1-1-1989

The Kirkpatrick Committee Report--Selected Insights

Stephen Calkins
Wayne State University, calkins@wayne.edu

Recommended Citation
Available at: http://digitalcommons.wayne.edu/lawfrp/6

This Article is brought to you for free and open access by the Law School at DigitalCommons@WayneState. It has been accepted for inclusion in Law Faculty Research Publications by an authorized administrator of DigitalCommons@WayneState.
THE KIRKPATRICK COMMITTEE REPORT—SELECTED INSIGHTS

Stephen Calkins
Professor, Wayne State University Law School

My assignment is to supplement what has been said, in order to complete this reader’s guide to the Report. Appendix C, which contains a wealth of information in graphs and tables, deserves special mention. After commenting on each section of the Report, I will pay some important tributes.

Section 1: Summary. The summary was written carefully by the Committee as a whole. It is unusually comprehensive.

Section 2: Introduction. The introduction describes the Committee’s procedures.

Section 3: Leadership. The Report’s first substantive section addresses leadership, because this is critical to the agency’s effectiveness. “Above all, the commissioners should be persons of recognized stature who will be respected by Congress, the businesses the Commission regulates, and the consumers it protects.”

Section 4: Antitrust. Graphs three through seven in Appendix C depict the Commission’s changing antitrust priorities. Between 1981 and 1987, workyears devoted to vertical restraints and market power offenses declined by 92 percent and 88 percent, respectively; workyears devoted to mergers and joint ventures declined by 24 percent; workyears devoted to horizontal restraints more than doubled. Workyears devoted to food industries and natural resources fell by 79 percent and 88 percent, respectively, while workyears devoted to health care increased by 11 percent. In 1988, more than 80 percent of workyears expended on the FTC’s competition mission were devoted to mergers and horizontal restraints.

1 REPORT OF THE ABA SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION [HEREINAFTER REPORT], 58 ANTITRUST L.J. 43, 60 (1989).

2 The notes are an integral part of the graphs. For instance, note three explains that prior to 1988 an FTC lawyer challenging horizontal health care restraints probably would have recorded his or her time under health care, but might have recorded it under...
Section 5: Consumer Protection. Graphs 14 to 19 show that advertising and rulemaking workyears have fallen substantially, while workyears devoted to consumer fraud have more than doubled in the past six years.

Section 6: Providing Guidance. With the decline in the FTC's adjudicative role (see Appendix B), it is essential that the FTC affirmatively seek opportunities to disseminate its views. The best guidance is provided publicly by the Commission acting as a whole.

Section 7: Competition and Consumer Advocacy. The Committee strongly endorsed the FTC's advocacy program. The Committee was troubled by Graph 22, which shows that the number of FTC interventions fell by 68 percent from 1987 to 1988, apparently in response to congressional criticism of the program.

Section 8: Economics. The Committee also endorsed the role of FTC economists. It applauded the collegial relationship that exists among lawyers and economists. Although economists should not have a veto over prosecutorial decisions, the FTC should hesitate before initiating action that the economists oppose.

The Committee also emphasized the importance of the FTC's research role. (It is troubling, in this regard, that Table 2 shows that economics research workyears fell from 29.6 in 1983 to 7.3 (planned) in 1989.) However, the FTC should change the focus of some of its research. First, the FTC should "concentrate on becoming the single most important repository of knowledge about the actual operation of major U.S. industries." Second, the FTC should develop extensive information about the U.S.'s antitrust and consumer protection systems. The FTC is well-situated, for instance, for determining whether competition was harmed by questionable mergers that were allowed to proceed, or by the preventing of mergers that were arguably procompetitive.

Section 9: Resources. The FTC has 124 lawyers in its Bureau of Competition, 118 in its Bureau of Consumer Protection, and 115 in its regional offices. This is not enough; the FTC's resources should be increased. At the same time, the FTC should use its resources more wisely. The Committee noted that the FTC has become top-heavy, which not only wastes resources but also harms effectiveness.

Section 10: Congress. The Report reviews the characteristics that make the FTC unusually vulnerable to congressional pressure. The Report

horizontal restraints instead. As a result, for instance, graph 7 understates workyears devoted to horizontal restraints. We were told that these graphs accurately show trends, even though the absolute numbers are unreliable.

3 REPORT, supra note 1, at 102-03.
offers a number of suggestions for improving FTC-congressional relations, many of which have been discussed by Cal Collier. One additional point deserves attention. If an activity should be exempt from the antitrust laws, Congress should proceed, through the responsible committees, to enact an antitrust exemption. There is no justification for leaving an activity subject to the antitrust laws but prohibiting the FTC, alone, from enforcing those laws.

Section 11: Dual Antitrust Enforcement. Three additional points raised in the discussion of dual antitrust enforcement should be mentioned. First, there is less dual enforcement than one might think from all the attention the issue has drawn over the years. The Antitrust Division currently expends more than seventy-five percent of its resources on mergers and criminal enforcement. Thus, for the non-merger antitrust enforcement program outlined in the Report, there may not be an appreciable risk that dual enforcement will impose significant costs by increasing uncertainty.

Second, dual merger enforcement does not appear to be imposing significant uncertainty costs. A survey of leading merger lawyers found that, because of the Hart-Scott-Rodino process, uncertainty about enforcement standards has rarely if ever deterred firms from proposing mergers. Merger standards are relatively clear and consistent, and the Hart-Scott-Rodino process provides a relatively inexpensive method of testing government reaction. Antitrust lawyers usually recommend reporting a questionable merger and hoping for the best.

Third, although the Committee described the benefits of dual enforcement, it expressed concern about the length of time it takes the Commission to write opinions. "Only partly in jest do we suggest that the commissioners announce an official summer recess, and then, as does the Supreme Court, discipline themselves by delaying its commencement until they have decided that term's cases."

Section 12: Unity of Functions. A majority of the Committee believe that the FTC should retain its roles as prosecutor and adjudicator. The Report discusses but makes no recommendations concerning suggestions to reduce the number of commissioners and the length of commissioner terms.

Appendix B: Changes in Authority Since 1969. We once thought of the FTC as an agency that issues administrative complaints, assigns them to law judges, and then hears appeals from initial decisions. That conception is no longer correct. In 1988, the FTC filed more than half its complaints

\footnote{Report, supra note 1, at 62 n.9.}
\footnote{Report, supra note 1, at 116 n.168.}
in federal district court. In 1980, there were thirteen administrative law judges; today there are three.

Graphs 21, 24, and 25 tell the story. The number of cases pending before ALJs fell by seventy-six percent from 1979 to 1988. During 1985 through 1987, FTC professionals spent comparable workyears on court and administrative litigation. In 1988, they devoted more than twice as much time to court litigation. These figures are the more remarkable because they exclude workyears spent by the general counsel's office. The change has been most dramatic for the Bureau of Consumer Protection and the regional offices; for each, court workyears have exceeded administrative litigation workyears in each of the past five years. Even for the Bureau of Competition, administrative litigation's lead has been steadily shrinking. In short, a sea change has occurred in the FTC's role. This change reemphasizes the significance of the agency's role as a prosecutor and makes it especially important that the agency regularly offer guidance.

TRIBUTES AND ACKNOWLEDGMENTS

That completes the reader's guide to the Report. With your indulgence, let me close by offering four quick but important tributes. First, the Report could not have been prepared without the assistance of the Committee's deputy counsel and assistant counsel, Kathy Wallman and Sandra Spear. Kathy, an Arnold & Porter lawyer who served pro bono, researched, drafted, and edited, and recruited and then supervised support staff. Sandra, a Covington & Burling lawyer who served pro bono, also drafted and edited, and was largely responsible for preparing the data that is presented in Appendix C.

Second, Irv Scher deserves credit. It is all too easy for an ABA Antitrust Section chair to encourage only activities that he initiated. Although our Committee was appointed by Jim Rill, we conducted our study during Irv Scher's term as Section Chair—and he worked with us every step of the way. He offered suggestions, he provided support, and he preserved the project as a Section priority. His unselfish and valuable assistance deserves praise.

Third, Jim Rill deserves a special tribute. This Report is the result of his vision. He persuaded the Section to endorse the idea, he announced the decision, and then he made it happen. When we needed ABA approval, he flew to the ABA meeting in Denver and obtained it. When we realized how much the study would cost, he told me, "Look, Steve, I have

---

6 Appendix A lists biographies of Committee members.
sent my fleet halfway around the world, and we'll figure out a way to bring it back. So press on.” And press on we did. Jim appointed an extraordinary committee and then, as a member of that committee, he was an active participant in the deliberations. Jim's fleet is finally back in port. He deserves great credit for launching it and playing a key role in bringing it back.

Finally, all of us owe a special debt to Miles Kirkpatrick. When Jim Rill learned that Miles would serve as chair, he knew that the Report would become a reality. Miles shaped the entire process. He was on the telephone with me regularly, prodding, making changes, and keeping things on track. Equally important, Miles established the tone of the Report. From the beginning, he said that this would not be the same kind of detailed critique as the 1969 Report. Miles set the agenda for our meetings and presided over them with a light, graceful, yet firm hand, keeping the discussion on point and moving forward, closing off unproductive debates, and searching for the consensus that he found. The absence of dissent is really a personal tribute to his leadership. It was an honor to work with one of the legends of antitrust on the second Kirkpatrick Report.