1-1-1989

The Kirkpatrick Committee--Objectives and Procedures

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Recommended Citation
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THE KIRKPATRICK COMMITTEE—
OBJECTIVES AND PROCEDURES

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A year ago, Jim Rill preliminarily announced the Section's intention to form this Committee. Jim told the Section's leadership that the Committee would not be asked to prepare a report card on the FTC, but rather would make prospective recommendations on the FTC's role. Jim also informed us that he had persuaded Miles Kirkpatrick to chair the Committee, and that Bob Pitofsky had agreed to serve. Many of us also correctly presumed that Jim would ask Tim Muris to be a Committee member. These steps set the tone for the project. The Committee was to consist of acknowledged experts with well-established views. It would include prominent voices on the left and on the right. Its assignment was to focus on the future, not debate the relative merits of various FTC leaders.

Two courses were open to us. One approach would begin with first principles, by debating whether consumer welfare should be the exclusive goal of antitrust, then move on to select ideal HHI thresholds for merger enforcement, and so forth. This would have been a simple task, given the frequency with which Committee members had addressed these issues in articles and speeches: for each important issue, a paralegal could have collected the publications on each side, weighed the two piles, declared the heavier pile the majority view, bound the papers, and issued a report. We decided not to take this course.

Instead, following the inspiration of Jim Rill, we identified important questions concerning the FTC's role, and then sought the areas of substantial agreement. This was not an easy task, since the Committee included eighteen experts with a variety of backgrounds and perspectives and with strongly-held views on many issues. Nonetheless, consensus was

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achieved: all eighteen Committee members signed the Report, although two members issued separate statements on particular issues.

Perhaps we will be criticized for failing to address some important issues. It is true that the Report does not state whether consumer welfare should be the only goal of antitrust, and it never mentions HHI levels. It also is true that the Report does not call for radical surgery on the FTC. In many ways it is a small report—not in length—but in the sense that it offers many modest observations and suggestions. Although readers will have to decide for themselves, I believe that many of these observations and suggestions are useful and important.

Without telling tales out of school, let me describe briefly how the Committee functioned. This Committee worked. Many members prepared position papers. We had a half dozen meetings lasting a day or more—and most Committee members attended every session. Even Tom Rosch, from San Francisco, made all or almost all of the meetings, either in person or by speaker phone. (That speaker phone provided my fondest memory. A debate would be raging when suddenly, like Banquo's ghost, a seeming spirit would speak, startling us and redirecting our attention to some important issue we were missing.)

None of our meetings were quiet or gentle. There was no solicitude for the uninitiated or the overly sensitive. Speakers were at the far end of the learning curve; near-encyclopedic knowledge about the agency and relevant legal standards was assumed; and the debate left no holds barred. Time and again, one Committee member would look at another, and say, “That's just wrong. That's not how things work.” Views were expressed with vigor and even passion.

In spite of—or perhaps because of—the passion with which most Committee members participated, each was willing to compromise. Committee members worked to reduce their differences, not emphasize them. At one point or another each Committee member was on the telephone with me, arguing for some position. Wording was changed and rechanged to respond to particular concerns. Through hard work and good will, and through Miles's leadership, the Committee was able to achieve the consensus that the Report reflects.

Without further delay, let me turn the microphone over to Cal Collier, who has already been introduced. After Cal, Tim, and Nancy have reviewed various parts of the Report, I will highlight other points. Putting our remarks together, you should have a reasonably comprehensive reader's guide to the Report.