

The Future of U.S. Competition Policy

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I sometimes am praised for papers I haven't written. The erroneously aimed plaudits usually are meant for Bill Kolasky, whose name and professional interests resemble my own. I ordinarily would welcome a free ride on Bill's scholarship, but not on his essay, *What Would a Kerry Administration Antitrust Program Look Like*.

Kolasky predicts that "the biggest difference between a Kerry Administration and the current Bush Administration would likely be" at the Federal Trade Commission. For several reasons, his explanation is unsatisfying. First, Kolasky's definition of his forecasting task is unduly narrow. He speaks of the Kerry Administration's "antitrust program" and "antitrust policy," but his essay overwhelmingly addresses litigation-related matters. Except for a comment about U.S. participation in ventures such as the International Competition Network, Kolasky suggests that "antitrust policy" consists only of cases and amicus briefs.

The era of equating antitrust policy with cases is past. The successful government agency today does not engage simply, or even primarily, in "antitrust enforcement." The global trend is to use a broad range of policy instruments to diagnose and address obstacles to competition. Beyond cases, the successful competition agency invests in research, holds hearings and workshops, performs empirical work, publishes studies, and submits advocacy comments to other public authorities.

By his case-centric coverage, Kolasky is silent on the likely content of a Kerry FTC non-litigation competition program. Will the FTC continue to hold hearings and publish studies, in the tradition of Bob Pitofsky and Tim Muris, on subjects such as global competition, health care, or the intersection of competition policy and intellectual property policy? What about the continuation of existing FTC research to assess the effects of past FTC law enforcement decisions? Would a Kerry Administration sustain or expand FTC transparency initiatives, such as explaining decisions not to prosecute and releasing data on variables that influence merger analysis? The omission of non-litigation activities in the forecast overlooks what the FTC and many other competition agencies today understand: coordinated strategies that make full use of litigation and non-litigation tools are essential to successful competition policy.

In reviewing the FTC's antitrust cases, Kolasky states that the Commission under Muris "had a very active nonmerger civil enforcement program but one largely reflecting its Chairman's public choice policy agenda." He adds that "many" FTC cases in the Muris era "focused on settlements of patent disputes, alleged abuses of standard-setting organizations, and activities arguably protected by the state action or *Noerr* doctrines." Kolasky explains that "all" of these matters "reflect the classic Republican view that the most durable restraints are imposed by government." By contrast, he predicts that a Kerry Administration would "focus more attention on private restraints and exclusionary conduct, as the Clinton Administration did." Kolasky gives no data on Muris FTC enforcement matters to show how many FTC cases fell into the "public choice" and non-public

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choice categories, respectively. Nor does he assemble data for the Clinton FTC to compare the Muris and Pitofsky nonmerger programs.

Tim Muris surely treated restraints involving government or “quasi-government” processes as serious transgressions. What was their place in the overall enforcement mix? During the Muris Chairmanship (June 6, 2001 through August 12, 2004), the FTC issued 34 nonmerger competition complaints. By the broadest definition, 12 of the 34 matters fall into Kolasky’s “public choice” category. It is not self evident why one would say that a program in which roughly a third of cases are “public choice” matters “largely reflects” a “public choice policy agenda.” Of the 22 “non-public choice” cases, 18 involved horizontal restraints in the health care sector. These matters—all concerning private restraints—constituted the largest part of the Muris nonmerger enforcement program. Does Kolasky think a Kerry Administration would do otherwise?

The essay’s only comment on the Muris “private” restraint nonmerger program scorns the FTC’s *PolyGram* case (*Three Tenors*). Though the author omits other private restraints matters, such as the FTC health care program, he points out that “some view” the *Three Tenors* case “as a misallocation of [the FTC’s] scarce enforcement resources by pursuing an action against an unimportant covenant not to compete.”

Kolasky’s lament about *Three Tenors* implies that the fact that “some” observers dislike a government case proves, by itself, that the matter is flawed. I suspect that at least some observers—practitioners, newspaper editorial writers, academics—find fault with virtually every government antitrust case and believe such matters waste scarce public funds. It would be strange policy to insist that a government agency forgo a case if it is possible to identify some who oppose the intervention in question.

Kolasky also declares that “the purpose of [the FTC’s *Three Tenors*] action seemed largely to be an effort to resuscitate the *Massachusetts Board of Optometry* framework for a truncated rule of reason analysis, which Chairman Muris helped develop during his previous tenure at the Commission.” Kolasky provides no further explanation for his conclusion about the motivation for the FTC’s case. The best time to identify the “purpose” of the “action” presumably is the original decision to prosecute. Chairman Muris did not participate in the Commission vote in July 2001 to issue the *PolyGram* administrative complaint.¹ It is not apparent how Kolasky confidently can infer that the four voting commissioners initiated the case “largely” (or to any degree) to give Chairman Muris an opportunity to “resuscitate” the *Massachusetts Board* framework.

If we put aside doubts about Kolasky’s assessment of the emphasis, significance, and soundness of the Muris nonmerger enforcement program dealing with private restraints and instead adopt a somewhat moderated version of the Kolasky hypothesis and posit that the Muris litigation agenda had a strong “public choice” emphasis, we must ask: Would a Kerry Administration materially depart from this agenda? Kolasky puts the Pitofsky and Muris eras in watertight compartments, ignores important connections in enforcement across administrations, and overlooks the cumulative nature of FTC policy making.² It is misleading to discuss the evolution of FTC competition policy in the “Muris” era involving patent and standard-setting issues without acknowledging contributions and influences from Pitofsky-era antecedents such as *Summit/Visx*, *Dell Computer*, and *Schering* (which the Commission initiated at the close of Pitofsky’s chairmanship).

¹ The FTC Press Release announcing the *Polygram* complaint appears at <http://www.ftc.gov/opa/2001/07/tenors.htm>.

² For a critique of commentary that slights important elements of continuity across administrations, see William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 467–70 (2004).

Similarly, the Pitofsky FTC's decision in 2000 to start the generic drug study—a project embraced by the Muris FTC and concluded with a formative report in 2002—ought to make one wary of the notion that future administrations would not have an enduring interest in Orange Book listing matters. Perhaps Kolasky thinks that a Kerry Administration would reduce the effort the FTC has given to these and related pharmaceutical matters that implicate the government's regulatory processes and involve billions of dollars in health care costs for consumers. Tim Muris assuredly pursued such measures aggressively, but he built upon enforcement approaches and a base of knowledge that Bob Pitofsky had a key role in developing.

Addressing Kolasky's contention that the Muris "public choice" matters "reflect the classic Republican view that the most durable restraints are those imposed by government," we can look at a recent statement by Ulf Böge, President of Germany's Bundeskartellamt, at the Seoul Competition Forum on April 20, 2004.³ Böge observed that "Economic policy researchers have increasingly come to realize . . . that a large number of these restrictions of competition, if not most, are not caused by private companies at all. It is rather the governments themselves which cause damage to consumers and reduce overall economic welfare due to distortions and restraints of competition resulting from their laws, regulations or concrete administrative practice." He concluded by saying that the "battle against state-imposed restrictions of competition is no less important" than challenges to private restraints "if competition is to develop freely."

Böge's comments underscore a modern development that Kolasky ignores. Foreign competition officials increasingly endorse the philosophy that Kolasky labels "public choice" or "classic Republican"—namely, that competition policy must be no less concerned with attacking public restraints as private restraints. As Tim Muris has pointed out, the United States has tended to lag behind foreign authorities, such as the EC, in putting public restraints high on the competition policy agenda. Against the backdrop of this emerging international norm of competition policy, it would be unremarkable for a Kerry FTC to decide it is appropriate to have a third of its antitrust cases address restraints featuring government or quasi-government involvement.

Beyond his review of the Muris litigation program, Kolasky also comments on government antitrust litigation trends. The Bush Administration, he notes, "recently has suffered a string of defeats in both merger and nonmerger cases." Kolasky advises that "[w]hoever is elected, the antitrust agencies will need to focus on what lessons they should take from these defeats." Since June 2001, the FTC has had two antitrust matters, both merger preliminary injunction actions, decided in federal court. In one case (*Libbey*), the district court granted the preliminary injunction. In the other, more recent case (*Arch Coal*), the court denied the preliminary injunction. The current "string" of FTC federal court antitrust defeats stands at one.

No public agency should regard any litigation defeat with indifference. To ensure superior preparation and utmost attention to sound policy development, an agency must approach each new matter with the view that the agency is only as good as its latest case. The FTC's modern development of a norm of continuing self-assessment and ex post evaluation—one of the institutional trends that escapes Kolasky's attention—provides assurance that the Commission in any presidential administration will examine the causes of any federal court setback carefully. ●

³ Ulf Böge, *State-Imposed Restrictions of Competition and Competition Advocacy*, Seoul Competition Forum (Apr. 20, 2004).