# With A Little Help From My Friends

A Fond Farewell From Ken Davidson (FTC 1978-2005)

There is some symmetry to my leaving this year. I came to the FTC during the deliberations of the National Commission for the Review of Competition Laws and Procedures and I am leaving during the deliberations of the Antitrust Modernization Commission.

Since February 1978 when I started at the FTC, I have made some of my best friends, received an exceptional education in law, business, economics, bureaucracy and life, done some of my best work here at the Commission and been allowed to explore opportunities outside the Commission.

I had the great good fortune to be hired by, then Bureau Director, Al Dougherty, who did so despite my confession that I knew nothing about antitrust. He was the fifth and final person within the Bureau who interviewed me. He asked about my then current job as Branch Chief in the Decisions Division at the EEOC. I said I was a GS 14 in charge of the twelve attorneys in my branch. The Branch drafted decisions for the Commissioners. I had reorganized the assignment of cases so each attorney would become an expert on one or more issues. That attorney would prepare for the Commission a policy statement together with a collection of the draft decisions. My intention was to begin to develop a manual that would define the basic terms of the Act. However, since Eleanor Holmes Norton had become Chairman, I was put in charge of a task force that was creating new procedures. The procedures were intended to eliminate rapidly the EEOC's backlog of 100,000 charges of discrimination. I told Al that I was interested in fighting discrimination, not eliminating backlogged charges. I did not want to get in the way of implementing Chairman Norton's approach, so I was looking for a new job.[1] I also told Al that one of my wife's classmates who worked in the Bureau of Competition had said that the FTC was giving away GS 15 positions so I gave him my resume. Al knew from that resume that I had taught law, written law review articles and published two law casebooks one on discrimination, the other on foreign taxation.

[1] I was also interviewing at the Treasury with Don Lubick, of the International Tax Counsel's office. I had mutual friends with Don, who had practiced in tax law in Buffalo, during the years I taught at the law school there. The members of his office were very enthusiastic about having me fill a vacancy in that office when I interviewed. They said that the casebook I had written, UNITED STATES TAXATION OF FOREIGN INCOME AND FOREIGN PERSONS, with Boris Bittker and Larry Ebb was the only secondary source that they consulted. In the end, I met one of Don's staff on a flight to Los Angeles who said I was not going to get an offer. They decided that they were not going to offer me a job because the office had a policy of starting each person as a GS 13 and over time that person would be promoted to the GS 14 position; the GS 14 would replace the person who had been the GS 15 attorney. The GS 15 was expected to find a new job. They were unwilling to offer me the GS 13 position on the grounds that I was over qualified.

I asked Al why he did not care about my lack of antitrust expertise. He said mildly that the Bureau of Competition had many people who knew lots about antitrust but not many who knew how to think about problems that had not been solved. So, having been carefully vetted (5 interviews) and full disclosure that I had no idea about what the Bureau did, I was hired as a GS 15 for a job that was yet to be determined.

Al and Chairman Mike Pertschuk had an agenda to examine or reexamine everything about antitrust (and consumer protection) law. Bob Reich and his crew in the Office of Policy Planning were to identify explicit and implicit commission policies and priorities. They would then present to the Commissioners policy reviews on specific subjects with recommendations to reaffirm those policies or to change the approach to the substantive law and then propose a timetable for implementing these changes.

Within the Bureau, Jack Kirkwood and his Planning Office were examining new theories of antitrust liability and developing criteria for targeting anticompetitive behavior. Bert Foer and his Special Projects office were developing an ambitious research agenda that attempted to explore the relationship between competition and the capital markets, tax law, business strategy, and political power. I, who had spent seven years as a law professor, but knew nothing of antitrust law, was put in charge of the Bureau's academic wise men: Antitrust Law Professors Larry Sullivan of Berkeley; Harvey Goldschmid of Columbia (now a SEC Commissioner); and Lou Schwartz of the University of Pennsylvania. I had taken Lou's course but had understood almost nothing, including why it was called Free Enterprise and Economic Organization.

My first assignment was appropriate to my background. I was to put together a team to develop a new approach to limiting conglomerate mergers. If ignorance is the beginning of learning, I had a good start on what turned out to be an exciting experience. It forced me to go back to the origins of antitrust laws in the United States, find out how they had developed in the Courts and Congress and how they had been influenced by academic theory.

I remember one early experience trying to understand the Efficient Market Hypothesis which was a pillar of the neoclassical economics that was, even then, beginning to dominate antitrust analysis. I said to Jack, "Isn't it easy to determine if the hypothesis is correct? I mean, if it were true, you could prove it by running a chronological study backwards and it should show that the value of a stock or all stocks at some time in the past was equal to the current value of the stock plus the amounts distributed as dividends." Jack paused before answering as he always does. Finally, after an uncomfortably long silence, he said to me, "The theory does not actually claim to value shares correctly. It claims only that it is the market value is the best estimate of the true value."

He explained to me the random walk studies and the Wall Street Journal experiments. The reporters at the Journal threw darts at the pages of the Journal listing stock prices and then compared these stocks with stock predictions of ten "experts" and then compared which stocks rose in value over the next quarter year. The dart had repeatedly done as

well or better than the experts. Allegedly, this showed that the market knew as well or better than any expert what the value of the shares were. I concluded this meant that the market represented a balance of ignorance rather than a mystical avenue to truth. Jack conceded that this was an equally fair characterization of the data and agreed that it lent some support to my suspicion that neither businesses nor consumers were likely to be always correct in their estimates of value.

I learned a lot from Jack, Bert and our academic wizards, but even more from my personal reading, the projects we undertook, the programs we presented, and the legislation and cases we worked on. It is difficult to believe the scope and variety of programs, people and books that I was exposed to in the Pertschuk years. We had a one day MBA program from Jules Schwartz Dean of the Boston University business school and a three day MBA program from Ralph Biggadike and Neil Borden of UVA's Darden School of Business. To this day, I remember that Jules Schwartz told us how corporate boards of directors choose among requests for capital funding of new projects when every project projects the exact same rate of return. And I remember the case study on the reasons the simple, inexpensive Polaroid camera was a flop in France. Apparantly, the French did not like the simplicity of the Polaroid. Like the astronauts in the Mercury program, they wanted some control of the mechanism. There was also a one day antitrust law course taught by Phil Areeda of Harvard. That was memorable because he persuaded me that antitrust *per se* rules did not exist and that all antitrust law ought to be decided under a single theory of competitive harm.

Most impressive was a series of seminars with the leading economic historians of the day including Al Chandler, Ellis Hawley and Louis Galambos on government–business relationships in the United States. Lessons from history were not merely to avoid repeating the same mistakes but also to understand the derivation of business structures and legal doctrine. Chandler was the most impressive, in his quiet way, but Louis Galambos made a point that still haunts me. Antitrust law traditionally is harder on loose collaborations of businesses than tight ones. I understand this means you can merge with another company, but it would be illegal to fix prices with that company if you did not merge. There are serious reasons for this result, having to do with efficiencies and risk sharing: still the generalization remains troubling to me.

The mini-MBA courses were videotaped and made available to the regional offices. The historians' seminars were transcribed and should be in the FTC library.

The Bureau of Economics complemented some of this enquiry with a massive conference on "The Economics of Firm Size, Market Concentration and Social Performance," and later a conference on "Strategy, Predation and Antitrust Analysis."

I also met alone or in small groups with Charles Lindblom (about his book, POLITICS AND MARKETS), Robert Engler about his book on oil companies, Jerry Kohlberg (founder of Kohlberg, Kavits & Roberts), George Ball (then of Lehman Brothers, formerly Undersecretary of State), Adam Wildavsky (about his book POLITICS OF THE BUDGETARY PROCESS), Michael Porter (of Harvard Business School, soon to be a superstar advisor on

business-related matters). There were many more whose names I forget. There were also many academics that we, in Special Projects, hired to do studies. Alan Feld on competitive effects of taxes; Wayne Boucher, on motives for mergers; and many more.

We were determined to preserve the work from this period. There was a blossoming of reports by and to the policy offices and numerous law review articles including those published by Neil Averitt, Jim Hurwitz, Bill Kovacic, Bob Lande, Randy Marks, and two articles I co-authored, one with Al Dougherty and another with Mike Pertschuk. Chairman Pertschuk's article was reprinted by two other publications. Mike insisted that I be listed as the coauthor because I wrote the first draft even though it was originally a speech written for him to give in the first person singular. Al listed me as coauthor because the article consisted of his testimony. I had directed and coordinated the writing of half a dozen people to produce the testimony.

In the beginning, because everything was new to me, there was a golden luster to people and places that made them larger than life. Audrey and David, Al's secretaries were feared guardians of the door to his office and encyclopedic repositories of where any document could be found that had been sent to the Director's office. Deputy Director Dan Schwartz – the then Darth Vader of the Bureau -- gave me some of the best and most humane advice I have been offered. He said, when my now 26 year old daughter, Alice was born, "don't let work keep you from being at home as she grows up. Childhood happens only once and you don't want to miss it." Sage advice. Perhaps I was never in danger of becoming a workaholic, but that advice has supported my own prejudices about work: get your work done early and well, so that you do not become the captive of deadlines imposed on you by others. Eating lunch across Pennsylvania Avenue at Barney's with Bob Reich is an experience I will long remember even though the building was torn down twenty years ago. Barney's was an FTC institution that named sandwiches for former commissioners and other FTC luminaries. It was also the last place I have been to in Washington that had much needed rolls of flypaper hanging from the ceiling.

People have been nice to me at the FTC. One example from the Dougherty era sticks in my mind. I was on the Third Floor for the first ten years I was at the Commission, but I had five or six different offices partly because my duties changed. In any case, at one time I had the office closest to the main elevators on the third floor quite close to the office of then Commissioner Pitofsky. It was his second of three tours at the Commission. It was a cold and dreary day when I heard a knock on my door. It was Bob Pitofsky. He noticed that I was sitting at my desk wearing a winter coat and hat with the flaps tied down to cover my ears. He said he had come in the room because he felt cold air coming from under the door and assumed that someone had left a window open. I assured him they were closed and I had complained about the temperature which was probably in the low 40s. What have they done, he asked? Nothing yet, I replied. We'll see about that, he said, and left. The next day it was warmer in my office.

I was impressed by the brain power of my colleagues in the headquarters building of the FTC. At 37, I was older than most of my colleagues. I had written two law school

casebooks and several law review articles and taught for seven years at the law school in Buffalo, but their law school education, experience on law reviews, graduate degrees, judicial clerkships, and prior work experience made the individuals mentioned above along with Chris White, Perry Johnson, Alan Palmer, Alan Proctor, John Seesel, Bobi Baruch, Jon Groner, Anne Schenof, Naomi Licker, Sandy Merber, Art Lerner, Toby Singer, Winnie Sullivan, Ben Sharp, Paul Davis, Pat Foster, Sandy Pfunder, Dave Frankel, Don Clark, John Hilke, Phil Nelson, Dick Duke, Ken Miller, Steve Salop, Mickey Kaus, Denny Drabble, Tom Stanton, Gail Shearer, Alden Abbott, Richard Craswell, Ed Morrison and Jacques Feuillan a formidable array of talent with whom to work.

Ordinary events became legendary. Sandy Merber and Art Lerner would play chess at lunch without a chess board. Ben Sharp, who spent only one day as Bureau Director (before the arrival of the 1980 election victors) etched a place in history when he walked from one room to another by way of the Third Floor ledge to rescue Bobi Baruch's purse from her locked office so she could drive home. Ken Miller's office was filled with half-finished paper coffee cups. Paul Davis figured out how to coopt the research budget of the Small Business Administration to fund Special Projects contracts. Bert Foer realized that if he acted fast enough at the end of each fiscal year he could get the Commission to reprogram funds for Special Projects research contracts. Each year the Commission allocated millions of dollars to analyzing Exxon documents, but because each year Exxon successfully resisted turning over the documents, those funds had to be reallocated to other Commission projects before the end of the year or returned to the Treasury.

You should understand the audacious undertaking that Mike Pertschuk, Al Dougherty, and Bob Reich were attempting to appreciate the value of such an idiosyncratic, iconoclastic group. Some people might say that they were asking the policy people at the FTC to think outside the box, but I think that would understate the scope of their objective. The policy staff was more like Lewis and Clark exploring the unknown territories of the United States for President Jefferson. They were exploring the unknown nature of the American economy. They were trying to map the contours in a way that permitted consideration of multiple social, economic and political, concerns. There were certainly pressing reasons for concern during the 1970s – The formation of OPEC and subsequent gasoline price rises, high interest rates and high unemployment. The stagflation of the United States compared unfavorably with the Japanese and the German economic miracles.

Concern about the political and social power of big businesses, concern about the impact of taxes and capital markets on competition, concern about the impact of competition on innovation or innovation on competition, concern about the effects of advertising on consumers and competitors, concern about the impact of business strategies on competition are all traditional antitrust issues. The legislative debates over the antitrust laws are filled with discussions about the dangers of excessive power of big business and the potential benefits of innovation that can be stimulated by competition.

The problem was that no one fully understood the relationship of good corporate governance and fair business practices to the production of healthy, environmentally sound, innovative, and inexpensive goods. Fully understood, it might be possible to develop competition and consumer protection theories to make the market work better. Make no mistake, Pertschuck, Dougherty and Reich believed in market solutions and in consumer choice and that Adam Smith had it right both when he said that a business promotes the public good by pursuing selfish interests and when he said that businesses will conspire against the public good if allowed to do so. They were clear-eyed, however, and could see that the invisible hand did not operate by itself, that government regulation and private agreements created enormous distortions that needed to be constrained in ways that enhanced rather than impeded the benefits of the market.

So they were willing to entertain, if just for a moment, proposing FOGCO (a federal oil and gas company) to compete with the apparent oligopoly of oil companies. They were willing to consider no fault monopoly theories. They were willing to consider, at least in theory, creating a national institution to promote innovation even if much of the evidence indicated such efforts generally led to lemon socialism (that is, propping up politically powerful, but economically unviable firms). They were willing to consider limiting television advertising to children that promoted tooth decay.

So perhaps it is not surprising that they were willing to hire me, because I had taught, among other things, corporations, federal taxation, administrative law, and employment discrimination and had written a law review article titled "Government Role in the Economy." At times, they thought I and the other eclectic policy people on the payroll and on contract might unravel the mysteries of the economy and propose solutions that would really benefit society.

I was authorized to organize people inside the agency and hire outside consultants to produce what became the Bureau's cap and spin-off legislative proposal. It was the epitome of market-based regulation. Firms were to be prohibited from simply growing by merger. If a firm larger than a given size sought to buy another large firm, the buying firm could do so provided it spun off assets equal in value to those it was buying. There would be no more growth for its own sake. The political and social concerns of the antitrust laws with corporate size and power would finally be made a direct part of the antitrust laws. Mike endorsed cap and spin-off in what became his/our speech/law review article. Jack Kirkwood spent months getting the other Commissioners to agree on the wording of a statement that endorsed the concept.

The Cap and Spin-off proposal was produced with great care. We consulted noted economists, political scientists and other academics, Wall Street investment bankers, and lawyers. It could not be, and was not, dismissed as a wacky idea. The Business Roundtable with the guidance of Ira Milstein rounded up droves of economists to argue that cap and spin-off was unneeded, based on misconceptions about the political and social power of big business, and just plain wrong. Joel Perwin and Hank Banta of the Senate Antitrust Subcommittee helped me to understand how the debate would proceed. I relied on University of Maryland economist Dennis Mueller to counter the evidence of

neoclassical stock market studies showing that mergers were efficient. He was the first to take on those studies without rejecting the assumption of the efficient market hypothesis. His stock market studies showing mergers did not improve corporate efficiency were later confirmed by the more diverse approaches used by Mike Scherer and David Ravenscraft.

Sometimes the economic debates on the value of mergers bordered on the bizarre. I was sent to hear economist Mike Jensen present his response to the discovery that acquiring firms lost money because they paid too much for the firms that they bought. Jensen argued that the excess the firms paid showed the total value of the transaction was positive and the overpayment was beneficial because it allowed the shareholders of the target firm to reallocate the excess cash flow of the acquiring firm to more efficient firms. In other words, the very smart executives who were to improve corporate performance by taking over inefficient firms were also improving the market by giving away their own money because they did not know how to invest it properly.

The Cap and Spin-off proposal may have been wrong or ill-timed. It was not enacted as law, but it put me on the map at the Commission. I was made Deputy Assistant Director for Special Projects. I have a theory about why I was given a title despite my reluctance. I wanted to continue my work not review or rewrite the work of others. Al told me that I needed a title so that he could assign me to give speeches and attend interagency conferences. I think that I was chosen so that Al and Mike could keep a little distance from the details of what I had to say. Bert Foer was already famous (notorious) for giving speeches on topics about which we knew practically nothing. Not only was Bert a quick study, he also had an uncanny ability to take the smallest number of facts and show how they could benefit by applying competition analysis. I, in contrast, was expected to know something about the merger debate and avoid embarrassing the Commission. Although all speeches by FTC staff begin with a disclaimer that the speech or remarks do not necessarily represent the views of the Commission, any Commissioner or even the Bureau, I think Bert and I were chosen to give these speeches because no one else was prepared or willing to face follow-up questions on these arcane subjects. Also, as Mike Pertschuk has detailed elsewhere, the FTC was under grave attack in Congress by many industries. Mike, Al, Bert, together with Mike Sohn, the General Counsel, Bill Baer, the Assistant General Counsel for Congressional Affairs, and Kathleen Sheeky, the head of the Office of Congressional Affairs were, for a period of time, consumed by efforts trying to save the agency from Congressional extinction.

I gave a lot of speeches on the ongoing “merger wave” and participated in a lot of conferences. I talked to industry sponsored meetings on mergers, the North American Securities Administrators Association, the Center for the Study of Financial Institutions at New York University, the George Meany Center for Labor Studies and others. I participated in interagency studies on innovation. My work began to be published, first by ghost writing responses for interviews with Mike Pertschuk, then in an anonymous background briefing for a Washington Post business reporter, then in quotations attributed to me in the Institutional Investor. Then a paper I gave at the NYU conference

was compiled with the other conference papers into a book, and finally the Journal of Business Strategy asked me to publish an article on merger activity.

I do not want to give the impression that I became the center of attention at the FTC. If anything, I was in a backwater following-up on yesterday's news. The FTC was proceeding aggressively on dozens of fronts. Even as regards conglomerate mergers, I was only a part of one of at least three initiatives: the challenge to Exxon's acquisition of Reliance Electric under existing antitrust law, Boston University law professor Joe Brodley's attempt to help write a Trade Regulation Rule that would limit conglomerate mergers were two other unsuccessful attempts.

You should not conclude that the FTC under Mike Pertschuk was running in so many directions it could not accomplish anything. Indeed, it was an extraordinary era in which the Commission helped to deregulate the airline and trucking industries by supporting the abolition, of the CAB and the ICC. It made successful presentations to the ITC arguing that consumers would be hurt by certain kinds of restrictions on imported products. The Commission helped to dismantle anticompetitive rules of doctors, dentists and other professions. The eyeglass rules opened up that industry for better and cheaper eyeglasses. The Commission also helped improve markets by requiring disclosures in the funeral industry, the franchise industry, and the sale of used cars. Indeed the Congressional onslaught in 1980 by the funeral industry, the AMA and the life insurance industry were testimonials to the successes of the FTC, not its failures. But my purpose here is to describe my experiences at the FTC, not to defend the failures or tout the successes of the Pertschuk era.

My assumption that Chairman Miller would dismantle the Office of Special Projects was quickly realized. I was pleasantly surprised, however, by the graciousness of his Bureau Director Tom Campbell. Tom was so young when he was appointed it might seem in retrospect that he was filling in time before he was old enough to run for Congress. That impression is reinforced by the fact that after leaving the Bureau for a short stint at Stanford Law School, he successfully ran for Congress. He is the only Director (that I recall) who had a public swearing in session and then gave an inaugural address to the assembled members of the Bureau. He was extraordinary in many ways. Instead of searching for personal Assistants in the private bar, he retained or appointed from existing staff some of its brightest lawyers: Toby Singer, Naomi Licker, John Seesel and Winnie Sullivan. He had breakfast individually with each member of the Bureau. When my mother died, he sent me a handwritten note of condolence and found that it was necessary for me to represent the FTC in Paris at an International Energy Agency meeting. As a result, I was able to spend a few days with my father who had lived with my mother in Paris for many years. His sense of humor was evident when a Federal District Court reversed his decision not to grant early termination to a company that had filed a premerger notification on the grounds that early termination would give that firm an unfair advantage in a takeover battle. On the day we received word of the court's decision, he was seen skipping down the hall saying, "the court has held that I am not only arbitrary but also capricious!"

Finally, Tom approved my application for a year's leave without pay to write a book on the merger wave. I had been approached by a publisher to write a book on mergers as a result of the article that appeared in the Journal of Business Strategy. I declined on the grounds that I had said all that I knew in the article. I said that I had never worked on a merger investigation, had never tried a merger case, had never even done a deposition in any case, including a merger case, that my experience was purely theoretical having sat in on merger screening meetings and having read a lot. The publisher was insistent that the book was timely and that I was the right person. Upon reflection, I decided that a book on mergers might be a good way to present much of the research we had been doing over the previous three years, so when the University of Bridgeport offered me a visiting appointment I accepted the teaching offer, the book contract, and an offer from the California Law Review to comment on one aspect of the newly issued Department of Justice merger guidelines. After I returned to the Commission I used to see Congressman Campbell riding the subway occasionally on his way to Congress. As always, he was a gentleman.

Granting me a leave of absence to write a book was a very generous action. I was unlikely to write a book that promoted the view of mergers that the Miller administration adopted. Nevertheless, when it became clear that I needed more time to finish the book, my leave of absence was extended by Tim Muris who had then moved over from Consumer Protection to become the Director of the Bureau of Competition. A cynic might suggest that the FTC administration thought the leave was a way to get rid of me, but the way Tim treated me then and since convinces me that he, Tom Campbell, and Jim Miller, because they were academics, had some respect for the endeavor that I was undertaking even though they probably expected to disagree with some of the views that I would express.

It turned out that I had way overestimated what I could get done in a year. It had been nine years since I had taught in a law school. I taught many courses during my seven years at SUNY Buffalo, but antitrust, which Bridgeport wanted me to teach, was not one of them. Nor had the years at the FTC given me much preparation. My work, indeed most work at the Commission, does not involve a comprehensive review of current, much less ancient, antitrust case law. So I had to learn the subject that was supposed to be my expertise. The other courses I taught were old friends, corporations and torts.

My living arrangements helped me to cope with that first year. My wife, Ellen, had decided to stay in Washington so I commuted by train to Bridgeport each Monday morning and came back each Thursday night. The long train ride and the solitary life in Bridgeport gave me lots of time to prepare my classes, read, and write. My research was assisted by two law students who put together files of articles on merger related subjects.

Work progressed quickly on the article for the California Law Review. I knew what I wanted to say and what materials I intended to rely upon. I thought the 1982 Justice Merger Guidelines overemphasized the importance of product homogeneity in projecting anticompetitive effects of mergers and ignored the likely anticompetitive effects of mergers in markets that were segmented by product differentiation. I believed the

business literature I had been reading supported my view. (The later Justice guidelines, in which the FTC joined, were consistent with my view.)

Despite progress on the article and success with the teaching, two things became clear even before the Christmas break. First, I did not like teaching with the commute. Teaching three courses in four days each week left me hoarse by Thursday evening when I got on the train. Second, it was obvious that I could not finish writing the book. I was not even keeping up with the clippings and references that my research assistants collected.

The book was not going to happen without a second year and I was unwilling to spend another year as a part time father and husband. I discussed the matter with my friend Tony Waters who was then teaching at Maryland. Mike Kelly, then Dean at Maryland, called me less than a week later, to offer me a visiting position to teach Torts and anything else I wanted. Maryland's torts teacher was to be away that year and many of the faculty knew me from interviews I had there in the mid-1970s. So when Tim extended my leave of absence, I had time enough to write the book.

At this time, before Christmas 1982, the book loomed like an impenetrable forest before me. The publisher had required me to submit an outline on a subject that was mostly *terra incognito* to me. When their editorial board accepted it, they required me to accept a $2000 advance. Given that I took a pay cut to teach and had higher expenses, I was worried that I would not be able to write the book and the prospect of repaying the advance was both humiliating and likely to be financially difficult.

By June, I had left Bridgeport, corrected my exams, published my article, but had not written a single word of the book and I did not like my outline. Fortunately teaching is a different world. It has different rhythms. Summers are not exactly holidays. When I taught in Buffalo, I generally packed a suitcase of books and went to Europe to see my parents in Paris and stayed by myself in a London apartment for six weeks to read and write.

When I returned to Washington from Bridgeport that summer, Jack Kirkwood found an empty office at the FTC for me to write in. I spent the summer teaching myself securities law and used the FTC library to read about merger transactions. At the end of my book, there is a three page bibliography of books on subject that are relevant to the text. But little of my time was spent with these books. I had read most of them over the previous three years or before. Rather I spent months reading microfilm news stories from the Wall Street Journal and the New York Times and back copies of Fortune, Business Week, and the American Lawyer to trace the development of mergers in the 1970s and the early 1980s.

Using indexes, day after day I located and printed or copied articles that reported daily events that surrounded the major mergers of almost a decade. It was an exhausting, enlightening and exciting experience. I had never been much of a newspaper reader. I find books more interesting because they provide the perspective of hindsight on a

subject that a reporter cannot know. But by reading the daily reports covering a period of months or even years, I found a fuller exposition of who did what in mergers and how contested takeovers were fought, and how the mergers turned out, what role the lawyers, investment bankers and arbitrageurs play. It was like putting together a puzzle and the people were all too human and the stories often just plain funny. By the end of the summer, I had written over a hundred pages of longhand describing the merger wave. It was only a beginning, but I knew I could write the rest of the book.

The year at Maryland was a surprising delight. Preparation time was reduced because I was teaching the same courses as the previous year. The faculty and students were both very good, in the sense that they had strong credentials, were serious and confident of the value of their work and were not envious of people at other "better" schools. It was a relaxing, perhaps ideal setting for me to write the book. Some of the faculty helped me with some of the securities or tax issues that came up. Others were collegial sounding boards for some of my ideas.

If there were a downside, it was the commute. In my little Renault LeCar, it took me under an hour to get from my house to my desk, which is comparable to my Metro commute to the FTC that involves a lot of walking. There were two downsides to the commute to Baltimore. One was the beltway, which moved a lot faster in those days, but had occasional backups or hazards. I would be driving 60 miles an hour and round a bend to find the traffic stopped or to find wooden pallets scattered over the road or treads off of a 16 wheeler. LikeYossarian in Catch 22, I feared that however many trips I made successfully, the odds of my survival would run out before I finished the book.

The second problem was of my own making. I was having a wonderful time writing the book and, although I tried to distract myself with Morning Edition and All Things Considered, my thoughts inevitably drifted back to the book. I remember one day on the I-95 stretch, I figured out some problem about the oil mergers that had puzzled me. I was so excited I did not want to forget the insight. With my left hand I steered the car at 65 miles an hour and wrote notes with my right hand. Fortunately the traffic on 95 was fairly steady and not generally crowded.

At home, Claire was born on March 10, 1984, and unlike her sister, Alice, Claire slept through the night almost from birth, allowing me the luxury of doing the same. In fact, at two months she used to sit in her scoop looking up at me writing and either because she was transfixed by my concentration or bored, she would take little naps, wake up, smile for a while and then go back to sleep. One advantage of teaching was the flexibility it added to my schedule. While in Bridgeport I was able to use my Fridays in Washington to periodically participate in Alice's cooperative nursery school. At Maryland, when working at home, I could take breaks and walk around the neighborhood pushing Claire in the stroller. I had learned with Alice that if you are pushing a stroller, everyone you see is your friend. Whatever fears or reticence people normally have that causes them to avert their eyes when they see strangers on the street are transformed to friendliness by the presence of a baby.

In any case, by early August, my secretary, Sandy Morris, had typed the entire manuscript for my book. I liked it.[2] I still like it. I liked it so much I thought it could become a big seller, maybe not on a scale with the best selling business book of the day, IN SEARCH OF EXCELLENCE, but big enough to be worthy of some promotion. My publisher was too small for that but allowed me to search for a replacement. Several major firms were interested, but most wanted substantial changes to make the book more exciting. I finally settled on Ballinger, a business subsidiary of Harper & Row. I was to be their lead book for the following season.

I returned to the FTC in the Fall of 1984 uncertain of my future. I knew a lot more about antitrust after teaching the subject for two years, but as I said case law has little to do with enforcement by the antitrust agencies. Certainly everyone had been nice to me while I was away, but what was a used policy person going to do in a new administration. Fortunately, Bobi Baruch had no doubts. Bobi had worked for me in Special Projects before she became head of the premerger notification office. After she was promoted to be Deputy Assistant Director for Evaluation, which supervised the premerger office, she designated me as head of that office. However, it turned that I had time for little more than closing down or finishing the Special Projects that were in process.

When I returned, she welcomed me with the largest package of rules changes that had ever been attempted. It was essentially an attempt to fix the (remarkably few) problems that had arisen since the rules were first promulgated. There were projects to fix 13 separate rules and none had been completed. During the six months before I left, John Sipple was selected by Bobi and me as senior attorney in charge of the premerger office. He had his hands full running the ten person office that tracked and summarized the HSR filings for the weekly merger screening meeting. Bobi could not devote herself to working on the rules because of her other responsibilities.

In one sense, I was ideal for the rules project. I had one handicap. I knew absolutely nothing about the Hart Scott Rodino Act or the premerger notification program. For reasons that have never been clear to me, no one has ever thought that ignorance would disadvantage me from accomplishing whatever task they wanted me to do. My advantages were clear. I had nothing else to do. I had previously supervised a large staff in several different offices. I had substantial experience writing regulations and working with statutory materials, in my law review articles and casebooks, at the EEOC where I was co-leader of the group that redrafted its procedural rules, and I wasn't afraid.

Working on the HSR rules turned out to be the second best thing that happened to me at the FTC. Without a doubt the education I got in my first three years at the FTC was the best experience, but the work on the "gang of 13" as I called the projected rules package was the second best because it gave me a useful expertise in premerger notification, an area that few people have had much interest.[3] Part of my interest in the rules lay in the

[2] Even Alice liked the story about how the Borden company bought the Liederkranz cheese company.
[3] Some years later, Larry Fullerton, then Deputy Assistant Attorney General for Antitrust, confided to me walking to a meeting with prospective defendants that he had hoped during his twenty years of antitrust

puzzle qualities of rule writing. You have to make each rule fit the rest, both as a matter of using consistent language but also making the language comprehensible and understandable in terms of the overall structure of the program.

The premerger rules presented some uniquely difficult challenges. They had been very well constructed by very bright insightful lawyers, but they were designed to supplement a statutory framework, not to implement it through a comprehensive set of rules. You could not tell what was allowed or forbidden by reading the rules. For that you had to read the statute. But you could not understand the statute unless you read the definitions in the rules. Even the rules are often obscure unless you also read all of the Statements of Basis and Purpose that have been published in the Federal Register by the Commission. The structure of the rules and statute are complicated and, to me, counterintuitive. But once you learned the system, it can be fun.

I had the great good fortune to work with lots of talented people. John Sipple and his staff had done the initial drafting, Bobi helped me think through some of the seemingly intractable problems and got me very able assistance in honing the rules and writing the Statement of Basis and Purpose: Jon Groner and then Naomi Licker helped to transform this large collection of rule changes into a readable Federal Register Notice. The procedures required us to send the rules package to OMB for a review under the Paperwork Reduction Act.

Over the next few years, we worked on a number of additional rules changes. Bobi, Naomi and I had an easy working relationship that made hard work fun. One of our most treasured projects was undertaken by Naomi. Bobi and I had an ongoing complaint that the premerger notification program was drafted in a way that made the law essentially incomprehensible to anyone who did not devote substantial time to the statute, the regulations and the Statements of Basis and Purpose in the Federal Register notices. We were determined to make the law more accessible to the lawyer who was first faced with a question about whether his client had a filing obligation. Naomi took on the daunting task of writing plain English explanations of who has to file. Naomi was the natural choice because she is the best writer of the three of us. Also, she had started her career working in the premerger shop. The problem was to state the notification requirements in a way that was accessible to the novice without saying anything that oversimplified the rules. Any oversimplification was likely to come back and haunt us when we tried to enforce the rules. With the three of us working on editing two introductory guides, I think Naomi succeeded in providing a good starting place for lawyers who were new to the premerger requirements.

Another effort to make the work of the premerger office and the Bureau more transparent was equally successful. Although Bobi or I might take credit for the idea of publishing useful statistics on the disposition of premerger filings, Pat Foster, a paralegal premerger notification analyst, did all of the work. Together the three of us figured out that information about HSR filings could be released to the public in summary: by type of

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experience in law firms and on Capitol Hill, that he would never have to deal with an HSR issue. Neverthess, he later gave a seminal speech on gun jumping in HSR cases.

filing (e.g., asset versus stock acquisition, negotiated takeovers versus tender offers, etc.) and by industry code without violating the restraints on disclosing HSR information. Pat set up the tracking system to produce the information automatically. We were then able to use some of this summarized information in supporting the need for changes in the regulations.

For Pat and the Commission, this was just the beginning. Pat took over the production of the annual report, a task that Bobi and I had struggled through in Special Projects by contacting each shop to determine what cases they had completed. Pat developed a simpler, much more effective way of keeping track of the output of the Bureau. She collected all the press releases of Bureau action during the year. At the end of each year, she cut and pasted the press release description of each action. She had therefore not only a timely and reliably complete list of the Bureau actions, but language describing each action that had been approved by the Bureau and the Commission. Pat went on to develop more techniques for tracking Bureau activity. Bobi and I enthusiastically supported promoting Pat to a newly created position of Information Management Specialist. Bureau Directors and Commissioners have for twenty years relied on her statistics to review the work of the staff, to prepare testimony for Congress and to give speeches about the activities of the Bureau. Pat is retiring on the July 3, the same day I retire. I assure you that she will be missed more than I am.

Proposing rules and getting OMB approval forced me to work on a regular basis with Chris White, then Assistant, now Deputy, General Counsel for Legal Counsel. Chris had been Executive Director in the Pertschuk administration, but managed to find himself a niche that he still occupies. I have always suggested that his ability to retain his position through different administrations is because, as chief ethics officer, he knows all of the secrets about Commissioners and staff. It has occurred to me that they might not like all of their activities to see the light of day and therefore leave him alone; but the truth is likely to be more mundane -- they have been grateful to him for advice that has kept them out of trouble. In any case, we became good friends and have exercised together three times a week for fifteen years. I have always claimed that that my mid-day break was vital for rethinking the work I had done in the morning. But when Chris joined me at the gym, a few years after I started, we began to do work, and solve or complain about the problems of life and the Commission. I learned more from Chris, than anyone else, about what was happening at the Commission and how to manage bureaucratic issues. He was and is a master of the possible.

Notwithstanding my developing standing as a premerger expert -- especially after the somewhat reduced “gang of nine” rules were approved by the Commission, proposed in the Federal Register, concurred in by the Assistant Attorney General for Antitrust and promulgated as final rules by the Commission – I was initially somewhat uneasy about how I was viewed by the Miller/Muris administration. Whatever my concerns had been, they disappeared on a day when I was working in my office during a Merger Screening Committee Meeting. Someone came into my office and said Tim wanted me to participate in the meeting because of my California Law Review article on segmented markets. So I walked across the hall and joined the discussion. I do not think my

contribution made any difference to the outcome of that case, but it changed my view of Tim forever. I guess Tim had read the article and liked what I had written or thought my views might be useful to the discussion. The focus on "usefulness" is what impressed me. As a writer, Tim and I might disagree or agree, but that was not relevant to the work of the Bureau. The only question was how to get the work of the Bureau done and anyone willing to work was made to feel welcome. When we had Congressional pressure about persons who were avoiding their obligation to file premerger notification, Tim asked me to propose a rule to stop the problem. Using my knowledge of the tax law, I came up in a day with an approach that we were able to present to the Commission and the public. Ultimately, we developed a different approach, but the quick response made the intention of the Commission clear.

Tim came with a very different agenda than Al did. He was much more confident of his view of the market. It was the market described by the neoclassical economists. Accordingly, he was less concerned about understanding market forces and more concerned with market failures especially those caused by abuse of government processes and coordinated action by groups to limit competition. Accordingly, research efforts and enforcement energies were directed to examining antitrust exemptions and abuses of those exemptions. Articles by Jim Hurwitz on the Noerr doctrine and Randy Marks on the labor exemption continued the stream of staff publications.

I think Tim was one of the two best Bureau Directors with whom I have had a chance to work. The other was Al Dougherty. They probably agreed on little about politics or antitrust, but they each used their position as Bureau Director to project a vision of what they wanted to accomplish, and they were each entirely unprejudiced in their willingness to take advice and accept help from any member of the staff. It is the vision thing that made them so exceptional. As a civil servant, I have admired leaders like FDR and Reagan because when they projected a vision, they freed civil servants to come up with ideas to implement the objectives. Of necessity, most work of a government agency is not done by Presidential appointees, it is done in agencies like the FTC by the knowledgeable, experienced attorneys. When the objectives or agenda is set, the civil servants can be most effective in carrying through efforts that they know will be supported. Tim and Al did this better than other Bureau Directors. Moreover, the work done under both administrations was recorded in law review articles and other retrievable publications. Publication adds to transparency and allows work to be critiqued by persons outside the Commission. Published work is also an available resource to be picked up at later times by others when the issues again become relevant.

My book, MEGAMERGERS, was published about a year after I returned to the FTC, sometime in 1985. I had a book party at a small Arlington bookstore. It was great fun. I wrote op-ed pieces on megamergers in the Wall Street Journal, the Journal of Commerce, the Saint Louis Post Dispatch and other newspapers. I spoke on radio and tv talk shows about the book. I went to Paris and participated in a conference at the Ecole Polytechnique. Is it irony that my 1981article in the Journal of Business Strategy persuaded a publisher that I should write MEGAMERGERS, and that the publication of

MEGAMERGERS in 1985 persuaded the Journal to ask me to write a column for it on mergers? I contributed columns from 1987 to 1994.

All of this writing and speaking was done on my own time, and mostly without any pay, but I loved it. It gave me a continued outlet for the reading on business, economics, history and strategy that I had begun in 1978 when I joined the Commission. The ideas that I had found so challenging when I joined the Commission had an afterlife in my writing. Some of my articles and editorials were selected for inclusion in business books. The Wall Street Journal's ON MANAGING included my op-ed article. A Journal of Business Strategy article was included in the LIBRARY OF INVESTMENT BANKING. At the University of North Carolina and at the Ecole Polytechnique in Paris, I attended conferences no longer as an official of the FTC, but as a writer on business topics. My Paris presentation was reprinted as two articles in the Journal of Business Strategy and published in French as part of the conference proceedings. I avoided writing about antitrust because I did not want any confusion about my work at the Commission and my writing. One of the reasons I am leaving the Commission is that I want more time to write and perhaps to comment on some matters that deal with Commission policies.

The appearance that I led a charmed life at the Commission has a great deal of truth. Of course there was one Bureau Director who had no use for me. When he was ordered by an angry Commission to reduce his personal staff, he used it as an occasion to transfer Naomi and me off of the Third Floor of the Headquarters Building. Naomi was sent to the Food and Oil Shop and I was sent to the Compliance Division where I still work.

The Compliance Division was then run by Elliot Feinberg. In the beginning, I think he had no idea of what to do with me. He had not asked for me and I had not asked to be transferred. Moreover, I came with an unfinished rules project that the Bureau wanted the Commission to issue. So for a while, I continued the same work across the street in the 601 Pennsylvania Avenue building. Eventually, however, Elliot had to face the question of what to do with me. As had been true so often in the past at the FTC, I was starting a job for which I had no known training. I had never done an investigational hearing and I had probably never looked closely at a Commission order. While I had evaluated many proposed cases when they were considered by the Third Floor at the outset, I knew nothing of the nuts and bolts of writing or enforcing Commission orders.

So for a while, I was given a variety of special assignments. I was assigned petitions to revoke a series of fifty year old Commission orders. I wrote a staff opinion on the meaning of successorship under Commission orders, starting with knowledge dimly remembered from teaching corporate law. And I helped out on writing memoranda recommending enforcement actions against persons who had violated the premerger rules. This last task, enforcing the premerger notification law, drew upon my most readily recognizable strength. I knew as much as or more than anyone about the history, development and meaning of the premerger notification law and rules.

So it became inevitable, given my grade and age, that I was assigned as lead attorney on an investigation of a possibly unlawful failure to file a timely premerger notification

form. No one had any illusion that I would know how to conduct an investigation – the forms to open a case, the procedures for issuing a subpoena, the way to conduct an investigational hearing, etc – so Elliot assigned Eric Rohlck, a very junior attorney to help me. Eric may have been young but he had as much experience as anyone on these cases, having recently completed as lead attorney a premerger case against the Rales brothers.

I confess I was worried. I immediately signed up for an FTC course on conducting depositions and read what I could on conducting an investigation. It turned out that my fears of making a mess of the case and a fool of myself were not realized. Eric, whose office was next to mine, and I were already good friends and we had worked together on a number of matters. We had a wonderful time working on this case together and Eric did what he could to coach me on how to frame questions. To this day, when some people complain about my style of questioning (Naomi in particular), I blame Eric for not teaching me correctly.

I did manage to make a fool of myself in at least one regard. I put my straw hat in the overhead compartment on our flight to Los Angeles. Someone put their suitcase on the hat; consequently, I descended from the plane looking like a hobo. I needed the hat because I suffer from basal cell skin cancer. Eric had to put up with a strange looking companion throughout the trip. I may have made up for my sartorial failing by the companionship that my friend Ken Guido gave us for the four days we were there. Guido had gone to school with me at Yale. He lived in Washington but was on an extended assignment as Regional Director for the CFTC. Each night, after eight hours of hearings, Eric and I would return to the hotel exhausted (because we woke at four or five each morning) and Ken would pick us up and take us to a different, very good but not expensive, restaurant. He would have us back to hotel by nine so we could get our sleep.

The hearings in LA and Washington went well. Eric and I, got the documents we needed and eventually negotiated a settlement. It was the beginning of a good partnership. We have done a number of cases together, all of which we won and all of which were fun.

For a while I spent most of my time working on premerger investigations. Over the years, I have worked on HSR with cases Naomi Licker, Ken Libby, and Ren Davis and lawyers from the merger shops – Cathy Moscatelli, Joe Brownman, Garry Gibbs, Mo Bloom, and others, who uncovered violations in the course of their antitrust investigations. There is no question that investigations can give you an adrenaline rush. So once again, I demonstrated that I had some value to the Commission while having fun.

Bureau Directors come and go. Each is unique. The most surprising in my career was Kevin Arquit. Kevin and Chairman Janet Steiger saved the Commission and the Bureau. When they came to power, the reputation of the FTC on the Hill was, yet again, in trouble and morale in the Bureau was even lower. By force of personality, the Chairman and the Bureau Director turned around the agency. Their weapons were integrity and charm. Not since Perry Johnson succeeded Al Dougherty had I seen attorneys have such a positive view of a Bureau Director. Certainly Tom Campbell had been polite and

sensitive, but Kevin brought an extra talent of advocacy to the position of Director. As a result, attorneys had confidence that Kevin would ably represent them and their cases to the Commission.

His skills were not based on knowledge or experience as an antitrust attorney. If anything, his knowledge was based on having been in the Chairman's office, and as General Counsel. He knew his audience at the Commission table. But I had the opportunity to see him both with outside counsel and with Justice Department officials, and he was equally effective in those settings. This appears to have been based on his unique talent as a quick study. On a number of occasions I saw him briefed for half an hour before a meeting, having previously had only a general knowledge of the matter, and then watch him at the meeting asking incisive questions and making persuasive points by marrying facts he had been told minutes before with his own personal experiences.

It always impressed me that, while he would ask some questions during the briefing, he did not insist on any particular format. Indeed, often he would hear diverse views about the merits of the case and the facts. He seemed to have an almost uncanny ability to sort out in his own mind what facts and theory he would use and ignore the rest. The result was the ability to make a knowledgeable and persuasive statement of the case for the Bureau's position. It is an advocacy skill that seems to have made him a great success in the private bar.

My personal relations with Kevin have always been extremely cordial. I had worked with him a little when he was in the Chairman's office on some HSR matters, but did not know him well. Shortly after he came to the Bureau as Director, he called me on the phone and asked me if I wanted a different job. I assumed he meant that I could return to the Third Floor or perhaps he was considering me for a title. I said I was happy where I was and that I preferred working on a project team to running an office. When pressed, I said I thought it would be useful to have someone else in the Compliance Division who knew about drafting HSR rules, because I had found it very difficult to draft rules by myself. I suggested that Bobi and Naomi were the two most knowledgeable people. I do not know whether there was any relation, but not long after the conversation Bobi was reassigned from the Evaluation Office as Deputy Assistant Director to become Deputy Assistant Director for Compliance.

He also asked me about some international antitrust issues in that phone conversation. I suggested that Mike Porter's book had some insights on the matter and sent some excerpts to him. I appreciated the note he sent me in response. Thereafter, he often sent me comments on my Journal of Business Strategy columns. He was more faithful in commenting on my articles than anyone other than Naomi and my editors. When he left he asked me to keep him on my mailing list. I assume his interest in my work reflected a broad intellectual curiosity of which my writing was just a small part.

Kevin may have decided that, given the times, it was more important to get the Bureau functioning than to articulate or pursue a particular antitrust agenda. I have no doubt that, for his time, he was the best Director.

I believe it was after Dan Ducore succeeded Elliot as Assistant Director in charge of the Compliance Division when I was first assigned the meat and potatoes of the Division – helping the litigation shops write Consent Orders to settle investigations. I remember the first one that I worked on was with Claudia Higgins. I could not have asked for a better teacher. Claudia was a highly experienced attorney; she was smart, well organized, unflappable and easy to get along with. She delegated clearly and always knew where she was in an investigation. Fortunately, she had written many orders, so my job, ultimately, was to sell the terms of the draft order to Dan. In the meantime, she asked me and Steve Nelson the economist assigned to the case to help her formulate the remedy. It was a unique remedy, one that I later found out did not work as well as an alternative approach might have. But I am confident that we asked all of the right questions, the failure if there was one was our inability to understand the answers we were getting.

After that, I took my turn with everyone else working on orders when I was not busy with a Compliance Division investigation. I had exceptionally good experiences working up consents with Chris Perez, Yolanda Grundel, Bob Tofsky, Pat Roach, Elizabeth Jex, Elizabeth Schneirov and Oliver Grawe. Jackie Mendel and I had an excellent experience forcing the abandonment of a transaction by demonstrating that no consent acceptable to the parties would have maintained competition. Until Naomi joined the Division, I found working on orders very difficult because aside from some standard clauses there did not seem to be much consistency between orders. As a result, on practically every order I had to ask Dan if the paragraphs that were particular to the order I was working on were acceptable. Generally respondents would point to the provision of some order and say they wanted parallel treatment. I could see this tended to make the weakest order the start point for negotiations, but I had no idea why an apparently bad idea had been accepted by the Commission. Dan had an enclyclopedic memory of the circumstances behind orders, so he was generally in a position to judge whether the circumstances were in fact parallel and he had authority for the Division to approve the language. This was very time consuming for Dan and meant he might have to look at proposed language repeatedly.

From my perspective, the Compliance Division became pretty much complete when Dan hired Anne Schenof about a year after Naomi joined us. Dan asked me my opinion about hiring her because I had worked with her when she was an Assistant to Al Dougherty. She had left shortly thereafter to raise her two children and was now seeking to return. If I remember correctly, some of the other ADs had questions about hiring her because she had been at home for 10 years not practicing law. Moreover, she had been a GS-15 and was applying for a GS-13 slot. I do not exactly understand their suspicions but I told Dan Anne was a great opportunity for the Division. She was one of the best lawyers among Al's many Assistants and had been given the hardest tasks. Dan hired her and quickly found her value.

I felt very much at home surrounded by friends from my Third Floor past. I also believe that the Compliance Division was or was becoming the most talented and experienced Division in the Bureau. Most of us had or had had titles. In addition to Anne, Naomi, Betsy Piotrowski, Eric Rohlck, Ken Libby and Dan had been Assistants to on the Third Floor. Besty had also been an attorney advisor to two Commissioners and worked in both Bureaus. With the addition of Ren Davis, we could have formed substantial alumni chapters of Harvard and the University of Chicago. We also have had graduates of other elite law schools, University of Michigan, Penn, and Yale. Other colleagues, Art Strong and Jeff Dahnke, brought litigation experience that most of lacked. Joe Eckhaus added a history of the Division that went back to the beginnings of time. It is an impressive and sometimes intimidating group. We are always a bit concerned when we get new attorneys like Jennifer Lee and Michele Cerullo that they will be scared away either because we are so old or have done so much. These two young attorneys seem to be doing just fine and they have helped me with both my legal research and technical computer problems.

I worked extensively with Anne Schenof on only one case. It was an order violation investigation that might have resulted in civil penalties. It had been a strange case from the beginning. Betsy was the Deputy supervising the case when it came in as a proposed consent and she assigned it to me. From the first reading, we had grave doubts about this remedy which was purely a technology transfer of a computer data base. The truth is that we were rolled by the AD. He brought us just the signed license agreement and the signed Agreement Containing Consent Order. We asked questions and got assurances from the buyer of the assets to be divested that it was satisfied that the deal would work. So we had no basis on which to object and hoped that would be the end of it.

That was not the end. Unlike most buyers of divested assets who have problems this one complained. He had to because the system did not work and his former business had been abolished by the merger. Anne and I investigated the compliance issue. In an initial transcribed interview, I established that the respondents had made at least a technical violation of the order. That gave us some leverage but our objective was to make the order work and restore competition in the market. We got help from Dennis Lynch and other FTC computer people. It was not enough; the problems were too difficult. The respondent was transferring a legacy computer system. Finally Anne found a consultant who executed an agreement with the respondents to act as a monitor for us to assure the FTC that the order was being implemented. The parties did not trust each other. That was most clear on the day the buyer turned on the transferred system that had now been installed by the respondent. The system crashed. As in so many other cases it was the monitor who used his good offices to coax the parties back to working on the system. Two years after we opened the investigation, after the respondent had paid for over a year of work by the monitor, had sent their technical people to finally make the system workable, we recommended closing the investigation without penalties. We felt we had grabbed victory for the consumer from the jaws of defeat and the respondent had paid enough.

Anne went on to work on several more civil penalty investigations in which she got money and more remedy. She worked with Ken Libby on two cases, the second of which was Boston Scientific Corporation. They got the highest antitrust civil penalty in the history of the FTC: $7.04 million.

Soon after Naomi arrived, Dan asked her to draft an annotated model order so that I and others in Compliance would have an idea of where to start on drafting orders and why, in general, alternative approaches had been used. The idea was that the draft would be refined, approved by the Bureau, and distributed to all the shops so all negotiations would begin at a neutral point. The annotated model order never got further than a draft stage, but it was a good starting point for everyone in our shop because it explained the rationale behind some of the exceptions built into certain orders.

I had been urging Naomi to join Compliance from the time we were evicted from the Third Floor. Instead, I ended up working with her on an HSR investigation that had been assigned to her. It was a very complex matter and she did her usual masterly job of piecing together the evidence in the case to fit a violation theory that I developed. Soon thereafter she was assigned a merger investigation that seemed to present both difficult remedy issues and HSR filing issues. I was assigned to work on both of those. For various reasons, Naomi then decided to ask to transfer to Compliance. That brought Bobi, Naomi and me back together again.

I would be remiss if I left the impression that we three were responsible for all changes in the premerger rules. One of the most rewarding experiences I had working on rules in the Compliance Division was working with Marian Bruno who was then an attorney in the Premerger Office. Marion was obviously bright, but new to the office, and had never worked on rulemaking. She was assigned a massive project that had a deceptively simple title, the ordinary course rule. The idea was that we could significantly reduce the burden on the public and the Bureau by exempting large groups of routine transactions that never raised competitive issues. We worked on the project for over a year. It was difficult to tease out categories of transactions that were defined by objective criteria but were not too broad. Marian came to my office from the headquarters building approximately twice a week. She had tea and sat in my comfortable overstuffed chair while we discussed her latest draft and whether it was consistent with the other rules she was drafting, the rules as a whole, and the statutory criteria for granting exemptions. It was a difficult but fully enjoyable experience, at least until others tinkered with some of the rules before they were promulgated.[4]

Timing is always serendipitous. From the time I was first assigned to work on drafting Commission orders, I wanted to know which provisions worked and which did not. I worked with a succession of summer interns trying to develop information on whether divestiture orders had been successful. I also discovered that the Bureau of Economics was undertaking a similar effort under a project started by Mike Black. None of us had

[4] Years later, after Marian had become head of the Premerger Office, I had a similar pleasure of working with one of Marian's attorneys, Karen Berg, on another important rules package, but we did not have the luxury of afternoon tea.

developed any really useful information. The best information was in an internal report drafted by Barbara Clark, Jim Mullinex and Linda Badger, but that was based solely on internal FTC information and that did not give us enough data to consider the success of divestiture orders. When Naomi finish her draft model order Dan approached Bill Baer, then Bureau Director, to authorize us to do a preliminary study of divestitures with the Bureau of Economics. I had already checked with Chris White and found out that we could interview no more than nine companies without seeking OMB approval for a study.

Bill may have been impressed by the unanimity of staff that such a study was important, had never been done, and the possibility that we might discover significant shortcomings that could be cured. Naomi and I interviewed the buyers of assets in nine divestitures with Charissa Welford and Harold Saltzman of the Bureau of Economics. The preliminary study suggested that there were serious problems with the way we had viewed divestitures. But everyone agreed that the sample was too small and there were other methodological shortcomings. Consequently, we sought authorization from the Commission and ultimately OMB to conduct a larger more reliable study.

The larger study confirmed our initial impressions that we had been seriously mistaken in relying so heavily on buyers or potential buyers of divested assets to tell us whether the divestiture package was sufficient. We found a surprising degree of frankness among the buyers. They readily admitted that they had made serious mistakes in assessing the assets to be divested. They assumed the forced sale of assets made them a bargain but we found that buyers repeatedly told us they paid too much. Buyers told us they chose the wrong assets or less than all the assets that they needed. This failure arose both because they were buying less than a stand-alone business and they had never operated the business they were buying. Furthermore, fearing the respondent would choose some other buyer, they were reluctant to bargain harder and ask for more. Even after a divestiture was ordered, buyers were reluctant to complain to the Compliance Division about problems because they assumed that the respondents would find ways to treat them worse whatever the FTC did.

Fortunately, as we were gaining an understanding of these problems, Claudia Higgins developed a new remedial approach in pharmaceutical orders where transfers of technology take years and require FDA approval. She appreciated that we in Compliance would never be able to monitor whether the respondents were fulfilling their obligations so she required the respondent to hire a monitor who had the relevant expertise to report to us on respondent's behavior. It was quickly clear from what we were finding in the study that this approach of an expert monitor would be useful in many other settings.

The Bureau of Competition published the results of our study in 1999. We had been unable to get much of the statistical data that the Bureau of Economics had wanted so they declined to join in the report. The report was, however, a valuable tool for the Bureau in negotiating the terms of orders and communicating to the private bar why we insisted on certain kinds of protections in orders. The conclusions of the report were made more explicit by a Commission statement on divestiture remedies and a staff listing of frequently asked questions. All three of these are posted on the FTC web site.

The Commission furthered transparency in areas that I had nothing to do with in the Pitofsky/Baer administration. Merger guidelines, health care guidelines and other statements of common policy were released jointly by the FTC and the Department of Justice.

That administration also added an enormous new capacity to the Bureau by launching the honors paralegal program. As I understand it, Bill originated the idea to bring in, for one year, recent talented college graduates to assist the legal staff who had to review hundreds of boxes of documents. He charged Judy Bailey with establishing the program. Judy picked Philo Liedquist-Scott to implement the program. Philo has done a brilliant job of instilling camaraderie among these bright young graduates to carry them through the tedium of reviewing thousands of documents. They, in turn, have received a real education in what it is to do legal work and antitrust. The program has been a great success and copied widely.

Bob Pitofsky and Bill Baer went toe to toe with the Antitrust Division to support a settlement that Ren Davis and I had negotiated. The respondents had signed an agreement to pay civil penalties for an HSR violation. The agreement had been approved by the Commission. This case, as was frequently true, got hung up because of disagreements with the Justice Department on how to phrase the HSR civil penalty complaint. For unknown reasons, Congress decided that the FTC should administer the premerger program, but that civil penalty violations should be brought by the Department of Justice. As a practical matter, this has meant that most violations have been investigated by the FTC, and referred to the Antitrust Division with a recommendation that the Attorney General appoint FTC attorneys to represent the Department under the supervision of the Antitrust Division. After exhausting all staff negotiations, the Chairman and the Bureau Director personally took the lead and got the Department to implement result that Ren and I had negotiated.

I had one last hurrah in this period working on another HSR case. This time Eric was the lead attorney (I think). We brought both a civil penalty action for failure to file and the first remedial action under the premerger law asking for divestiture and disgorgement. The case was brought in cooperation with the Health Care shop that was challenging the merger on substantive grounds. It is odd how the frustrations of a difficult investigation and lawsuit such as this build camaraderie. Eric and I had been trying to obtain disgorgement funds from persons who had violated the HSR Act for fifteen years. This was the perfect case because it was also an antitrust violation. It was perfect in many other ways. We liked working with Garry Gibbs because he was drooling over trying the antitrust aspects of the case. The only real issues were ours which dealt with remedy. I will let Eric tell you about that when you have a lot of time. We liked working with Mel Orlans who, still in the General Counsel's office, forced the other side to actually answer the questions we had asked by filing a subpoena enforcement action. Big disgorgement, big penalties. It was a good final act.

Of course in real life you get up the next morning and have to go back to work. In Eric's case that meant interminable squabbling over the implementation of the order. In my case, it was an exciting adventure which is not finished. Markus Meier came to my office on a Friday afternoon and asked me if I would like to go to Indonesia for six months as the FTC technical assistance advisor to the Indonesian competition agency (known as the KPPU). He had spent five months advising the just formed agency and wanted to go back but was litigating a case and was not free to return. He claimed he wanted someone competent and asserted that I filled the qualifications. I expressed some doubt about my qualifications to train people to conduct antitrust investigations but said it sounded like a very interesting opportunity. Eric had enjoyed two years in Romania on the same program. I thought my wife, Ellen, and my daughter Claire would not go to Indonesia and would not want me to go. But I agreed to ask them. I was astonished when they both expressed enthusiasm for me to go and suggested I should go alone. My father had recently died and they thought I needed a break.

On Monday, I told Markus yes. Jim Hamill, head of technical assistance, approved me. Dan approved. The Bureau Director approved. USAID approved and the KPPU approved. So Markus took me under his wing. He gave me books to read about the history of Indonesia. He gave me the Indonesian competition law and the regulations. He gave me the speeches and material he had written about the Indonesian law. Most importantly, he gave me the almost complete handbook he had put together to train the staff of the KPPU. He put me in contact with John Davis an American lawyer working at the KPPU as a USAID contractor. And he took me to Indonesia. The trip might have had something to do with seeing his friend Nonni, but he used the occasion to introduce me to everyone in the American Embassy and the technical assistance community with whom I would be working and he introduced me to the KPPU. My guess is that he probably saved me weeks or even months of time that I would have needed to get oriented.

I had warned Markus of some of my limited life and work skills. He thought at most I was exaggerating, and then he developed a theory that I pretended to be helpless to gain sympathy and help. But when I lost my computer when we were switching planes in Japan, he began to believe I was going to need help. (We got the computer back before taking off.) So Markus enlisted his friend, Nonni, to buy me a cell phone. Nonni's help getting me a cell phone was a great advantage even though I never was able to learn how to text message. She also bought for me the batik tablecloth that Markus took back to Ellen. She also arranged for the three of us to go to the ancient Buddhist and Hindu temples that first weekend. That was the most extensive tourist activity I undertook.

The question of my competence is an old one. I have strengths and weaknesses. Bobi, 20 years after the fact, still tells everyone that I was the last lawyer in the Bureau to use computers as word processors. It is probably true, but that may have something to do with the fact that I was on leave from 1982 to 1984 when secretaries became administrative assistant and lawyers became typists. In any case, I am now devoted to the word processing of the computer and the email. Since childhood I have written very slowly and I find the word processor much faster for me, despite the fact that I type slowly. I also read slowly, which is one reason why I prefer to read books instead of

newspapers, magazines, or advance sheets. I find it almost impossible to take notes in a class or a meeting. Daryl Deaktor, who sat next to me first year in law school, said it made him crazy that I took almost no notes. Fortunately I have a good oral memory and when it has been necessary after a class, a meeting or a deposition, I can write a coherent and pretty accurate rendering of what I have heard.

I also cannot proofread as well as most people. That fact has been the bane of many for whom I have worked. Despite years of experience, they contend that I do not care about typographic errors, that if I would just make more effort I could find them. It has to be true to some extent.[5] I am not blind. I see the errors when they are pointed out, but the history of my proofreading weakness is so long, it must be at least partly based on something else.[6] I think the way I read leads me to miss the errors. I think about what I am reading when I read the works of others or my own work. My focus on the substance seems to be something of a barrier to seeing the individual words on the page. But who knows, maybe I am lazy.

Fortunately for me, there was more help waiting at the KPPU. John Davis had arranged for me to rent an apartment at the Borobudur Hotel where he lived. The apartment had a nice workable kitchen. My living and bed rooms both overlooked the swimming pool and 23 acres of grounds that had tennis courts, a health club, squash courts, five restaurants and two discos. John had a driver and could take me to and from work each day. (Nevertheless, unlike most people in hot, humid, hazy Jakarta, I usually walked to work.) He had a secretary, Miranti, who immediately became also my secretary and administrative assistant. I am glad to say that she is here today with her husband. Miranti immediately got me business cards and arranged to hook up the computer the embassy had agreed to loan me.

I cannot express how grateful I am to Markus for his help, even if he still makes fun of me. He sat through the first meeting I had with four of the ten commissioners in which one of them seemed to try to renegotiate the term of my assignment. Markus had written the document which had been approved by USAID and the KPPU so he was able to explain its terms. That was also the last time anyone every talked about the terms. My assignments came from what I was asked to do by the Chairman, the Executive Director, the senior staff and circumstances. On that first day I was told I would be giving a speech to a committee of the Indonesian Supreme Court on the following Monday. I was to describe the relevance of American law to the still new Indonesian commission.

Thanks to Markus, I had a pretty good idea about the structure of the Indonesian competition law, and 20 years of reading about the history of antitrust and viewing the

[5] Certainly the criticism is consistent with my 85 percent rule, which states that when you have completed 85 pecent of a job, you should stop because the law of diminishing returns means that trying to improve beyond 85 percent costs more than it is worth. Of course, what constitutes 85 percent is highly subjective.
[6] Roger Goldman, my law school roommate, still has not fully forgiven *himself* for not reading my moot court brief. We were disqualified because I had transposed three words at the end of a sentence so that it made no sense. Roger volunteered in 1967 to proofread the first casebook I wrote because he did not want my coauthors, Boris Bittker and Larry Ebb, to be embarrassed by my weakness. He was paid for that work, but his motivation was not the money.

practice of the FTC gave me some ideas about what I might say. I agreed on the condition that John Davis accompany me to act as translator. I have no idea of what I might have done had Markus not provided all the background material on the Indonesian program. That speech accomplished a lot of things. First, it gave Chairman Syamsul confidence that I was knowledgeable about antitrust agencies and an effective speaker and advocate for the competition program. That led to many more speeches with Commissioners which gave me the best contacts I established with them. Over the time I was there, I also wrote or edited speeches by the the two Chairmen and the Vice Chairman.

The meeting also established a partnership between John Davis and me. Miranti arranged to have my speech translated into Bahasa so all could read my basic statement. At first, John took notes in English for me of the conversation and translated my comments phrase by phrase. However, after my presentation John and I had lunch and discussed the various matters that were at issue with some law students. On the basis of that discussion, I decided that I needed to add to my statement to clarify some matters. It ended up being a three or four minute comment, much too long to translate. So rather than translate the words I had spoken, John gave his own version of the points I had made. From that time on we became partners in everything we did at or for the KPPU.

We could and did speak for each other in many settings. John gained greater access to people at the KPPU when they saw his able performance in the meeting. With dual credibility, we were both more effective and could work through issues more rigorously. It was, and remains to some extent, a great partnership. We team taught the staff the investigation manual Markus had written. John was thereafter always invited to give his own speech to the groups of judges, lawyers, and business executives that we and the commissioners spoke to. Some projects we split between us. John did most of the negotiations with the Supreme Court on promulgating a statement enunciating a procedure or a standard for courts reviewing KPPU decisions. I took the lead on reorganizing the KPPU through a comprehensive set of procedural rules. But in all cases we reviewed each other's work and agreed on the substance of the advice we were giving. We were assisted throughout by our good friend Ningrum and by Markus Meier. Ningrum is an Indonesian law professor who has traveled here for this party all the way from Indonesia.

I took advantage of the luxury of the Borobudur and enjoyed cooking for Ningrum, Maranti, John, his wife Kim Ahn and son and a number of others. But I was captivated by the work. Without family, I worked seven days a week with time out for tennis, exercise, shopping and cooking. Even during the six months we were evacuated after the Bali bombing, I continued working with the same intensity (except weekends with my family). The evacuation gave me time to work through the comprehensive set of procedural rules and with the help of Doug Ostrov, one of Philo's Honors Paralegals, we put together a power point guide to the rules. I found an office at the FTC for John so he and I could continue our work and Markus was drawn in as well. The three of us did a videoconference with KPPU from Washington to present the rules. I also had time to put

together an agenda for the KPPU's strategic planning session, helped plan a Southeast Asian conference on competition law, and wrote my speech for that conference.

I will not try your patience with descriptions of the substance of what I did. If you are interested, much of that can be found in my recently published article in the Asian Pacific Law and Policy Journal.[7] What I mean to say is that I was reinvigorated by my experiences in South East Asia. I would not say I was successful or effective in establishing a functioning competition agency in Indonesia, but I tried hard and have continued to work on the problems I found and continue to try to find solutions.

Since returning from Indonesia, I have worked on a number of matters here in the Compliance Division. Most notable is a case that has further developed the Commission's capacity to utilize disgorgement as a remedy for our cases. Unlike the two previous cases, this one will not distribute the amounts recovered through private lawyers who had brought companion class actions. In this case, there were no such actions and the Commission will distribute the amount it recovered to those who paid monopoly prices for the product. I am happy to leave the conclusion of this process in the hands of Ren Davis who is implementing the Consent Judgment obtained by Mike Kades, Brad Albert and others in the Health Care shop.

I have mentioned a lot of people in these remarks, but not nearly enough. All that I have done at the FTC has been assisted by many others. I beg the pardon of those not mentioned because my success has always been due to help from my friends.

After the years at this Commission, you may not be surprised to learn that I have some thoughts about how it has been run and how it might be improved. You also might guess that my critique is based on a theoretical opinion about the nature of the Commission and the general nature of organizations. Briefly stated, most administrators believe that orders are made at the top and carried out by the staff below. However, General von Steuben, one of Washington's aides, said an army is only as good as its corps of sergeants. I think the latter is closer to the mark.

In the year that I spent working on the problems of the Indonesian Commission, I thought a lot about the question of agency expertise and roles of different persons in the agency. I concluded that an effective agency must be run by experienced and competent lead attorneys or economists, rather than the political appointees. Given the role I have chosen for myself, this may seem like a self serving delusion. I am persuaded, however, that the claims of agency expertise, and the assertion that courts should defer to agencies cannot be defended if the term-limited appointees attempt to direct the particulars of agency action.

In Indonesia, I was faced with a group of ten Commissioners, only two of whom were lawyers and only one was an economist of note. I thought then and continue to believe

[7] As always I was helped in the writing by my colleagues. I specifically mention Ellen Connelly and Naomi Licker in the first footnote. But in footnote 6, I give credit to a host of people for making the Indonesian experience and the article successful.

that was not a fatal defect. Indeed, I could tell that Commission that the lack of formal competition credentials was a feature that the KPPU shared with a number of the past and present FTC Commissioners. I argued to them and I argue to you now that Commissioners are or should be appointed for their life experience, their wisdom, and their judgment. Those qualities make them well suited to choosing between well formulated arguments. The arguments, to be sure, should be formulated by persons well versed in the history, theory and facts of the particular case presented for decision.

The limits of Bureau Directors, Deputies, ADs, etc. are a function of workload. Generally the lead attorney is the last person who really knows the facts of the case. By the way they investigate, by the content of the memoranda that they write, they determine what is known about a case. The more administrators attempt to personally direct or control the work of lead attorneys, the more they become bottlenecks, the less work will get done because others stand around waiting for decisions from above. It is also demoralizing and leads to sloppy work if the attorneys expect that their work is going to be redone by managers. Moreover, the more time a manager spends doing the work of a lead attorney, the less time the manager can devote to think about priorities and policy.

There is an additional problem with too great an attachment to individual cases by administrators. There is a temptation to place more importance on winning cases than on effectively promoting policies. The agency is and should act like a repeat player. It should not be afraid to lose cases. If it loses, it should look for better facts and try again. If necessary, it should go to Congress to seek changes in the law that will enhance the Congressional objectives in establishing the agency.

For administrators, the temptation is to win cases, to establish an impressive record for returning to a more lucrative private practice. Winning is better than losing, but the desire to win should not distort policy priorities or the development of a stable group of experienced attorneys. I think there has been a trend, off and on, for the past 20 years to move litigation away from the shops and to the Third Floor to enhance the likelihood of winning particular cases. Kevin's short-lived experiment with four Directors for Litigation created nice titles, but it is not clear to me that it served any institutional purpose.

Bill Baer may have been right that Deputy Director George Cary was needed as lead attorney to win *Staples*. Certainly *Staples* was a landmark win and gave the Commission a new and better way to win some merger cases. But George is gone and so is almost every other attorney who tried that case. To be sure, his successors, Rich Parker and Molly Boast, were equally talented litigators, but they also are gone. And short tenure puts greater pressure to win the big case than to develop the good case. I think Molly had the temperament, the talent and the interest to become the best of Bureau Directors; she did not have the time.

The transfer of Mel Orlans from the Office of General Counsel to create a cadre of Third Floor expert advocates discourages the development of able advocates among the staff. Mel is a terrific person and lawyer, but I am not convinced that having his group working

on the Third Floor helps the staff to develop talented advocates like Joe Brownman (who tried a case on his first day of work in 1966) or Markus Meier, or Mike Kades, or Rhett Krulla or Mo Bloom.

One of the elements that has troubled me most over my career at the FTC is that almost everyone who announces he or she is leaving to join the private sector is congratulated. I know of very few cases in which any attempt has been made to keep promising or demonstrably able FTC attorneys. No one says: Gee, we trained you, we spent a lot of time and money giving you the skills that make you desirable, please stay, we need you.

Now there may be a number of reasons why this is not done or at least why we do not hear about such conversations. One reason is politeness. It would be impolite to say to the person leaving: you are an ungrateful greedy person taking the valuable training and experience of the FTC and converting it to you own personal use. But I have not heard such talk among those who are not leaving. Sometimes those who remain envy the person leaving but realistically most people seem to believe the person leaving had no choice – and the reason is money. When young lawyers leave it is generally because they have a large debt built up from years of expensive higher education. When older attorneys leave, it is generally either the costs of buying a house or the education of their children. In both cases the older attorneys want to provide for their families what they had growing up or better and cannot on the salary of a GS 15. (There is some split in what we hear about life after the FTC. Some like the work in the private sector, most do not.)

The good news about money-based problems is that they are solvable. If there is the political will, the FTC can get more money. The SEC and financial regulators have higher salaries. Higher salaries ought to be a priority to retain experienced attorneys. And younger attorneys with high education debts ought to receive help in paying off the costs of their education, a fraction of the cost each year to preserve the ability of the lawyer to stay as he or she takes on family responsibilities.

Finally, there should not be a Henderson, The Rain King syndrome. In Bellow's book, the person who becomes king is killed automatically after a year in office. In the Commission, if you become a Deputy Director or (god forbid) Director, you are expected to leave with the entrance of a new administration. To be sure many in these positions are happy to cash out with a high-paying partnership. I am not saying that the FTC does not benefit from the infusion of new and experienced attorneys from the private sector, it can and it does at every level of experience from the very young and new attorneys to the seasoned trial lawyers. Nor am I saying that the new administration should be disabled from bringing in some new people who share their particular point of view. What I am saying is that this should not be automatic.

There is tremendous value in having experienced people, especially on the Third Floor, so that the new administrators do not have to reinvent all of the procedures and practices that have developed over time, but are never made explicit. The Commission as a whole faces this kind of problem right now in positions that are not normally subject to

wholesale change, because of the departures of the Executive Director, the Chief Financial Officer, the Inspector General, the head of Human Resources, the Associate Director for Enforcement in BCP, the BC Coordinator of Honors Paralegals, and Pat Foster. These are not positions that normally change with administrations because it would be highly disruptive to the normal operations of the Commission if they did. The same is true for at least some senior staff of the Bureaus.

The FTC will survive these departures but it will add to the burdens of the agency to replace so many at one time. I came a year or so after Al Dougherty became Bureau Director. He had had previous experience in the Bureau and the private bar. He replaced almost all of the Assistant Directors with new young lawyers from the private bar. Before he left, he had replaced most of those new ADs with individuals from the Bureau who had shown talent and energy. Was the initial housecleaning warranted? I do not know because I was not here. I can say that the initial replacement of ADs did not solve the Bureau's management problems. The costs of finding and replacing experienced people are high.

I am asking not that everyone be retained; rather I am asking that the presumption that senior staff in the Bureaus will change with administrations be eliminated. It is perhaps age that makes me conservative in this regard, but I think Chairmen and Directors should examine carefully what they lose when experienced people leave. I feel confident that Tim Muris, who criticized Jack Kirkwood before he came to the agency, was glad Jack stayed on and continued to contribute as Tim's Assistant Director for Evaluation.

I have talked a lot about what Commissioners and managers should not do, but have neglected to talk about what they should do apart from vague and disparate references to "policy." I think the model, if not the implementation, of the Pertschuk administration was a good one. The idea was for the policy planning shop to develop policy review sessions for the Commission in which staff would lay out what the Commission had done in an area, say Vertical Restraints or Merger Policy, and then set forth an agenda with policy choices for the Commission to choose among. These sessions had the potential to provide Commissioners who are not experts in competition issues with an overview that can inform them for deciding cases and priorities in allocating funds.

At the same time, the Pertschuk administration recognized that competition affects the entire economy and we understand its role only dimly. As a consequence it sought to enquire about the working of the economy and to educate the staff the Commission and the public about what they learned. We are at an economic stage where this seems more necessary than ever. The combination of globalization with networked electronic industries cries out for more investigation. The forced retirement of John Hilke because of inflexible personnel rules may have robbed the government of one of its most creative thinkers on these problems.

It is not just the policy offices that should enquire, investigate and think about these issues. The staff that has to investigate matters should have the opportunity to learn and contribute to the learning. We have been working on open access remedies in a number

of cases for at least ten years. The Commission has issued orders to resolve what we clearly saw as competitive problems. Having worked on a number of these cases, I am not sure that any of the open access remedies have worked. I am not sure that we have come further than *Chicago Board of Trade* and the *Railroad Terminal* cases in our ability to analyze and formulate remedies in networking cases. I know that some of the problem rests in understanding the industries well enough before the Commission acts, but there are more fundamental problems concerning our lack of understanding.

Bob Pitofsky and Susan DeSanti made an effort to broaden discussion through public hearings. It was a noble effort, but Chairman Pitofsky's later speech complaining that consent orders and decrees hide the resolution of difficult issues from public view shows that we have yet to find a way to research hard problems and then debate focused issues in a useful way. We will see if the litigated opinions issued under Chairman Muris are creating better solutions.

I think developing policy means that the agency should look at recurrent problems and devote efforts to try to solve them. I can suggest two problems that I have worked on for years and with which I can claim some familiarity. Both arise in the context of the premerger notification program. For years, I have argued that firms routinely do not give the antitrust agencies all of the Item 4(c) documents that are required by the form. Item 4(c) is arguably the most important submission that a firm should make. It requires (in simplistic terms) the submission of all documents that the firm relied on in deciding to make an acquisition. It is the only specification apart from the contract or the description of the deal that relates directly to the transaction. A review of the summaries of filings prepared by the premerger office each week indicates that most firms submit one, three or maybe four documents in response to this specification. Years of conducting premerger investigations have convinced me that large firms typically generate many more documents than we get in response to this item. The FTC could, if it made it a priority, routinely investigate the failure to submit the documents that we uncover during HSR investigations. There are many reasons why this has not been done. Ultimately, the reason seems to be that the FTC does not act as a repeat player which has institutional interests in making Item 4(c) do the job the legislative history suggests was intended – namely to require firms to give the antitrust agencies all the documents they relied on in deciding to do the deal. Rather the agencies limit their scrutiny to individual filings in which there is some reason to believe that the agencies have been harmed by the failure to submit information. I have no reason to believe that the Commissioners have ever considered whether better information in initial filings would improve the merger enforcement process. I am told however, that, almost thirty years after the notification system came into effect, part of this issue may be examined by the current administration.

Another HSR issue, which has gained additional attention in egregious cases, concerns "gun jumping," the premature integration of firms during the HSR waiting period. We lack a coherent theory of what is and what is not prohibited activity between firms that have filed to merge. I have worked on many of these cases. Pam Cole and I looked into a merger some years ago. We did nine investigational hearings in two days and amassed so much evidence that the buyer was already running the target firm, that the parties

signed an Interim Consent Order with the Commission agreeing to terminate a series of practices until the investigation was complete. The Antitrust Division and the FTC have brought a series of cases where blatant behavior has been found. Yet there have been and continue to be routine exchanges of information between firms during the waiting period that are allowed. The exchanges are permitted on the grounds that planning needs to go on so the merger if allowed can proceed quickly. The result is that the Commission will only investigate activity where it is likely to be able to show unlawful effects. This kind of cat and mouse game does not seem appropriate for a prophylactic statute that is intended to require a standstill pending antitrust investigation. It is not an easy issue, but it is certainly one on which enquiry, debate and resolution is long overdue. Again, I would say that the matter has not been resolved because the Commission looks at cases individually rather than from an institutional perspective.

I could suggest other issues that deserve close examination as policy issues, but creating the list of what should be addressed is the highest duty of the Commissioners and the senior staff. Their actions decide what issues are most important. Only they have the power to direct the staff to report on them on issues as well as require the enforcement of the FTC Act. The Commission and senior staff should consider the reports and decide whether they can make changes to improve the effectiveness of the agency or need additional legislation. I will stop at this point because I am merely repeating the charge to the Commission in the words of the statute.

Need I say that these are my views and not necessarily those of the Commission or any of its Commissioners? I think not. We live in a world where the economy is changing fundamentally: Globalization, the spread of income between the rich and poor is widening, the American trade deficit is growing, software and pharmaceuticals often are expensive to develop, but have negligible costs to produce, networked industries have created new kinds of barriers to entry and new relationships between suppliers and producers. Some of these changes may pose problems that can be solved by application of traditional antitrust, some require new antitrust theories, and some require new legislation. It is an enormous agenda to decide which problems can be addressed by antitrust law and, if so, what remedies will work. Consequently, I am not disheartened that the Commission has not addressed all the issues to which I would give priority.

I hope I do not sound as if I have been disappointed at the Commission; I do not feel that way. I have made best friends here at the FTC – Naomi, Bobi, Chris, Jacques, Eric, Claudia, and many more. I have been given great freedom in what I have done and how I was to do it. I have been able to pursue parallel interests in writing and teaching. I have been very fortunate.

I share my thought on leaving because that is what I do and have done in memoranda for 27 years. Early in my government career, Leslie Gray, an attorney who was working for me at the EEOC said: Until I worked for you I did not know working could be fun. I replied that it not only could be fun, it should be fun. I am not leaving angry. I have had fun and intend to continue to have fun consulting, teaching and writing. At my age there is not enough time to pursue those and continue to work with my friends. How I will be

able to get along without them I cannot imagine. But as my father always said it is important to be lucky. And I have been lucky.

I wish good luck to all of you.
Ken

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