Interview with William E. Kovacic, General Counsel, Federal Trade Commission

Editor's Note: *In this interview with* The Antitrust Source*, William Kovacic candidly discusses the role and functions of the FTC's Office of General Counsel (OGC), setting out with great specificity his goals for the OGC and the challenges it faces as it fulfills its mission. During the interview, Professor Kovacic addresses, among other topics, the FTC's enforcement priorities through administrative and federal court litigation, including its commitment to appellate advocacy through amicus work. He also highlights the FTC's special non-litigation capabilities to advance antitrust and consumer protection policy making, notably the important contribution of the FTC's recent report on intellectual property and antitrust. Of course, the views Kovacic presents in this interview are his own and not necessarily those of the FTC or any of its individual members.*

This is Bill Kovacic's second tour of service at the FTC. He left academia to rejoin the Commission, this time as its General Counsel, in June 2001. 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 is on leave from the George Washington University Law School, where he has served as a professor since 1999.

Professor Kovacic is a prolific writer and speaker on antitrust topics. He is the co-author of the 4th Edition of Ernest Gellhron's Antitrust Law and Economics in a Nutshell *(1994), and is a co-author, with Andrew Gavil and Jonathan Baker, of* Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy *(2002). Kovacic's most recent article,* The Modern Evolution of U.S. Competition Policy Enforcement Norms*, has just been published in 71* Antitrust Law Journal *377 (2003). He also has special expertise as a global ambassador for antitrust. Since 1992, Professor Kovacic has served as an advisor on antitrust and consumer protection issues to numerous foreign governments, including Benin, Egypt, El Salvador, Georgia, Guyana, Indonesia, Mongolia, Nepal, Panama, Russia, Ukraine, Vietnam, and Zimbabwe.*

William E. Kovacic

ANTITRUST SOURCE: Let's start with a general question: Would you please explain your role and responsibilities as General Counsel of the Federal Trade Commission?

BILL KOVACIC: The Office of the General Counsel (OGC) basically performs four functions. The first is litigation. Under the supervision of John Daly, our Deputy General Counsel for Litigation, our litigation group represents the FTC in most matters before the federal courts. For example, we have represented the Commission in the various cases involving the implementation of the Do Not Call Rule. We consult with the Commission and the FTC's operating bureaus on proposed enforcement actions and provide advice to commissioners on matters in administrative adjudication. The litigation group also acts for the FTC on employment law issues.

The second principal area of responsibility is legal counsel, a function supervised by Chris White, who is our Deputy General Counsel for Legal Counsel. This area concerns the large body of statutes and regulations that form the Commission's administrative practice and procedure infrastructure. Among other activities, we oversee FTC's Freedom of Information Act program, carry out the agency's Paperwork Reduction Act duties, advise the Commission on governance questions, including voting procedures, counsel current and former FTC employees on ethics questions, and consult on proposed legislation such as reforms to improve the agency's ability to address cross-border fraud.

The third area is policy studies, which is managed by Susan DeSanti, the Deputy General Counsel for Policy Studies. The policy studies group is one of the FTC's internal think tanks and

a focal point for the Commission's investment in what Chairman Tim Muris has called "competition policy R&D." Among other projects, the policy studies group was the principal drafter of the Commission's report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (October 2003) and has represented the Commission in the joint FTC/Department of Justice hearings on Health Care and Competition Law and Policy.

The fourth function is to coordinate the Commission's international technical assistance programs involving competition and consumer protection policy. This area is managed by Jim Hamill, who is Senior Counsel for International Affairs. In the current fiscal year, the Commission will receive roughly $1.5 million in funds provided by the U.S. Agency for International Development—the largest sum the agency ever has received in a single year for technical assistance. With these funds the FTC will present short-term seminars in Africa, Asia, Eurasia, and Latin America and will support the FTC's participation in long-term, resident advisor programs with the competition agencies of Indonesia and South Africa.

A second priority is to contribute to a more complete understanding of the full array of institutions that affect competition policy.

My own role is mainly to focus on policy-related issues in each of these four areas. I am blessed to work with a management team that is second to none and is headed by John Graubert, the Principal Deputy General Counsel. John and the other senior managers do a masterful job of supervising the operations of OGC's four main practice areas. This gives me considerable freedom to work on policy-related features of projects within the General Counsel's office and on other matters of interest to the Commission.

ANTITRUST SOURCE: You started in this position thirty months ago. What have been your top priorities, have you accomplished them, and what are your priorities going forward?

BILL KOVACIC: One major priority is to continue to develop the FTC's distinctive capabilities as both a competition authority and a consumer protection agency. One of the most impressive developments in my professional lifetime is the progress the Commission has made towards realizing the potential inherent in the unique institutional design contained in the mandate that Congress gave the FTC upon its creation nearly ninety years ago. A key area in which the Commission can and must justify its distinctive institutional existence is the administrative adjudication of competition and consumer protection matters. Administrative adjudication today commands a prominent place on the FTC's policy agenda. In the past twelve months the FTC has issued decisions in two cases, *PolyGram* and *Schering*, and a number of other matters—including *Unocal*, *Rambus*, *Chicago Bridge & Iron*, *Brown & Toland*, and *South Carolina Board of Dentistry*—are in various stages of the administrative process. As a group, these matters are an important measure of the Commission's capacity to use administrative elaboration to improve the quality of antitrust jurisprudence. OGC has advised the Commission extensively on administrative adjucation matters and expects to work closely with the Commission on other matters that have been or will be presented for decision by the Commission.

A second priority is to contribute to a more complete understanding of the full array of institutions that affect competition policy. There is a tendency sometimes to equate "competition" or "antitrust" with the prosecution of cases. More properly considered, the enforcement of antitrust laws is a subset of a much larger category of activity that could be called "competition policy." For a competition agency like the FTC, making competition policy involves not only the prosecution of cases, but also demands substantial investments in non-litigation activities, such as issuing reports, performing empirical studies, urging other government bodies to undertake pro-competition reforms, and cooperating with other competition agencies at home and abroad to

improve the institutional framework of competition policy. To an ever greater extent, the success of the FTC and other competition authorities will require devoting significant resources to non-litigation initiatives. One dimension of the necessary investment in developing non-litigation policy tools includes attaining greater appreciation for how other government bodies that we do not ordinarily mention in discussions of competition policy affect the competitive process. These would include, for example, the Patent and Trademark Office and the Food and Drug Administration. A major objective for the General Counsel's Office is to assist the Commission in promoting greater awareness of the role that these and other government institutions play in shaping the competitive environment and in drawing attention to possible reforms that would improve competition policy by promoting adjustments in how such institutions operate. OGC played a central part in preparing recent FTC contributions on this front, including the Commission's recently published study on the relationship between competition and patent policy, *To Promote Innovation*, and the Commission's empirical study of the introduction of generic equivalents to branded drugs, *Generic Drug Entry Prior to Patent Expiration*. Through its legal counsel, litigation, policy studies, and international affairs activities, OGC spends a substantial amount of time working with other government agencies and observing how their decisions influence competition policy. This gives us a unique vantage point within the Commission and a special ability to assist in developing a fuller, more accurate understanding of how competition policy is formed and might be improved by the prosecution of cases and the application of non-litigation tools, alike.

A third priority, another aspect of developing the FTC's unique institutional capabilities, is to promote the realization of the benefits of the Commission's distinctive combination of functions—to further integrate the application of the agency's competition and consumer protection authority and pursue projects that exploit synergies between the two missions. One dimension of realizing the Commission's destiny as an institution consists of realizing that its competition and consumer protection mandates are not linked simply as a matter of historical accident, but instead provide opportunities to realize policy benefits that would be unattainable if the Commission had a single mandate, but not both. The understanding of links between competition and consumer protection policy has an increasingly major international component, and OGC has been active in the Commission's recent efforts to explore these links with foreign governments that have institutional configurations and a mix of competition and consumer protection responsibilities similar to the FTC's. By my count, approximately thirty foreign competition authorities also have a major consumer protection portfolio. OGC is participating in the Commission's initiatives to explore ways to work with these agencies to explore how better understanding of the complementarities of or synergies between competition and consumer protection policy can help agencies assigned this combination of functions to improve policy making. I think that is part of the larger theme of identifying unique institutional strengths of the Agency.

A fourth priority is for OGC to assist the Commission in further developing our relationships and cooperation at home and abroad with other government institutions having competition or consumer protection duties, or both. A significant change in the world since 1983, when I ended my first tour at the FTC, is the growing multiplicity of institutions that make competition or consumer protection policy in the United States and abroad. This multiplicity often is seen as a difficulty to be managed, yet it also is an opportunity to be grasped. The multiplicity has created an unprecedented opportunity for comparative study to identify how the FTC and, more generally, the U.S. system of competition and consumer protection policy, may have lagged behind some jurisdictions in adopting best practices. A second, related possibility is to look for ways in which cooperative relationships among the FTC and other government institutions—with domestic govern-

ment agencies, such as state competition and consumer protection authorities, and with foreign government agencies—can improve the quality of competition and consumer protection policy. From the work that OGC does together with the FTC's other bureaus in dealing with other government bodies in the United States and overseas, it is apparent that building more effective cooperation with these institutions is essential to the performance of the FTC's responsibilities. For example, the FTC today faces the same challenges in consumer protection law enforcement against serious cross-border fraud that the Department of Justice faced years ago in dealing with international cartels. Tim Muris has emphasized the need to develop international mechanisms and networks that will permit the Commission to deal with wrongdoers who increasingly operate globally, are highly adaptable, and are adroit in devising countermeasures to deflect enforcement measures pursued strictly on a national scale. Assisting the Commission in building new domestic and foreign intergovernmental relationships to combat serious fraud is a major OGC goal.

The final OGC priority I will mention is to help the FTC improve its human and administrative infrastructure. OGC has a number of projects underway to improve the quality of life for FTC employees and, among other aims, to deal with the fact that a significant number of our most valued employees are entering the zone in which they could retire if they choose. We are seeking ways to sustain and enhance our human capital and preserve the technical knowledge and institutional know-how that our senior employees have developed—in some cases, in the course of three decades of service to the FTC. The Commission's administrative infrastructure demands similar attention. Let me give one example. The development of e-mail and expanded reliance on electronic records present difficult recordkeeping challenges that did not exist twenty years ago for the agency. In the era of paper transactions and paper correspondence, one could not generate records at the rate that electronic media and networks permit. This confronts OGC and the Commission with the need to change dramatically how the agency maintains records and to impose greater discipline on how the agency collects and transmits information. These infrastructure issues may not be as glamorous as other policy matters I have mentioned, but their successful resolution is absolutely indispensable to putting the Agency on a footing to operate successfully in the future. An institution ignores or slights them at its peril.

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ANTITRUST SOURCE: In a speech in December 2003, you said there was historically too little willingness in government to embrace sound programs initiated by prior administrations. Are there any such programs from the prior administration that the Commission is currently pursuing?

BILL KOVACIC: In my view, the most crucial respect in which Bob Pitofsky took the FTC to a higher level during his chairmanship in the 1990s was his recognition of the importance of having the Commission make substantial investments in attaining intellectual leadership—by undertaking research and policy analysis projects to support its competition and consumer protection missions. Bob Pitofsky's first major initiative after becoming FTC Chairman in April 1995 was to launch the Commission's hearings on innovation and the global market place. That was a brilliant and highly influential measure, both for its immediate contributions to policy making and for its enhancement of the institution. In choosing this path, Bob recognized that the capability—indeed, responsibility—to use non-litigation policy instruments to advance the state of the art of understanding about difficult competition and consumer protection issues is uniquely within the charter that Congress has given the FTC. You can liken the Commission to a ship whose engine room has a number of different boilers. One of the FTC's boilers is administrative adjudication, another boiler is the gathering of data and issuance of reports, another boiler is the capacity to conduct hear-

ings and workshops, still another boiler is the synergy of consumer protection and competition functions, and others consist of the litigation of cases in the federal courts. To make the vessel perform at its peak, you need to light all of the boilers and accurately chart a course toward superior policy destinations. Bob understood that expanding the research and analysis component of the FTC's work was essential to increase speed and improve navigation. Tim Muris has built upon this foundation, and future generations of FTC leadership will inherit well-tested approaches for exploiting the Commission's special non-litigation capabilities. The centrality of hearings, workshops, reports, studies, and advocacy initiatives on the Commission's current agenda builds upon Bob Pitofsky's legacy and embraces his realization that the Commission can make extraordinary contributions by using a unique portfolio of policy instruments that includes considerably more than the prosecution of cases.

A second, closely related element of Bob Pitofsky's legacy, and an exemplar for how the Commission has continued to operate since Tim Muris's arrival, is the realization that it is not enough simply to use all of the agency's policy instruments. It is important in approaching any single project or undertaking to develop an integrated approach to policy making—to encourage the Commission and its professional staff to treat individual competition or consumer protection problems with an awareness of the full range of policy instruments at the Commission's disposal. For example, to solve perceived competitive problems in the pharmaceutical sector, you might pursue a strategy that addresses the problems from several directions. The Commission can, and did, bring cases that challenge certain patent settlements. The Commission can do empirical research, and it did conduct a 6(B) study, initiated in 2000 and published in 2002 as *Generic Drug Study Prior to Patent Expiration*, that examined the introduction of generic equivalents. The Commission can, and did, hold hearings that gather information about the role of intellectual property and competition policy. The point is that you have to have a strategy that from the beginning not only identifies the problem in a general way, but also recognizes there are a variety of policy tools that can be brought to bear on diagnosing and solving the problem. The Commission made enormous progress during Bob Pitofsky's tenure in realizing that good policy making requires the FTC to make sustained, conscious efforts to devise strategies that take advantage of the unique ensemble of tools within its control.

This is not an exhaustive list, but I want to mention one other of Bob Pitofsky's contributions as Chairman that continues to influence the Commission's work under Tim Muris. In examining initiatives during my time as General Counsel, it is extremely impressive to see how much one's predecessors shape the FTC's current agenda, and determine its future success, by their willingness to make investments—commitments to new litigation and non-litigation projects—that promise to increase the agency's effectiveness and are likely to bear fruit after incumbent managers have left the agency. Bob Pitofsky demonstrated how, in order for the FTC to prosper in the long term, incumbent leadership must be willing to invest in projects that will yield results well after one's own tenure ends. As Tim Muris underscored in his remarks at the Antitrust Section's Fall Forum last November, the forward-looking ethic has been extremely important to the Commission as I have seen it in the past two and one-half years.

ANTITRUST SOURCE: In the same speech that I alluded to earlier, you said it was very important for federal agencies to promote policy improvements by doing *ex post* assessments of outcomes, and you pointed to both internal and external audits as vehicles for conducting those kinds of assessments. Do you envision commissioning internal or external audits of FTC activities, and if so, in what areas?

BILL KOVACIC: One initiative consists of an extensive study the Commission is conducting of the consequences of mergers in the petroleum industry. Scheduled to be published later in 2004, the oil merger study will provide the FTC's assessment of the competitive consequences of mergers in recent years involving petroleum companies. Another step in this direction is the recent publication by the FTC and the Department of Justice of data concerning merger challenges in fiscal years 1999–2003. The information includes HHI data and some qualitative information that, taken together, illuminate considerations that affected the decision to prosecute. The oil merger study and the release of the merger data set are two examples of measures that involve the development of a process of *ex post* assessment. I believe it is important for the Commission to commit itself to undertaking the routine practice of performing an internal examination of the competitive outcomes of specific enforcement matters and to engage external audiences in the examination of the effects of what the Commission has done. Both of the specific matters I mentioned, the oil merger study and the merger enforcement data set, will stimulate a larger discussion in the competition policy community about merger policy.

ANTITRUST SOURCE: Is there any particular plan to call for an external audit of any of the Commission's activities?

BILL KOVACIC: None that I can point to at the moment. I would like to see the FTC move toward adopting a systematic process of not only having the agency's professional staff routinely do internal assessments of enforcement effects, but also to engage outsiders in the examination and discussion of the Commission's work. Two models for this type of evaluation by outsiders go back to my first time at the Commission from 1979 to 1983. The first is a collection of studies of vertical restraints cases published under the title of Federal Trade Commission, *Impact Evaluations of Federal Trade Commission Vertical Restraints Cases* (Ronald N. Lafferty, Robert H. Lande & John B. Kirkwood eds., 1984). The second was a study of the effects of the consent decree that the FTC accepted in 1975 to resolve its claims of illegal monopolization by Xerox in the market for plain paper photocopiers. This study was published as Timothy Bresnahan, *Post-Entry Competition in the Plain Paper Copier Market*, 75 AM. ECON. REV. 15 (1985). The studies of the vertical restraints cases and the *Xerox* consent decree all were done by academic economists who were given a very modest fee to study the individual cases and write reports on their findings. The inquiries were very limited in their scope, as they did not involve the collection of substantial amounts of data. Nonetheless, they did provide very useful insights on the outcomes of the FTC's cases. In addition to the internal assessments that the Commission has done, I would like to see the Commission find a way to revive some variant of analysis by outsiders and the publication of their studies.

ANTITRUST SOURCE: Let's change topics and follow up on something you said earlier with regard to administrative litigation. Certainly administrative litigation is an avenue that is uniquely available to the Federal Trade Commission to pursue competition enforcement, but why is there such an emphasis on it now as opposed to litigation in the federal courts? Can't the Federal Trade Commission pursue its policy objectives equally well in the federal courts, and why are there no cases being prosecuted in the competition area in federal courts?

BILL KOVACIC: One explanation simply deals with the reduced flow of work concerning mergers. There has been a significant reduction in the number of merger filings with the federal agencies

owing to the general reduction in deal making in the past two years. There have been fewer occasions for the Commission to use its 13(b) authority to go to court and challenge mergers. The Commission has authorized the staff to seek injunctions in federal court to block a number of matters, but only one of these—the challenge to the glassware merger in *Libbey*—has resulted in a litigated decision in a 13(b) case since I became General Counsel in June 2001. The amount of federal court litigation in the competition mission depends heavily on the intensity and nature of deal making at any one time. As a general matter, the more robust the transactional market, the larger the number of events that provide the points of friction that tend to generate federal court litigation for the FTC. Recent news accounts about acquisition trends and comments by practitioners with active merger practices have suggested that we might see a general rise in deal making in the coming months and an increase in ambitious transactions. If such a trend emerges, the FTC might be in federal court more frequently. Notwithstanding the decline in federal court litigation, the FTC has pursued three administrative cases in the past thirty months involving consummated mergers: *MSC.Software*, *Chicago Bridge & Iron*, and *Aspen Technology*.

ANTITRUST SOURCE: Does the Commission currently have any competition cases pending in the federal courts?

BILL KOVACIC: The only competition case in federal court at the moment is the appeal to the D.C. Circuit from the Commission's decision in *PolyGram*.

ANTITRUST SOURCE: In light of that, is there any situation that you can envision in which the Commission would pursue a non-merger case in the federal courts in the first instance?

BILL KOVACIC: It is possible, though such matters have been exceptionally rare. Going back over the past decade or so, the only cases that come to mind in which the FTC used its 13(b) authority to go directly to federal court in non-merger matters are *Mylan Laboratories* and *Abbott Laboratories*. Another I might add to the list is *Hearst Trust*, which sought disgorgement arising from a merger and was resolved by settlement within a few months after I returned to the FTC in 2001. The best indication of the Commission's intentions is the policy statement issued in 2003 dealing with disgorgement and monetary recoveries in competition cases. Consistent with that statement, if the Commission saw a matter that involved a clear violation of antitrust law, a reasonable means of calculating the remedial payment, and a strong possibility that other means of recovery and other means of recourse would not protect injured parties, I easily could imagine the Commission would bring a case. I have no specific examples in mind, but, given the historical rate since 1990 of what is basically one matter every four years, I would not expect there would be a lot of them.

ANTITRUST SOURCE: Let me ask you one follow-up there. Will the Commission urge Congress or the courts to allow a private right of action under the FTC Act?

BILL KOVACIC: I am aware of no discussions along those lines. A factor that would weigh against such a measure is the elastic property that Congress built into Section 5 and the power Congress gave the FTC to use Section 5 to establish competition or consumer protection principles of liability that are not embodied in existing judicial interpretations of other statutes. The deliberately evolutionary process embodied in Section 5 is best suited to an administrative process, by which the Commission can draw upon the complete mix of analytical tools discussed earlier to denom-

inate specific practices as contrary to Section 5. The list of competition cases in which the Commission has relied on distinct Section 5 authority to establish principles outside the boundaries of Clayton Act or Sherman Act jurisprudence is fairly short. This is principally because the courts have interpreted the Clayton Act and the Sherman Act in a more expansive and adaptive manner than Congress expected in 1914 when it passed the Federal Trade Commission Act. To the extent that Congress conceived Section 5 as a flexible instrument for extending the zone of competition policy liability to address practices beyond the reach of the other antitrust statutes, Congress also perceived—correctly, I believe—that the process of jurisprudential elaboration and extension was best entrusted exclusively to the Commission's administrative process and not through routine litigation before federal or state courts.

ANTITRUST SOURCE: What is the General Counsel's Office's role in administrative litigation? Earlier you said it was advisory, but what exactly do you do?

BILL KOVACIC: In the pre-complaint period leading up to the Commission's decision to prosecute, OGC gives the Commission our views about the strengths and weaknesses of specific proposed enforcement actions. We provide the same guidance to the Bureau of Competition and the Bureau of Consumer Protection in the pre-complaint period. In this capacity, for both the Commission and the operating bureaus, we offer an independent opinion concerning proposed enforcement actions. Once the FTC issues an administrative complaint, we stand on the adjudication side of the administrative litigation fence. In the post-complaint period, our most important contributions consist of advising the Commission on the drafting of opinions and in defending the agency in appeals from Commission decisions.

Chairman Muris has a special concern about the modern expansion of judicially developed antitrust immunity doctrines.

ANTITRUST SOURCE: Let's talk for a moment about amicus briefs. What causes the Commission to want to file an amicus brief in a particular case, and how does it come up with the position that it wants to take?

BILL KOVACIC: One major consideration is the preferences of the Commissioners about the kinds of matters in which FTC amicus participation might best contribute to the improvement of doctrine and policy. As articulated in a number of his speeches, Chairman Muris has a special concern about the modern expansion of judicially developed antitrust immunity doctrines. In recent years, several FTC competition policy amicus filings have dealt with the bounds of immunity established in the state action and *Noerr* doctrines. In a closely related area of activity, the FTC has filed briefs to discourage state government instrumentalities from adopting measures that unnecessarily restrict opportunities for competition. One example is the amicus brief that the FTC and Justice Department jointly filed, without success, to persuade the Georgia Supreme Court to reject an interpretation of the definition of the unauthorized practice of law that would require the presence of an attorney at real estate closings.

A second important factor is the flow of proposals that come to our attention. We rely mainly on two sources of information to identify promising amicus candidates. First, we have a number of internal "case watchers" who examine advance sheets and news accounts to spot matters making their way through the district courts and through the courts of appeals. The second source of information consists of recommendations by outsiders, including those who are in engaged in pending litigation matters. External observers are particularly important sources of information for less noticed cases or matters developing in the trial courts.

ANTITRUST SOURCE: How does the Commission figure out what position it wants to take in an amicus brief? Is a vote or a straw poll taken? And who reviews the briefs before they are filed?

BILL KOVACIC: In competition matters, OGC usually makes an initial identification of potential amicus candidates, in cooperation with the Bureau of Competition and the Office of Policy Planning (OPP). We typically consult the Commissioners concerning amicus possibilities and, working with the Bureau of Competition and OPP, we often will take the lead role in drafting a memo that discusses the issues and the Commission's possible contribution as amicus. Based on the response to that memo, OGC usually drafts the text of the brief. We obtain Commission approval before we file an amicus brief. Most of our amicus matters also involve close cooperation with the Department of Justice. Matters involving amicus appearances before the court of appeals typically involve a joint appearance by the FTC and the Department.

The U.S. competition policy system faces two fundamental challenges: one from private behavior, and the other from publicly imposed restrictions on competition.

ANTITRUST SOURCE: Then do the briefs as filed represent the official position of the Federal Trade Commission?

BILL KOVACIC: That's right.

ANTITRUST SOURCE: Have you seen any evidence that courts are influenced positively by amicus briefs filed by the Commission?

BILL KOVACIC: There have been instances in which it is apparent that the court has embraced a specific proposed analytical approach. Perhaps the clearest example in my experience in OGC is the decision issued in the Southern District of New York in 2001 in the *Buspirone* case. In *Buspirone*, the district court directly drew upon the framework that the FTC had recommended in its amicus brief. There also have been instances in which the court indicates that our views were unpersuasive. In the unauthorized practice of law (UPL) matter I mentioned earlier, the Supreme Court of Georgia thanked the FTC and the Justice Department for their views and proceeded to dismiss the agencies' recommendations. The Georgia UPL matter and *Buspirone* are instances in which the court provided an unambiguous signal about its assessment of our views. Probably more often than not, the reaction is not so transparent, and we are left to speculate about how our suggestions influenced the result.

ANTITRUST SOURCE: Let's turn to the state action doctrine which you mentioned earlier. How would you describe the Commission's agenda in the area of *Parker v. Brown* state action issues?

BILL KOVACIC: The U.S. competition policy system faces two fundamental challenges: one from private behavior, and the other from publicly imposed restrictions on competition. The paradox is that the more effectively competition agencies attack private behavior, the more they create an inducement for private parties to solicit public regulations or statutes that authorize measures—such as concerted action by competitors to set prices, to establish conditions of entry, or to specify other elements of trade—that antitrust doctrine otherwise would forbid if undertaken purely by private action. A competition policy system that takes publicly imposed restrictions less seriously than it addresses private restrictions is akin to an army that devotes the mass of its arms to a single front to wage a war that has two equally significant fronts. Upon observing a decidedly asymmetrical deployment of resources by a competition system, private parties seeking to restrict competition

can prevail simply by overrunning the weakly defended second front. To put it another way, focusing all of a competition policy system's attention upon attacking purely private behavior can become the equivalent of building and reinforcing the Maginot Line. A significant number of private parties will learn not to challenge the Maginot Line and instead will devote more effort to circumventing the fixed fortifications—in this case, by seeking publicly imposed shelter from antitrust commands.

The state action doctrine, as first recognized in *Parker v. Brown* and elaborated in subsequent judicial decisions, is uniquely American in the breadth of the dispensation it creates from antitrust rules. Many other jurisdictions, including the European Union, do not so readily or expansively allow the decisions of subordinate political units—such as states and municipalities—to curb the operation of competition law as does the United States. Chairman Muris has stressed the concern that expanded notions of *Parker* immunity will dilute the success that U.S. competition agencies have achieved over the past century in dealing with purely private behavior and will invite ever greater efforts by private actors to employ public instrumentalities to achieve the anticompetitive ends that government cases attacking private action routinely oppose. I would say the basic, minimum objective is simply containment—to make sure that courts do not expand *Parker* immunity beyond its existing boundaries. This minimum aim is not the FTC's only goal. There is a desire to retrench various frontiers where *Parker* already has become inappropriately tolerant of public intervention to restrict competition. So the minimal agenda is containment; the more ambitious objective is to push back.

ANTITRUST SOURCE: Would you say that you think courts are mostly getting it wrong as they apply the "clear articulation" and "active supervision" requirements of *Parker v. Brown*?

BILL KOVACIC: As the FTC's State Action Task Force observed in a report that was issued in September 2003, there are a disturbing number of instances in which both of *Midcal*'s requirements—that the legislature clearly articulate its aim to curb competition, and that the state actively supervise the operation of the regime to suppress rivalry—are not applied with adequate rigor. On the whole, we are not satisfied with the existing equilibrium of jurisprudence with respect to the application of either of the *Midcal* conditions.

ANTITRUST SOURCE: Does the Commission's amicus brief in the *Brentwood Academy* case represent an extension of its findings in the State Action Task Force report of September?

BILL KOVACIC: That is a fair characterization. The concern addressed in the Commission's *Brentwood* brief is that the government intervention taken and pointed to as the basis for Sherman Act immunity lacked the clear statement of intent that the state must make to displace competition. The goal on the clear articulation issue is to promote acceptance of the principle that allows the state to suppress rivalry pursuant only to a declaration that unmistakably articulates its intent to displace competition. Requiring the relevant decision maker to provide such an unambiguous declaration at least has the potential to alert adversely affected parties to the consequences of the proposed government intervention and to inspire debate about the wisdom of anticompetitive measures.

ANTITRUST SOURCE: I have the same question about the *Noerr-Pennington* doctrine that I asked you about state action. How would you describe the Commission's agenda as it relates to *Noerr-Pennington* immunity?

BILL KOVACIC: It is very similar to what the FTC seeks to accomplish concerning state action immunity. The first element of the agenda is to ensure that the bounds of what courts deem to be immune petitioning do not expand. The second, more ambitious goal is to try to push back on what some decisions seem to contemplate as being acceptable petitioning. As with state action, the FTC's concern with *Noerr* immunity is that the easier it is for public action to displace antitrust rules, the more effort private parties will devote to soliciting public bodies to do so. Again, the hard-won benefits gained from an active and successful campaign against private misconduct will be dissipated because the public avenue to achieve the same objectives is too easily traveled.

ANTITRUST SOURCE: Would you describe the *Unocal* decision as a set back to the Commission's actions to curb expansion of *Noerr-Pennington* immunity?

BILL KOVACIC: Because the General Counsel's Office is on the adjudicative side of the FTC's administrative process, I have to refrain from saying anything that might be interpreted as discussing the merits of the *Unocal* case or characterizing the substantive significance of developments in the ongoing litigation.

ANTITRUST SOURCE: Let's talk about the Commission's IP Report that recently came out. How has that report been received both by the intellectual property community and the antitrust bar?

BILL KOVACIC: Even though some observers have expressed reservations of different intensity about specific policy recommendations, the general reaction in both the domestic IP bar and the antitrust bar is that the FTC's report was exceptionally well done in both the care with which it examined both the competition policy and the intellectual property institutions at issue and in the evenhandedness with which it presented the arguments for and against its recommendations. Even those within the intellectual property community who most ardently have disputed the report's recommendations generally recognize that this was a thoroughly professional, thoughtful, and pathbreaking contribution.

A second reaction I distill from comments so far is that the FTC's report is having the desired effect, within the U.S. IP and competition policy communities, of stimulating a debate and a discussion about the appropriate design of the rights-granting process.

A third consequence is that the FTC's report and the proceedings on which it is based have elicited considerable interest within the IP and competition policy communities overseas. Three weeks before the issuance of report, I attended a program that featured presentations by a large number of government officials from patent offices in Europe. Speaker after speaker referred to the proceedings that led up to the report and identified those proceedings as focusing needed attention upon the relationship between the intellectual property system and competition policy. The participants repeatedly praised the proceedings for pointing out how rights-granting organizations should pay closer attention to the competition policy consequences of what they do. And this was before the FTC's report appeared. Judging from reaction in the past two months to the report itself, I am convinced that FTC's contribution will change the way that many foreign officials and practitioners in the IP and competition policy communities think about the intersection of their fields. The FTC's report is a powerful illustration of how investments in first-rate research and analysis can exert a major impact on policy at home and abroad.

ANTITRUST SOURCE: What have been the most significant criticisms of the report that you have heard?

BILL KOVACIC: Two stand out. One line of criticism takes issue with the FTC's recommendation that Congress change the standard of review used by courts in considering the decisions of rights-granting authorities. A second criticism disputes the FTC's view that competition policy considerations ought in some instances to affect how the Patent and Trademark Office (PTO) reviews applications. Both FTC recommendations have stimulated, to put it politely, intense debate. It does not surprise us that these recommendations are the subject of criticism, as we learned in the hearings that the issues in question are particularly sensitive. Yet we think that these subjects are, at a minimum, vital subjects for discussion. Despite disagreements with some of the FTC's recommendations, there appears to be general agreement within the IP community that improvements in the rights-granting process would have great benefits for innovation and the U.S. intellectual property system. This view is evident in the PTO's own well considered strategic plan. So even if there is disagreement with specific recommendations the FTC has made, we see considerable agreement with our larger theme that policy makers must upgrade the rights-granting process and must recognize interdependencies between what competition authorities and antitrust courts do and their perception of the quality of the rights-granting process.

ANTITRUST SOURCE: You noted that some criticisms have been voiced about the recommendations on the standard of review for granted patents. The report calls for lowering the legal standard for patent validity challenges from "clear and convincing evidence" to a "preponderance of the evidence." As you know, already nearly 50 percent of litigated patents are found invalid; do you think that it would be a good thing or a bad thing for that number to increase further and why?

BILL KOVACIC: The correct policy choice depends heavily upon the quality and efficacy of the rights-granting process. Depending on the quality of that process, we can go down one of two paths concerning the standard of review. First, if the rights-granting process were made more robust, if it were more demanding in the way it examined patent applications, then the existing, comparatively deferential standard of review would be appropriate. The status quo standard would be defensible if the rights-granting process operated in practice with the same rigor that it is assumed to operate in theory. Alternatively, if the rights-granting process is not made more robust, so that a higher percentage of patents issued by the PTO would be "good patents" in the sense that they truly would satisfy the standards Congress and the courts have established for patentability, then it makes sense to adopt a less deferential standard of review.

ANTITRUST SOURCE: Let's talk briefly about the Slotting Allowances Report that came out in November 2003. The report has been praised for its intellectual honesty, but comes to no conclusive positions about whether slotting allowances are legal or illegal. What further steps will the Commission take in this area, and what's the role of the General Counsel's office?

BILL KOVACIC: OGC's policy studies group prepared the survey and wrote the study, which was issued as a staff report, under Susan DeSanti's supervision. The Commission's next steps depend a great deal on two things. One is the guidance we receive from Congress, particularly because this was a study Congress requested. The second is how the FTC study's findings about the nature and use of slotting allowances stimulate further thinking about slotting and promotional activities

and inspire the refinement of hypotheses about the competitive effects of specific tactics. One noteworthy respect in which I believe the report improves the state of the art is its finding that the role of slotting is more ambiguous than the previous commentary on slotting suggested. The FTC's study was based on the survey of a relatively small sample of food manufacturers and retailers, but the survey results were comprehensive enough to make clear that there is tremendous variation in how extensively different manufacturers and retailers choose to rely upon slotting as a promotional method. The variety is striking both across product categories and across individual retailers. The FTC study underscores that slotting is simply one tool that a retailer or a manufacturer can agree to use to elicit a given level of promotional effort from a retailer, with other means being a direct payment of promotional allowances or an increase in advertising (either with displays inside a store or with advertising directed to consumers before they enter the store) that alerts consumers to the availability of a product. Some readers of the study may feel a sense of frustration that the study did not yield clear-cut policy implications that point to the prosecution of specific cases. Yet one of the FTC study's most important contributions is its caution that the phenomenon of slotting is a good deal more complex, and competitively ambiguous, than some observers had envisioned before the study.

ANTITRUST SOURCE: Let's turn to merger enforcement. The FTC and DOJ recently released data on merger challenges from 1999 to 2001. What are antitrust practitioners to take away from that data and what are the highlights from your perspective?

BILL KOVACIC: The data will provide antitrust practitioners with a more accurate picture than they have obtained previously of the quantitative thresholds at which FTC and DOJ decisions to prosecute have taken place in the past. The data also will supply a more informative glimpse of how different qualitative variables affect merger enforcement decision. Perhaps more important from an institutional perspective, the release of the data is a further important step toward making the decision-making process more transparent. It is a first, systematic effort to make publicly available a body of information that identifies the HHI data associated with relatively recent merger challenges. From this information and further data that the FTC expects to release in the near future, practitioners are likely to gain a more illuminating glimpse of how the decision to prosecute actually is made. This should facilitate the larger aim of encouraging discussion about how the federal agencies review mergers and what additional types of information the agencies routinely should reveal to the competition policy community about how they exercise their law enforcement authority.

ANTITRUST SOURCE: The FTC's guidelines for merger investigations issued a year ago offer up the General Counsel's office as an arbitrator if second request negotiations with the staff have failed. Has that happened?

BILL KOVACIC: Twice in the past thirty months.

ANTITRUST SOURCE: How has that process worked?

BILL KOVACIC: I suppose it depends on your point of view. In both instances I denied the appeals. Without regard to the content of individual disputes, I can readily imagine that the merger parties generally will regard any internal review procedure with at least some skepticism. They are likely

to wonder whether the appeals process will vindicate their claims or, over the long run, discipline the second request process. The apprehension is that whoever the internal reviewer for the FTC happens to be, whether it's the General Counsel or some other unit in the Commission, there will be an inevitable tendency to endorse the positions advanced by the agency's staff.

One might look at experience with appeals at the FTC and find verification for that skeptical intuition: two appeals, two denials. This underestimates, I think, the potential and actual value of the appeals mechanism. Due to the confidentiality safeguards of the HSR process, I have to be cryptic in describing the two appeals considered at the FTC to date. Even so, without discussing the issues presented, I can identify an important positive consequence from the two appeals for the management of the second request process. Each appeal focused attention on potential difficulties with a practice common in the design of second requests, and each stimulated significant reflection and discussion within the FTC about second requests. As such, the two appeals supplied valuable feedback to the agency and, in a modest way, served to improve the second request process, even though the appeals were denied.

The renewed emphasis on coordinated effects has not caused the Commission . . . to walk away from unilateral effects theories or ignore them . . .

I think a step that my office has to take, with the consent of the parties in question, is to put more information about second request appeals in the public domain. Beyond describing the subject matter of the appeals themselves, fuller disclosure would help indicate how the appeals process can provide useful feedback to the FTC and improve its second request process.

ANTITRUST SOURCE: The Agency has stated a number of times a renewed emphasis on coordinated effects theories in the merger context. After two years, is that emphasis as strong as ever, and in your opinion, does the emphasis on coordinated effects come at the expense of a focus on unilateral effects?

BILL KOVACIC: Unilateral effects and coordinated effects are both important elements in merger analysis. The aim in merger analysis or any other substantive field of antitrust inquiry is to use analytical techniques that best illuminate the competitive phenomena at issue. The concern associated with the increased reliance in recent years on unilateral effects theory is that it could be used in cases better suited to evaluation with a coordinated effects approach. Over time, there might be a tendency to view unilateral effects theories as, in some sense, "easier" vehicles for establishing liability. This perception, in turn, might tempt enforcement officials to push facts artificially into a unilateral effects model or otherwise to apply unilateral effects theories in ways that undermine their analytical integrity. For this reason, it is important to make sure that the other principal tool in the merger analysis tool kit—coordinated effects—remained a viable instrument for diagnosing the competitive effects of mergers. Having effective and workable coordinated effects tools helps discourage strained applications of unilateral effects theories. The FTC's commitment to use coordinated effects analysis in appropriate circumstances remains strong, although the decline in the number of transactions presented for the agency's review means that there are fewer specific applications to point to. The renewed emphasis on coordinated effects has not caused the Commission or the professional staff to walk away from unilateral effects theories or ignore them, but instead to use the most suitable analytical tool and theory for a given set of facts.

ANTITRUST SOURCE: What is the role of General Counsel's office relating to international outreach, and what are its international objectives?

BILL KOVACIC: The most important OGC activity is the management, under Jim Hamill's supervi-

sion, of the FTC's participation in international technical assistance for competition policy and consumer protection. In the coming twelve months, the FTC will conduct an average of one significant overseas short-term mission per month. These missions usually consist of seminars of three to five days. Many of the seminars use a mix of lecture and role-playing exercises based on problems developed by the FTC or jointly between the FTC and the Justice Department. The FTC also is supporting two long-term resident advisor programs, one in cooperation with the DOJ in South Africa with the South African Competition Commission and the other carried out by the Commission with Indonesia's competition authority, the KPPU.

In the long-term and short-term missions, we seek to provide advice that builds the capability of emerging market competition authorities. Since the agencies undertook their first projects in the early 1990s with strong encouragement from Janet Steiger and Jim Rill, the technical assistance program of the FTC and the DOJ has been a relatively quiet but remarkably successful story. I have seen this firsthand. In the decade before returning to the FTC in June 2001, I spent a considerable amount of time working on technical assistance projects as an academic. I had many occasions to talk to the recipients of assistance that the U.S. antitrust agencies had provided. I often would pose the simple, direct question: "Have these projects been worthwhile for your competition agencies?" I knew them well enough and had developed enough trust that they did not feel an obligation to say "yes." In the course of many conversations, I never heard an adverse comment about the FTC or DOJ programs or the individual attorneys and economists who performed them. To the contrary, the uniform message from the recipients was that the U.S. agency programs consistently were among the best technical assistance initiatives undertaken by any donor or competition agency. This extraordinary contribution of the two agencies continues to this day, in a still more robust form.

The other role that OGC plays in international matters involves supporting the Bureau of Competition and the Bureau of Consumer Protection in individual enforcement matters and in the Commission's participation in bilateral arrangements with foreign governments and in various multilateral networks. We work extensively with Randy Tritell and Hugh Stevenson, who lead the international activities of the Bureau of Competition and Bureau of Consumer Protection, respectively. The focal point of our work with Randy and Hugh is supporting the Commission's participation in bilateral agreements with foreign competition and consumer protection authorities and the agency's participation in international bodies such as the Organization for Economic Cooperation and Development and the International Competition Network (ICN). Within ICN, attorneys in the General Counsel's Office have contributed extensively to working groups dealing with mergers and capacity building, as well as administrative groups dealing with funding ICN operations and developing the network's operational framework.

Finally, OGC attorneys have played an active part in the design of and advocacy for the FTC's cross-border fraud legislative recommendations to Congress.

ANTITRUST SOURCE: Commentators in the United States have criticized the proliferation of merger review programs adopted by many countries as imposing an excessive tax on international merger transactions, and as being out of step with antitrust norms established by U.S. agencies. What is your reaction to the PricewaterhouseCoopers study that was issued in June 2003 that showed that typical merger review costs for multijurisdictional mergers are relatively small, approximately a tenth of a percent of the transaction value, and that the U.S. merger review regime is by far the most costly?

BILL KOVACIC: In general, the PWC survey made a useful contribution to our understanding of the costs associated with multijurisdictional review of mergers. The PWC survey, like any survey that is so ambitious and difficult to execute, faces severe methodological challenges. There has an active debate about whether the PWC survey was comprehensive enough or whether the survey instrument posed the right questions to provide a confident basis for learning how large the international merger regulatory "tax" actually is. Some commentators, for example, have said that a more comprehensive, properly focused survey would have discovered the regulatory tax to be greater than PWC found it to be. Whatever its specific methodological limitations might be, the PWC study is laudable in a key respect: it demonstrates a proper appreciation for the importance of empirical work in advancing the state of the debate about multiplicity in merger review. So much discussion of the actual effects of multiplicity involving the review of cross-border mergers takes place on the basis of impressionism or highly idiosyncratic, anecdotal accounts of specific transactions. There is a need for a far more systematic examination of what these costs are. I applaud the International Bar Association, the American Bar Association, and PWC for undertaking this kind of effort. I hope that other institutions and individual researchers follow their lead and emphasize empirical study of multijurisdictional review.

What about the significance of the PWC findings for merger review in the United States? The PWC study makes a point that has resonated in other commentary at home and abroad about the U.S. process—that there is a lot of room for improvement. The multiplicity of competition policy systems today affords the U.S. agencies an unequaled opportunity for comparative study. The U.S. competition agencies ought to be involved in, and should be prodded by outsiders such as professional associations, academics, and other competition authorities to be involved in the kind of side-by-side comparative assessment that would help the FTC and the DOJ identify how to improve the process of merger review by, for example, reducing costs or increasing transparency. To the extent that the PWC study helps put a spotlight on the U.S. merger review process and motivates a continuing discussion inside and outside the U.S. antitrust agencies about how to improve the process, that is unambiguously a good thing.

ANTITRUST SOURCE: Has the PWC study done that in the FTC's case?

BILL KOVACIC: The U.S. inaugurated the modern version of premerger notification, and it has the most extensive experience with merger review. The fact of being the first of the modern premerger regimes and the most experienced imparts considerable momentum to the U.S. system. A long succession of federal antitrust officials has found that making adjustments to the U.S. system is no easy task, perhaps like trying to change the course of a large ship.

It is hard for me to isolate specific effects of the PWC study upon the FTC. Along with merger best practice recommendations developed by the ICN, the PWC study helps build awareness within the FTC about the need to improve its merger review process and to consider how enhanced cooperation with foreign competition authorities overseas might reduce merger review costs. ICN has been the main catalyst for this type of self-assessment, which at least has the effect of making agency leadership think more frequently about ways to improve the process.

I would identify another reason for the U.S. agencies to focus on, and eventually pursue, improvements. I do not think the U.S. agencies will have credibility in the international arena when they urge foreign authorities to improve their systems, for merger or non-merger matters, if the United States does not demonstrate observable progress towards reducing the cost of the HSR process. I do not have in mind a specific deadline by which such progress must become evident,

say, 6 months, 12 months, or 18 months. If progress does not become observable in what I evasively will call the medium term, the U.S. competition authorities will lose credibility when speaking on these issues internationally. I hope that one consequence of the ICN's work will be to exert continuing pressure by other competition agencies, by academics, the business community, and by the antitrust bar to adopt reforms. If these issues are not kept directly in the field of vision of the U.S. competition agencies, the perceived need to make adjustments will falter. It is simply too easy to put this matter on the back of, or off of, the stove.

ANTITRUST SOURCE: Finally, is there something that we should have asked you but we forgot to, something that would really put you on the spot and would be hard for you to answer?

BILL KOVACIC: You could ask whether anything I have been talking about is actually working, or is likely to work. You could look to the future and ask that we repeat this conversation five or ten years from now in order that you could ask me whether the developments that I have said to be worthwhile had staying power.

In reponse, I would try to think about these questions by comparing the FTC of today with the agency I joined as a staff attorney in the Bureau of Competition twenty-five years ago. I find the comparison to be encouraging and a source of hope for the future. In many respects, the FTC today is a far more capable institution than it was in 1979. In the intervening quarter-century, the FTC has paid increasing attention to questions of institutional design, both internal to the Commission and in the policy-making environment outside its walls. Visible signs of this progression include conscious, systematic efforts to develop and use the Commission's distinctive capabilities; a better understanding of the full constellation of institutions at home and abroad that play important roles in affecting competition and consumer protection policy; and an increasing awareness that the multiplicity of relevant institutions is not simply a source of problems to be managed, but also an opportunity for identifying and emulating superior practices from other institutions and for exploring cooperative relationships that allow the institutions collectively to accomplish beneficial ends that no single institution could attain on its own. I am reminded of a speech that the Director of the FTC's Bureau of Competition, Susan Creighton, gave last Fall to the National Association of Attorneys General during the group's meeting in Washington, D.C. A major theme of Susan's speech was that the FTC's relationship with the states necessarily is a partnership, and the focus of attention in that relationship ought to be in looking at areas where collectively we can achieve superior outcomes. In every structural upheaval that changes the order of established institutions, be it in government policy or in markets, there are difficulties and opportunities. Dwell on the difficulties, and the opportunities pass by.

Adapting to the new environment of multiple decision makers and institutional challenges does not come automatically or cheaply.

Similarly, in working with foreign jurisdictions, I have seen the FTC look for ways to improve its own operations by learning from the experiences of its foreign counterparts and to pursue stronger cooperation to confront misconduct, such as serious fraud, whose global character defies effective control by the activities of any single nation's enforcement authorities. This demonstrates a most encouraging awareness of how institutional design is a key determinant of substantive outcomes.

Adapting to the new environment of multiple decision makers and institutional challenges does not come automatically or cheaply. The necessary adaptation has two major implications for how the FTC allocates resources. First, the fact of the multiplicity means that the FTC over time has devoted, and will continue to expend, a growing amount of resources to intergovernmental coordination and cooperation with foreign and domestic agencies that have a major impact on competition or consumer protection policy.

Second, influence in the policy arena in an age of institutional multiplicity will come to agencies that make substantial investments in what Tim Muris has called policy research and development for competition and consumer protection. The necessary means for building consensus at home or abroad is persuasion, not compulsion. I do not expect to induce officials of foreign governments, state governments, or federal regulatory bodies, such as the PTO or FDA, to accept my views by berating them. They need not listen, and they are not obliged to follow. The means of influence today and in the future is the persuasion achieved by providing the higher quality idea, the more compelling analysis, or the stronger body of empirical data to test the validity of theoretical insights. The successful competition or consumer protection agency of the future is the agency that establishes intellectual leadership—a leadership that can be attained only through a significant, longstanding investment in policy analysis and research.

These considerations guide my own thinking about what the Federal Trade Commission must do to perform its mandate skillfully and to fulfill the promise of its original institutional design in the coming years. I see a number of signs that the requisite efforts will take place, going back to the choices Bob Pitofsky made in the 1990s to revitalize the Commission's research and analysis activities. In the past ten years, the Commission has increased its investment in activities that are a government agency's equivalent of durable capital assets. Investments of this type in any single fiscal year, or even series of fiscal years, do not necessarily generate benefits that the Commissioners who approved the investments can appropriate during their tenures. This was a central message of Tim Muris's presentation at the Fall Forum. The willingness to devote resources to sustain and build capability for the long term reflects a healthy awareness that such investments supply the essential foundation for successful institutions.

I'll finish by saying that the model of institutional improvement I have sketched above requires an understanding of the agency's past and a willingness to measure success by the long term. Along those lines, one area in which the General Counsel's Office has played a role is in assisting the agency in activities that recount the FTC's history and recognize contributions to the agency's development over time. By virtue of work it has done over decades, OGC is in some respects a de facto conservator of the agency's history, a repository of knowledge about how the institution has evolved. The examination of the FTC's past shows that today's good policies are the result of a lot of hard work that the agency and its people have done over the decades, and it promotes acceptance of an internal standard that makes future-oriented investments in institutional development an indispensable ingredient of policy choices today. ●