in his second edition.

3. Edwin S. Rockefeller, *The Antitrust Religion* (2007), a short, pithy, and witty plea for more intellectual honesty in how we describe the game of “Antitrust,” the choices enforcers make of

transactions they select to call a “market,” presumptions to “prove” the construct of “market power,” and the lack of accountability of the law enforcers’ decisions.

4. Ky P. Ewing, *Competition Rules for the 21st Century: Principles from America’s Experience* (2d ed. 2006), a work that acknowledges believers and skeptics alike, and in which I have aimed to:

- describe the global crisis of cartels and conflicting competition-policy regimes, quoting believers, skeptics, and others, such as Alan Greenspan, Lawrence Summers, Robert Crandall, and Mario Monti, who warn that caution is needed in regulating;

Recognition of these global issues, and the skepticism about our approaches to them, is sorely needed by the new administration, even as the successes of the International Competition Network (ICN) continue.

- cover briefly the history of regulatory efforts to curb monopolies and cartel behavior from ancient times through the present;

—all of which should lead the new administration to caution and prudence in attempting regulation in this age of the “new economy.”

- suggest ten principles of caution and prudence in enforcement efforts, as well as an eleventh commandment of constant reexamination;

If, as both political parties assert, government is to work more efficiently, such practical suggestions should be carefully reviewed by the transition team and the new administration’s appointees.

- emphasize the need for constant re-evaluation of what we are doing, to test whether our antitrust enforcement really works to improve consumer welfare (and perhaps answer those critics who claim it does not), and suggest concrete steps modeled on FTC Chairman William Kovacic’s earlier academic work on re-evaluation efforts.

The announced FTC effort at evaluation leading to its 100th anniversary in 2014 should be coupled with a DOJ effort, perhaps augmented by the Government Accountability Office, to reevaluate what we accomplish (or fail to accomplish) with the almost half-billion dollars a year the country spends on its “antitrust law enforcement.”

Kathryn M. Fenton

Jones Day and Chair, ABA Section of Antitrust Law

Understanding the historical context that has shaped modern antitrust law is a critical basis for establishing sound antitrust policy going forward. Thus, I would recommend almost any historical overview of antitrust enforcement and the social and political forces that shaped it. One good starting point would be the articles contained in the *Federal Trade Commission 90th Anniversary Symposium*, 72 ANTITRUST L.J. 745 (2005). In addition, because of the danger of relying on overly simplistic historical narratives, I would suggest reading William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1. Placing the role of the Chicago School in a larger context, this article discusses both the microeconomic theories to be applied in antitrust enforcement decisions, as well as the institutional design and capabilities of antitrust enforcement agencies—two subjects of considerable importance to the new administration.

Deborah A. Garza

*Deputy Assistant Attorney General, U.S. Department of Justice Antitrust Division;
Former Chair, Antitrust Modernization Commission*

I recommend that the new administration transition team members read the report and recommendations of the bipartisan Antitrust Modernization Commission. Over the course of three years, the Commission reached an important consensus on the state of U.S. antitrust enforcement today and what changes would make a material difference. The Report is as important for where it recommends *no* change as for where it recommends change. But the next administration, and Congress, would do well to consider seriously many of the recommendations for change.

The Honorable Douglas H. Ginsburg

Circuit Judge, U.S. Court of Appeals, District of Columbia Circuit

If the people responsible for the transition at the Antitrust Division and the FTC are not already familiar with the work of Bork, Areeda, and Hovenkamp, then the rest of us had better short the Dow Jones Industrial Average. But it is hard to imagine that any transition team would be so woefully ignorant. My suggested readings, therefore, are more cautionary than remedial, more empirical than theoretical, and—in deference to the limited time for transition since Inauguration Day was moved from March 4 to January 20 in 1933—more tailored to an airplane than to a train trip to Washington.

First, the transition team should—dare one hope?—reread Frank H. Easterbrook's minor classic, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984). Much has changed since it was written, of course, but the propensity of homo sapiens, and especially of homo governmenticus, to lapse from immodesty into hubris remains undiminished.

Second, since they are already no doubt masters of Karl Popper and Milton Friedman on the methodology of positive economics, they might profit from an application, such as Robert W. Crandall and Clifford Winston's article, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSPECTIVES, Autumn 2003, at 3.

Finally, FTC Chairman William Kovacic has written a characteristically thoughtful paper, *Assessing the Quality of U.S. Merger Policy*. Kovacic responds to recent critics of present policy—devastatingly, I might add—and, more important, provides a challenging and sophisticated research agenda for assessing merger policy, along with specific proposals for increasing agency transparency and otherwise facilitating such empirical assessments of antitrust enforcement. If the transition team thinks they can find anyone more qualified than Kovacic himself to carry out this agenda, then they should lie down until the delusion passes.

George A. Hay

Cornell Law School; Former Director of Economics, U.S. Department of Justice Antitrust Division

I will ignore the obvious (and probably correct) choice—the Antitrust Modernization Commission Report—and suggest something slightly more academic: Herbert Hovenkamp's concise, well-written, and easily accessible 2005 book, *The Antitrust Enterprise*. The book is worthwhile for the following reasons: (a) it reflects a sophisticated understanding of modern antitrust economics; (b) it is reasonably balanced in its approach; and (c) it emphasizes administrability of antitrust law as an important concern.

Robert L. Hubbard

Director of Litigation, Antitrust Bureau, New York Attorney General's Office

Because antitrust law is too broad and the time of transition team members is too limited, I would not recommend a reading list. But, for reference purposes, I would cite the submissions, hearings, and report of the Antitrust Modernization Commission. For executive priorities, I would begin by suggesting that “consumer welfare” be pushed actually to mean the welfare of individual U.S. citizens. Thus, I would urge eliminating the “direct purchaser” rule of *Illinois Brick* and imposing strict rules against a supplier agreeing with its retailers to raise prices for consumers.¹

Jonathan M. Jacobson

Wilson Sonsini Goodrich & Rosati PC; Former Commissioner, Antitrust Modernization Commission

It is important for any enforcer to understand *why* America has antitrust laws, and how important these laws have been—and continue to be—to our way of life. My first nomination is therefore Hans B. Thorelli, *The Federal Antitrust Policy* (1954). Reading Thorelli provides insight into why our choice of “antitrust” in 1890, rather than the socialism, fascism, and communism pursued elsewhere, has proven to be among the best political and economic decisions any country has made. The book also helps us understand why that choice is now being replicated in substantial part by country after country around the world. And after that, I would, of course, recommend the report of the Antitrust Modernization Commission as next on the list.

The Honorable Lewis A. Kaplan

U.S. District Judge, Southern District of New York

Arthur Schlesinger, *The Crisis of the Old Order* and *The Coming of the New Deal*

Kurt Eichenwald, *Conspiracy of Fools*

Martin Gilbert, *Winston S. Churchill: The Prophet of Truth 1922–1939* and *Winston S. Churchill: The Finest Hour 1939–1941*

Richard Kluger, *Simple Justice*

Leo Tolstoy, *War and Peace*

The incoming antitrust administration naturally will be well schooled in the antitrust and economic literature. I therefore suggest a broader scope not only for the antitrust administration, but the national administration as well.

We are in a time of crisis, unparalleled on the economic front since the 1929 crash and the Depression and in the foreign relations sphere arguably by anything since the rise of fascism and the Second World War.

Schlesinger in his two books vividly describes how the earlier economic crisis came about and how government sought to deal with it. Eichenwald demonstrates how the greedy, unscrupulous, and careless recently destroyed Enron. All three books have lessons for today.

The first of these two volumes of Gilbert's biography demonstrates that even the most powerful nations are quite capable of blinding themselves to the realities of the world. The second shows the disastrous consequences that can flow from such blindness.

¹ See generally 35 Attorneys General Support Discount Pricing Consumer Protection Act, available at http://www.naag.org/other_comp_advocacy.php.

The Kluger account of the journey to *Brown v. Board of Education* helps to understand the struggle for human rights in which our nation still is engaged.

War and Peace may be the greatest novel of all time. It is on my list because all work and no play Moreover, its insights into humanity are valuable to anyone.

William Kolasky

*Wilmer Cutler Pickering Hale and Dorr LLP; Former Deputy Assistant Attorney General,
U.S. Department of Justice Antitrust Division*

1. *Antitrust*, by Louis Kaplow and Carl Shapiro. This discussion paper, which is available at http://www.law.harvard.edu/programs/olin_center/papers/575_Kaplow_Shapiro.php, and which is forthcoming as chapter 15 of *The Handbook of Law and Economics*, is perhaps the best modern survey of the economic principles that underlie antitrust law and how those principles relate to competition policy. The paper addresses four core areas: market power, collusion, mergers between competitors, and monopolization. In each area, the authors select the most relevant portions of current economic knowledge and use that knowledge to critically assess central features of antitrust policy. It is an absolute must-read for enforcers.

2. *The Informant: A True Story*, by Kurt Eichenwald. This book, by a long-time *New York Times* reporter, provides an almost-impossible-to-put-down account of how the Justice Department broke the ADM lysine cartel. The book makes excellent beach-reading and provides a useful reminder that cartels really do involve hard-core criminal behavior. I'm still waiting for the movie.

3. *Broadcast Music, Inc. v. CBS* and *Continental T.V. v. GTE Sylvania*. These two seminal Supreme Court decisions from 1977 and 1979 together did more to reshape modern antitrust than any other decisions. Both deserve to be read and re-read as many times as possible.

Robert H. Lande

University of Baltimore School of Law and Secretary, American Antitrust Institute

The top "must read" for the new administration will be the American Antitrust Institute's report, *The Next Agenda: Transition Report on Competition Policy to the 44th President*, which will be published this fall by Vanderplas. (It also will be posted at <http://www.antitrustinstitute.org>.) The Report will consist of policy recommendations and detailed chapters on substantive areas, institutions, and industry sectors that cover one-third of the U.S. economy (energy, food, the media, and health care). The Report reflects a reformist, consumer-oriented post-Chicago perspective, making it a nice counterpoint to the AMC Report.

Richard G. Parker

O'Melveny & Myers LLP; Former Director of the FTC Bureau of Competition

Antitrust officials should read *The Post-American World* by Fareed Zakaria. Mr. Zakaria's thesis is not the decline of the United States, but the rise of others. The world's tallest building, largest dam, and most expensive shopping malls are not in this country. The most sophisticated cell phone is not made in this country. Globalization is steering the world economy towards unprecedented pluralism, with China and India leading the way. These developments have to be relevant to anyone involved in competition policy.

D. Daniel Sokol*University of Florida Levin College of Law*

Too often, antitrust policy discussions focus on the intricacies of the most recently decided case and not enough about larger policy issues. Chairman William Kovacic's "The Federal Trade Commission at 100: Into Our Second Century"² is an institutional analysis of antitrust agencies that any new antitrust leadership should be thinking about. Self-assessment plays a critical but underutilized role in antitrust. According to Kovacic, it can help to better explain where competition policy has been and to identify priorities on which to focus in the present and future. A second important contribution of the article is in discussing the need to create appropriate criteria for measuring success and in implementing recommendations. All too often, antitrust policy has meant holding hearings and publishing reports that get headlines but are never implemented.

Christopher J. Sprigman*University of Virginia School of Law*

I recommend Michael Heller's new book, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*. In general, private ownership creates wealth and helps foster innovation. But not always. Michael Heller, a well-respected law professor at Columbia, has written an important book describing the many areas in which too many property rights create a "tragedy of the anti-commons," which frustrates innovators attempting to bring innovative new products and services to market. Heller's examples of over-propertization and resulting innovation gridlock range from pharmaceuticals to agriculture to wireless telecom to documentary films. In all of these areas, Heller shows how overuse of patents, copyrights, and government regulation leads to underuse of valuable resources, retards innovation, and destroys wealth.

Joshua D. Wright*University of Texas Law School (visiting) and George Mason University School of Law (on leave)*

Frank Easterbrook's *The Limits of Antitrust*, 65 TEX. L. REV. 1 (1984), is required reading because it is simple, powerful, and often misunderstood. Easterbrook began with two insights: (1) the social costs of false convictions are greater than false acquittals because the latter are self-correcting, and (2) the antitrust authorities' assignment is remarkably difficult: to identify an "optimal mix" of competitive activities when precious little is known about welfare tradeoffs between competition's various forms. Easterbrook concluded that the antitrust rules likely to benefit consumers by minimizing the social costs of errors and administration should be biased towards false negatives. Easterbrook's error-cost framework is an innovation that can and should be used to assist policymakers of any political stripe in harnessing antitrust resources to earn the greatest rate of return for consumers. ●

² 21st Annual Western Conference of the Rutgers University Center for Research in Regulated Industries (June 18, 2008), available at <http://www.ftc.gov/speeches/kovacic/080618ftcat100.pdf>.

Required Reading for the New Antitrust Administration: Summary of Recommendations

BOOKS AND REPORTS

- AMERICAN ANTITRUST INSTITUTE, THE NEXT AGENDA: TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT (forthcoming 2008)
- ANTITRUST AND AMERICAN BUSINESS ABROAD (3d ed. 2007)
- ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS (2007)
(5 recommendations)
- ROBERT H. BORK, THE ANTITRUST PARADOX (1978)
- KURT EICHENWALD, THE INFORMANT: A TRUE STORY (2000)
- KURT EICHENWALD, CONSPIRACY OF FOOLS (2005)
- KY P. EWING, COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA'S EXPERIENCE (2d ed. 2006)
- MARTIN GILBERT, WINSTON S. CHURCHILL: VOLUME FIVE: THE PROPHET OF TRUTH 1922–1939 (1976)
- MARTIN GILBERT, WINSTON S. CHURCHILL: VOLUME SIX: The Finest Hour 1939–1941 (1983)
- ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (2d ed. 1995)
- MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008)
- HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005):
- HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY (3d ed. 2005)
- HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE INFLUENCE OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008)
- RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (2004)
- WILLIAM W. LEWIS, THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY (2004)
- MICHAEL PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS (1990)
(2 recommendations)
- RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2004)
(2 recommendations)
- Report of the ABA Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43 (1989) (*Kirkpatrick II*)
- EDWIN S. ROCKEFELLER, THE ANTITRUST RELIGION (2007)
(2 recommendations)
- ARTHUR SCHLESINGER, JR., THE CRISIS OF THE OLD ORDER: 1919–1933, THE AGE OF ROOSEVELT, VOL. I (1957)
- ARTHUR SCHLESINGER, JR., THE COMING OF THE NEW DEAL: 1933–1935, THE AGE OF ROOSEVELT, VOLUME II (1958)
- JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1942)
- MARTIN H. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS (1988)

HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1954)

LEO TOLSTOY, *WAR AND PEACE* (1869)

FAREED ZAKARIA, *THE POST-AMERICAN WORLD* (2008)

ARTICLES

Stephen Calkins, *Coming to Praise Criminal Antitrust Enforcement*, in *EUROPEAN COMPETITION LAW ANNUAL: 2006*, at 343 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2007)

Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 *ST. JOHN'S U. L. REV.* 1 (1998)

Federal Trade Commission 90th Anniversary Symposium, 72 *ANTITRUST L.J.* 745 (2005)

Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 *J. ECON. PERSP.*, Autumn 2003, 4, at 3–26

Frank H. Easterbrook, *The Limits of Antitrust*, 63 *TEX. L. REV.* 1 (1984)
(2 recommendations)

Louis Kaplow & Carl Shapiro, *Antitrust*, available at http://www.law.harvard.edu/programs/olin_center/papers/575_Kaplow_Shapiro.php (forthcoming as chapter 15 of *HANDBOOK OF LAW AND ECONOMICS*)
(2 recommendations)

William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *COLUM. BUS. LAW REV.* 1

SPEECHES

FTC Chairman William E. Kovacic, *Assessing the Quality of U.S. Merger Policy*

FTC Chairman Kovacic, *The Federal Trade Commission at 100: Into Our Second Century*, Presentation Before the 21st Annual Western Conference of the Rutgers University Center for Research in Regulated Industries, Monterey, California (June 18, 2008), available at <http://www.ftc.gov/speeches/kovacic/080618ftcat100.pdf>

FTC Chairman Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity*, Prepared Remarks Before American Bar Association Antitrust Section Annual Meeting (Aug. 7, 2001), available at <http://www.ftc.gov/speeches/muris/murisaba.shtm>

STATUTES AND CASES

The Sherman Act, 15 U.S.C. §§ 1–7

The Clayton Act, 15 U.S.C. §§ 12–27

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)

Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979)

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)
(2 recommendations)

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc)

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)

Book Review

The Power of Stories

Eleanor M. Fox and Daniel A. Crane, Editors

Antitrust Stories

Foundation Press • 2007

Reviewed by Thomas D. Morgan

Lawyers live in a world of stories. Clients tell us stories of their plans, their triumphs, and their mistakes. Lawyers transform those stories into forms we hope courts will find compelling. Our stories on behalf of our clients are often limited by the realities of available documents and the vagaries of witness memories, but good storytelling is ultimately what constitutes successful lawyering.

Law students learn the significance of stories from the day they begin their education. They are introduced to appellate cases that report the stories of controversies that earlier judges have addressed and new judges now resolve. Some students believe the only reason to read a case is to learn the “rule” on which the appellate judges base a decision. The best students, however, recognize that the litigants’ story will be relevant longer than the statement of any rule, and the more one knows about what produced a controversy, the more one will understand about problems the student’s future clients may face.

Nowhere is the power of stories more significant than in antitrust. More than any other upper-class course, save perhaps constitutional law, antitrust involves students in factual detail. Antitrust is the study of business conduct and judicial efforts to determine whether that conduct enhances or undermines consumer welfare. Ultimately, the relevant question in an antitrust course is not whether a given court correctly ascertained net welfare, however defined. Indeed, antitrust professors take pleasure in showing classes that the cases they read rarely reached the right result. At the end of the day, however, a good antitrust course leaves students with the ability to identify what motivates business actors to behave as they do, determine the proper analytic tools with which to evaluate the parties’ conduct, and cast the story in a form that will persuade a reviewing court to resolve the matter as the advocate’s client would prefer.

Appellate decisions are traditionally seen as the most convenient window into parties’ conduct, but it takes little reflection to realize that such opinions rarely reveal all that happened. Judges affect history, but they are rarely historians. The facts in appellate opinions illuminate particular issues presented to the court for decision; they typically tell little about the business or personal issues that drove the parties into conflict and how to keep parties similarly situated out of trouble in the future.

Professors’ teaching challenges become publishers’ opportunities, and beginning in 2003, Foundation Press began to produce a series of now over twenty books that tell “the stories behind the leading cases in important areas of law—the parties to the dispute, the legal and historical context, the immediate impact of the case as well as the continuing importance of the case in

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shaping the law.”¹ Some of the most prominent names in legal education have edited the various collections,² and the selection of Professors Eleanor Fox and Daniel Crane to select authors and edit their contributions into the antitrust volume continues that tradition.

Antitrust Stories brings to life thirteen cases or lines of cases, representative of almost a century of history and multiple doctrinal issues. Most of the cases are familiar to any antitrust lawyer. Horizontal arrangements are illustrated in *Socony-Vacuum*, *Topco*, *BMI v. CBS*, and *Superior Court Trial Lawyers*, while *Standard Oil*, *Alcoa*, *Aspen Skiing*, and *Microsoft* represent issues of monopolization. Vertical restraints are examined in *Dr. Miles*, and a half-century later, in the transition from *Schwinn* to *GTE Sylvania*. Mergers are represented by the recent *Staples* and *GE/Honeywell* cases, while *GE/Honeywell* and *Empagran* add an important international dimension to the collection.

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In my view, the “story” of each case ideally should contain at least five elements: (1) background about the time in history and the industry involved; (2) information about the particular parties’ goals, history, and practices; (3) description of what brought the parties into conflict, or where a case was brought by the government, what the government saw as the public interest breached by the defendant; (4) how the parties formulated their legal positions and told their own stories about the case; and (5) how the court took the case as an opportunity to state the law in a way that could give guidance to the lower courts and future litigants. Clearly, a full recitation of the background of the parties, the industry, and the strategic decisions could often justify a book per case. Limiting chapter authors to thirty pages or so inevitably required the authors to make choices.

Professor Rudolph Peritz produced perhaps the most successful chapter in his treatment of *Dr. Miles*. It is easy now to see *Dr. Miles* as in history’s ash can. Many know it only as a case that until last term had prohibited resale price maintenance, but now consider yesterday’s news. Professor Peritz’s chapter makes clear, however, that lawyers can continue to learn from the *Dr. Miles* story. Consistent with the issues I have suggested, Professor Peritz places the dispute squarely in the context of what was happening in the Progressive Era in general and the proprietary (patent) medicine industry in particular. Manufacturers’ claims of curative powers were extravagant and profligate. In one telling anecdote, for example, Professor Peritz describes the alleged curative powers of “Dr. Miles’ Compound Extract of Tomato,” a product we know today as ketchup.

Professor Peritz then goes on to discuss the interplay among pressure for brand differentiation among the medicines, the challenge of marketing once the Pure Food & Drug Act of 1906 required producers to reveal the ingredients in their products, and the effects of the Trademark Act of 1905 that seemed to help producers promote differentiation. Indeed, Professor Peritz tells us that the standard form resale price maintenance contracts adopted by *Dr. Miles* were widely used in the industry. It both rewarded local outlets for efforts at local promotion and allowed manufacturers to control distribution of their products nationwide.

Dr. Miles’ adversary, John D. Park & Sons, was no newcomer to the scene. Park had been around since 1840, and not surprisingly, saw proprietary medicine as overpriced and ripe for discount distribution. Park sought out dealers who were willing to sell it *Dr. Miles’* and others’ prod-

¹ Publisher statement on the back cover of *Antitrust Stories*.

² Douglas Baird of the University of Chicago edited *Contracts Stories* (2007), for example, while Jane Ginsburg of Columbia and Rochelle Dreyfuss of NYU edited *Intellectual Property Stories* (2006), and Robert Rabin of Stanford and Stephen Sugarman of Berkeley edited *Torts Stories* (2003).

ucts for below the resale price, and Park's efforts to market those products through emerging institutions such as department stores set the scene for conflict.

Professor Peritz takes these facts and skillfully makes the transition to how the issues were raised in the lower courts and later the Supreme Court. Dr. Miles had already won three lower court cases defending its manner of distribution, and, in Professor Peritz's hands, Dr. Miles' ultimately losing arguments based on trademark and consignment law take on a plausibility not found in the Supreme Court's majority opinion.

Professor Peritz says less than one might have hoped about the clash among the Supreme Court opinions. In particular, the alleged "dealer conspiracy" on which the majority rested part of its argument is seen as unpersuasive today even by those who defend the result on other grounds. But overall, Professor Peritz's chapter on *Dr. Miles* demonstrates the best in what these chapters have to offer, and it does so in a way that will capture any reader's imagination.

The same kind of praise can be offered for most of the other chapters as well. Professors Peter Carstensen and Harry First, for example, present an intriguing account of *Topco*, an application of the per se rule that many observers view as better off forgotten. Topco was and remains an association of grocery chains that buys collectively and creates private label brands for sale at its members' stores. What attracted the government's attention was the individual member chains' contractual right to exercise a practical veto over admission of new Topco members if they proposed to operate stores close to the objecting chain. The Court saw the case as involving per se illegal horizontal market division, but the arrangement looked to many as virtually identical to the kind of vertical territorial allocation found subject to a rule of reason just five years later in *GTE Sylvania*.

Professors Carstensen and First enrich this story by doing an excellent job of suggesting what was going on in the grocery store industry at the time. It was clearly true that having a buying collective and private label brands was useful to regional chains. Both allowed such chains to compete with organizations that operated nationally, and the trial evidence about how many private labels Topco could have developed and what difference it should have made is the kind of material that makes these stories useful for discussion. At the end of the day, however, the chapter makes clear that, far from Topco being one of many collectives, it was the dominant one and the ability to participate in Topco's program was significant.

Furthermore, the authors suggest there may have been evidence that does not come through in the Supreme Court opinion that Topco members were not simply limiting themselves to vetoing accession by new chains. According to the authors, Topco members might have sometimes met to keep existing member chains from moving into each other's territories. In short, the traditional story of struggling chains trying to protect themselves from potential free riders comes through in the *Topco* chapter as a story of relatively successful chains that were capable of competing with each other but that had agreed not to do so. Such conduct, the authors suggest, would properly have been found illegal under any analysis, including a quick look or rule of reason. The Court's per se analysis that gets the most attention by observers thus turns out perhaps not to have been essential to the decision.

Donald Baker's account of the *Superior Court Trial Lawyers* case is yet another success. The District of Columbia has a public defender's office, but 85 percent of DC's indigent criminal defendants in 1983 were represented by lawyers appointed by the courts pursuant to the Criminal Justice Act and subject to a limit on payment (unchanged for twelve years) of \$30 per hour for work in court and \$20 per hour for other work. Additional caps on total fees in a single case meant that sometimes lawyers realized even less than the \$20/\$30 rates. Many of the appointed lawyers

worked full time on such cases, and the result was not only painful for them but observers believed that, as a result, many criminal defendants were represented by marginally competent lawyers who could not attract paying clients.

The D.C. Bar had long urged an increase in rates paid appointed lawyers, but D.C. political institutions had not responded. Dean Wiley Branton of Howard Law School told the group (who called themselves the Superior Courts Trial Lawyers Association) that to get the city council to act they would “have to do something dramatic to attract attention.” D.C. Mayor Marion Barry had given similar advice, so SCTLA members decided to “strike.” They refused to accept case assignments, created havoc in the handling of D.C. indigent criminal cases for about two weeks, and as a result, the D.C. City Council amended the law to give the lawyers a pay increase.

The result was ironic but predictable. Higher pay attracted more and abler lawyers to the work of representing indigent criminal defendants, so SCTLA members wound up benefiting their client base far more than themselves. However, the case became a vehicle for the FTC to use in its effort to attack self-promotion by professionals. In response, then-young lawyers, such as Don Baker, Doug Rosenthal, Mike Denger, and Will Tom, acting pro bono, pressed the idea that the prosecution represented a perverse application of antitrust principles to punish an effort that was ultimately political in character.

The legal analysis in the FTC and court opinions struggled with familiar issues. There was no doubt that the SCTLA had gone beyond mere *Noerr-Pennington* lobbying, but so had the National Organization for Women in its efforts to have conventions boycott states that had not ratified the Equal Rights Amendment and NOW's conduct had been held not to raise antitrust concerns.³ Judge Needelman at the FTC found there had been concerted action, but he found the issues before the city were primarily political, not economic, and recommended against Commission action. The Commission rejected that advice, however, and concluded that the strike had been a per se illegal “price fixing boycott.” The D.C. Circuit's opinion by Judge Ginsburg tried to send the matter back for the FTC to determine whether the SCTLA had sufficient market power to have achieved the result it did or whether the result was derived from a constitutionally protected exercise of political power.

The Supreme Court's opinion, holding that the FTC appropriately gave the case per se treatment, now seems an historical footnote. Justice Stevens' majority opinion raised a legitimate concern that government contractors should not be able to call bid rigging and other forms of concerted action “political” activity, but the analogy the majority tried to draw between SCTLA's efforts to attract public attention to its cause and stunt flying that can be prohibited because it is inherently dangerous is one of the lamest in antitrust history. One cannot come away from this chapter in *Antitrust Stories* without taking pride in the lawyers who defended the case pro bono and without seeing that the Court utterly ignored the nuanced facts that are what made the case worthy of Supreme Court attention in the first place.

Of course, even a quick look at the list of cases discussed in *Antitrust Stories* reveals that many important cases are not here at all. It would have been wonderful, for example, to learn the ins-and-outs of the Trans-Missouri Freight Association and its violation of a new Sherman Act that it genuinely thought did not apply to railroads. It would have been fascinating to know more about how a run-of-the-mill pipe conspiracy came to be reviewed by the Sixth Circuit before a panel consisting of a sitting Supreme Court justice (Harlan), a future justice (Lurton), and a forty-three-year-old future President and Chief Justice (William Howard Taft).

³ *Missouri v. Nat'l Org. for Women*, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980).

Nor do the stories in this volume present any treatment of tying arrangements, predatory pricing, or concentrated industries, each of which has been sometimes taken seriously over the years as conduct of antitrust concern. Of course, no single book could possibly present all the stories potentially appropriate for the kind of treatment found in *Antitrust Stories*. However, readers interested in more such accounts may want to look at *The Antitrust Revolution*, a five-volume set edited by economists John E. Kwoka, Jr. and Lawrence J. White.⁴ The volumes each stand alone, so there is now an inventory of probably over 100 cases about which interested readers can get additional information of the kind brought out in *Antitrust Stories*.

In my view, antitrust lawyers will find reviewing such stories both entertaining and worthwhile. While designed to support law school classes, the books and stories could be equally valuable as a centerpiece for luncheon discussions in a practice group or enforcement agency. Continuing education need not be dull. Antitrust stories are among the most intriguing stories that we can tell each other. We are in debt to Professors Fox and Crane and their contributors for making the telling so accessible. ●

⁴ The titles are each called "editions" and the publishers of the volumes differ. See JOHN E. KWOKA, JR. & LAWRENCE J. WHITE, *THE ANTITRUST REVOLUTION* (1989); *THE ANTITRUST REVOLUTION: THE ROLE OF ECONOMICS* (2d ed. 1994); *THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION AND POLICY* (3d ed. 1999); *THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION AND POLICY* (4th ed. 2004); *THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION AND POLICY* (5th ed. 2008).

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: In this edition we comment on a paper by Herbert Hovenkamp, in which he examines the influence of schools of economic thought on antitrust policy, and a paper in which Tim Brennan considers whether RPM in and of itself could be used as an exclusionary device and how to test the likelihood that the effect of RPM is exclusionary. Send suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

Herbert J. Hovenkamp, *The Neoclassical Crisis in U.S. Competition Policy, 1890–1955* (July 8, 2008)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156927

In this paper, Herbert Hovenkamp offers a history of the influence of schools of economic thought on antitrust policy. He takes a strong view of the power of ideas, arguing that “when robust economic theory dictates that a particular regulatory or competitive regime is best for a particular industry, that theory weighs heavily in policy making” and can limit the influence of interest groups. The focus of his narrative is the period between 1890 and 1955, in which the theory of competition was unsettled because of what he calls the marginalist revolution, which disrupted the classical consensus. Classicism had viewed competition as the norm, and monopoly as the exception. Some implications of marginalism, however, suggested that in many markets, competition would not move toward a stable equilibrium. Ultimately, according to Hovenkamp, economic theory resolved the many puzzles this implication posed and produced the current (relative) consensus on the principal economic tenets of competition policy.

In the Progressive Era, Hovenkamp argues, marginalism revealed that, in industries with high fixed costs, scale economies made large firms and even monopolies efficient. If there were many firms in such an industry, “ruinous competition” would ensue as each firm tried to maintain capacity. Some economists in this period viewed the problem of fixed costs as so widespread that antitrust enforcement was futile: markets would predictably tend toward either collusion or natural monopoly. Joan Robinson’s *Theory of Imperfect Competition* in 1933 added the concept of product differentiation, which allowed large firms a measure of durable monopoly power, even though they faced a degree of competition. This theoretical innovation limited the problem of ruinous competition because it suggested that firms in many markets could avoid overproduction by differentiating their products in consumers’ minds to gain market power, but also implied that nonprice competition would be inefficient.

Many economists, including Robinson, embraced socialist planning as means of controlling imperfectly competitive markets. John Maurice Clark, however, proposed that markets that depart significantly from perfect competition may have characteristics that permit what he termed work-

able competition. This view suggested a new role for antitrust policy. Hovenkamp quotes the following passage from Clark:

The kind of policy which is indicated seems to be, not a laissez-faire acquiescence in any and all forms of trade practices which industry may evolve, and not an indiscriminate condemnation of all forms of canalized or restricted or "imperfect" competition, regardless of whether the competition that is restricted is of the cutthroat variety or not. What seems to be called for is a realistic control of trade practices which should not simply prohibit unduly restrictive forms, but should assume constructive responsibility for working out for each industry, where unduly restrictive forms are found, the form which, in that industry, bids fair to give the nearest practicable approach to the results of "normal" competition¹

Hovenkamp argues that this view of monopolistic competition played a key role in the shift to aggressive antitrust enforcement in the Second New Deal of the late 1930s.

The primary outgrowth of the notion of workable competition, Hovenkamp argues, was Joe S. Bain's Structure-Conduct-Performance framework. Voicing what became the key tenet of the Harvard School, Bain proposed that market structure, especially concentration and entry barriers, determined the degree of competition in the market and hence the conduct of firms in the market and the market's economic performance. Most important for antitrust policy, Bain endorsed the view (already expressed less formally by others, like Berle and Means) that firm size and market concentration tended to increase beyond the point at which scale economies were exhausted. Hovenkamp quotes Bain:

If . . . diseconomies of large scale are not important over a wide range, so that any firm can attain optimal efficiency either at a very small scale or up to a much larger scale, the number of firms is no longer forced to remain large, since firms may grow or combine without loss of efficiency until their sizes are large and their number few. Thereupon, the force of interfirm competition may be restricted to permit periodic elevation of price above minimal average cost, and existing firms may be permitted or induced to attain inefficiently large scales²

Bain also argued that vertical integration and product differentiation contributed to market concentration. This thinking supported the Harvard School's promotion of a no-fault monopolization standard and the Warren Court's strict treatment of mergers in markets that exhibited a trend toward concentration.

Hovenkamp describes the Chicago School's critique of the Structure-Conduct-Performance paradigm, which eventually led to its demise. Chicagoans like Stigler, Pelzman, and Demsetz challenged the propositions that market concentration was (1) usually unjustified by scale economies and (2) necessarily correlated with noncompetitive pricing (even in the absence of collusion). Relatedly, Chicagoans argued that scale economies were not properly considered entry barriers.

In his last few pages, Hovenkamp describes the Chicago School's attack on the idea that a monopolist can costlessly leverage its monopoly power into an adjacent market by tying and other practices and thus gain a second monopoly profit. Hovenkamp suggests that Chicagoans mistakenly ascribed the simple leverage notion to the Harvard School. In reality, the Harvard School was concerned about tying arrangements and related practices mainly because of the possibili-

¹ John Maurice Clark, *Monopolistic Tendencies, Their Character and Consequences*, 18 PROCEEDINGS ACAD. POL. SCI. 2, 8 (1939).

² JOE S. BAIN, *INDUSTRIAL ORGANIZATION* 160 (1959).

ty of foreclosure, “another term that produced considerable controversy with the Chicago School but which nevertheless remains a much more viable topic of debate.” Hovenkamp concludes:

The Harvard School abandoned most parts of the S-C-P paradigm in the 1970s, and since then Chicago and Harvard positions on competition policy have converged on most but not all issues. Further a “post-Chicago” critique, sometimes known as the New Industrial Economics, has emerged which uses the mathematics of marginalism and game theory in a highly technical fashion, in many cases far beyond the ability of any court to administer in the context of legal regulation.

Hovenkamp has provided an interesting and provocative account of the influence of economic theory on antitrust policy over the past 120 years. I strongly endorse his emphasis on the power of ideas rather than interest group politics in shaping the main lines of antitrust law. I would suggest, however, that formal economic theories gain or lose acceptance in antitrust law, not only because of their robustness and empirical support, but because of their congruence with ideologies that are more general and more fundamental than theory.³

—WHP

Timothy J. Brennan, RPM as Exclusion: Did the Supreme Court Stumble on a Missing Theory of Harm? (July 9, 2008) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161255

In the last issue of *The Antitrust Source* (June 2008), Howard Marvel considered the antitrust implications of the *Leegin* decision, a decision that ended the reign of the per se illegality of resale price maintenance (RPM).⁴ In his discussion, Marvel noted that the two most frequent anticompetitive concerns about RPM are its use in maintaining a manufacturer cartel and its use in facilitating a retailer cartel. In the case of the former, RPM would help ensure that defecting from the manufacturer cartel by offering retailers secret reductions in wholesale prices would not be profitable, because the retail price (and so the quantity demanded by consumers) would be unchanged. This would be particularly helpful to cartel maintenance when wholesale (manufacturer-level) prices are not readily observable. In the case of retailers, the manufacturer becomes the retail-cartel enforcer, using RPM to ensure that no retailer deviates from the supracompetitive cartel-set price. Of course, the long list of efficiencies associated with RPM provides the policy context for the “finally!!” view of the *Leegin* decision.

In this short paper, Tim Brennan suggests an alternative to the standard cartel-related reasons for anticompetitive concern. In particular, he considers whether RPM in and of itself could be used as an exclusionary device by a single firm and how to test the likelihood that the effect of RPM is exclusionary.

As is apparent from the paper’s title, the “hook” for this view is the *Leegin* decision itself. Citing Howard Marvel, the Supreme Court noted that “Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A manufacturer with market power . . . might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants.”⁵

³ For a brief account of the role of ideology in the transformations that Hovenkamp describes, see William H. Page, *The Ideological Origins and Evolution of Antitrust Law* (Apr. 14, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=692821.

⁴ Howard Marvel, *Resale Price Maintenance and the Rule of Reason*, ANTITRUST SOURCE, June 2008, <http://www.abanet.org/antitrust/at-source/08/06/Jun08-Marvel6=26f.pdf>.

⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2717 (2007) (cited by Brennan at 5–6).

Of course, an exclusive dealer agreement might seem the more straightforward way of raising rivals' costs—by signing up exclusive dealers, the availability of outlets to rivals is reduced and the rivals' distribution costs may consequently increase above that incurred by the manufacturer.⁶ The key contribution of the Brennan paper is that it focuses on whether RPM on its own can be exclusionary without being accompanied by cartel-related motives, i.e., a single firm imposing RPM. In this regard, he notes that “the particular argument for RPM being exclusive has to be that if one firm gives the retailer a margin exceeding marginal retailing costs, it will reduce the retailer's incentive to offer its services to that firm's rivals.” (p. 15) Brennan then sketches and evaluates a couple of possible arguments consistent with the *Leegin* concern.

The simpler argument runs as follows. Suppose a manufacturer sets the retail price for a set of retailers that exceeds their marginal costs and thereby increases the margin the retailers earn on the manufacturer's product. By virtue of the RPM, the higher margins will not be eroded by price competition. Other things equal, the retailers would have an incentive to provide the manufacturer with greater shelf space—the retailers earn more on these sales than previously. Thus, one RPM-as-exclusion story would be that by providing the manufacturer more shelf space, rivals have access to less shelf space and their costs may increase as a result of, e.g., the remaining retailers raising the price of shelf space. Of course, if the supply of shelf space is reasonably elastic for any given covered retailer, then RPM alone won't prevent rival manufacturers from obtaining the necessary shelf space. Thus, the exclusionary effect may require that there be capacity constraints on available shelf space or that shelf space for particular product lines be limited. But Brennan goes on to point out an additional problem with the pure shelf-space story—a higher retail price will in fact result in greater shelf space being available to rivals because the higher price results in a reduced quantity demanded by consumers.

A more complicated story would focus on the kinds of efficiencies usually associated with RPM. Suppose that retailers expend point-of-sale (POS) effort in informing and persuading customers to buy the manufacturer's product. Suppose further that retailers “have limits in the ability to provide effort to sell a single line of products.” Then, an RPM-supported higher margin would induce the retailer to devote greater effort on the manufacturer's behalf, “crowding out” the ability of rival manufacturers to obtain the same level of effort in this set of retail stores. If that crowding out increases the costs of the rivals because, e.g., the remaining retailers now have market power, then the RPM-setting manufacturer will have gained the ability to raise its product price higher than otherwise would be the case. That is, the RPM will have had an anticompetitive exclusionary effect.

Brennan observes that for this story to raise single-firm anticompetitive concerns, more is necessary. The manufacturer imposing the RPM must be doing so in a large share of the relevant retail space. If, instead, there are numerous alternative retailers to which the rivals can turn, then the strategy is likely to have little effect. And for those retailers covered by the manufacturer's RPM, the availability of shelf space or “effort” must be limited; otherwise the RPM-covered retailers can continue to provide services to other manufacturers (because there are no exclusive contracts). While not mentioned specifically by Brennan, the anticompetitive scenario will also depend on the extent to which the products of the firms not in the defined market compete with exclusionary manufacturers' products.

⁶ A classic reference for what is a vastly oversimplified description in the text above is Eric B. Rasmusen, Mark J. Ramseyer & John S. Wiley, Jr., *Naked Exclusion*, 81 AM. ECON. REV. 1137 (1991). I should note that RPM could be used to support other exclusionary tools (e.g., exclusive dealing), but Brennan's paper focuses on RPM as a standalone tool for exclusion. On RPM as support to an exclusionary practice, see Ittai Paldor, RPM as an Exclusionary Practice (Feb. 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092799.

Brennan also notes an additional complication. Suppose that increased POS effort is valued by consumers. Then the effect of the RPM may be exclusionary but it also increases the overall quality of the manufacturer's product, a benefit that must be weighed in the balance. Just as consumers benefit from the lower prices during a predatory episode, consumers benefit from the greater POS effort that might be associated with exclusionary RPM. As Brennan observes, a policy that seeks to substantially narrow the scope of RPM also threatens to reduce the very efficiencies that are associated with RPM, just as an aggressive effort to discourage price predation can discourage beneficial price competition.

Brennan views it unlikely that the facts in any real-world markets would support a finding of anti-competitive harm from a single firm's use of RPM as a stand-alone exclusionary device. I suspect that he's right. It would seem that RPM used in this way has all of the antitrust risk of exclusive dealing but is not nearly as well targeted towards taking out rivals. But I also suspect that now that RPM is no longer per se illegal, there will be a flood of new stories describing the antitrust risk of RPM. After all, there was no policy payoff in considering that issue if RPM was expected to remain illegal.

All in all, the Brennan paper offers some interesting insights into an incompletely explored observation made by the Supremes. ●

—JRW