

Separate View of J J White

Acknowledging the many virtues in Professor Hammer's file that are discussed in the majority report and conceding that Professor Hammer has measurably improved his file in the last two years, I dissent from the recommendation for tenure:

Professor Hammer has significant strengths. He remains an outstanding teacher and a contributor to the life of the school. In the last two years he has published and prepared for publication a large body of material, so the question of his will and ability to publish has been put to rest. He has been recognized by many in the health law field as one of the most prominent students of antitrust law's application to the health care industry.

Professor Hammer also has significant weaknesses. He is not a felicitous writer.

Among the inside and outside commentators there is a division of opinion about the originality and significance of his major work. He appears to enjoy little recognition among and to have only the slightest interaction with persons in law and economics.

Consider first his writing. I have little knowledge of formal economics or of antitrust law, so I start his work with a disability. Allowing for my ignorance, I found his two major pieces, *Market Failures in Michigan* and *Health Care Quality in Columbia*, exceedingly dense. In the first he gives no examples for ten pages, and the examples that he eventually gives are so abstract and elliptical that they were seldom helpful. For example he offers "Hospital Nonprice Competition" as an illustration of his point at page 864, yet he never gives a concrete example about how such competition could occur, or how it would come to court. Rather he lapses into jargon about "second-best trade-offs,

negative price externalities, and market failures" such as "moral hazard" and "agency problems." I have a moderately sophisticated layman's understanding of those terms, but a real example of nonprice competition might have made his point for me. I could only guess about his main point.

The writing in *Columbia* is not better. Consider a passage in the first full paragraph on page 81 in my draft: "Overall, then, our data show that courts can appreciate quality as a competitive concern, but not infrequently stray from that approach for reasons of either judicial temperament or historical path dependence." What does that sentence mean? I assume that means something like the following: "Courts sometimes find doctors' anticompetitive behavior to be permissible where that behavior would keep good doctors on the staff and bad ones off. But some judges are too impatient to hear the doctors' arguments. Other judges fail to appreciate these arguments because those judges are accustomed only to commercial antitrust cases where such arguments are seldom made."

Sometimes bad writing means bad thinking. I do not assume that that is true in Professor Hammer's case, but that possibility concerns me. Even if bad writing is not evidence of bad thinking, bad writing limits one's audience and diminishes one's influence.

More than a dozen people have given us opinions on Professor Hammer's writing. Like all but a few of our colleagues, I am dependent on those opinions to understand Professor Hammer's contribution to existing scholarship. I score and weigh their opinions somewhat differently than the majority does. First I give greatest weight to our colleagues and others who are on distinguished law school faculties and who are more

likely to understand our standards than are persons not on law school faculties. Second I give greater weight to those who are familiar with antitrust than to others.

Six commentators fit my two qualifications: Blumstein, Elhauge, Havighurst, Kauper, Regan and Trebilcock. In tenure case commentaries, I interpret everything but a "yes" vote to be a "no." Put differently, I read a substantively negative review of the work followed by equivocation about tenure to be a no vote. I adopt that interpretation of tenure letters partly because that is the way I write them, and partly because I think most writers approach this task in a spirit of generosity. Applying those standards to the six commentators, I find one quite favorable (Trebilcock), two to be guardedly favorable (Havighurst and Kauper), two to be guardedly negative (Blumstein and Regan) and one to be quite negative (Elhauge).

Don Regan and Tom Kauper can speak for themselves; if I have misrepresented their positions, they can correct my error in the faculty discussion. Why do I give more weight to Elhauge than to Trebilcock? I do so mostly because Trebilcock's letter is brief and conclusory while Elhauge's is substantial and substantive. Trebilcock devotes only one paragraph to each of the major articles, and he makes one statement about the *Columbia* piece that undermines his credibility: "I expect this paper [*Columbia* with Sage] when published, to become a standard reference piece on the application of antitrust law to the health care sector." Even Professor Hamner's advocates make excuses for the *Columbia* piece; I do not understand how it could ever become a "standard reference."

Elhauge deals at length with both of the major pieces. Several of his criticisms coincide with my uninformed intuition. He notes at page one that the basic idea of the

*Michigan* piece is "hardly new" and he criticizes Professor Hammer for failing to deal with some of the objections that the Chicago economists would make (e.g. "who should have the power to correct market failures" at page two). Elhauge's last point at page five about the lack of new ideas, of "insightful points" and of "sparkle", also conforms to my intuition.

Several commentators criticize Professor Hammer's second large piece for its lack of interesting data and absence of informative analysis. Blumstein calls it "surprisingly sterile analytically;" Elhauge says that the authors "never translate [their policy implications] into a genuine recommendation of legal policy;" Havighurst claims that the article falls into the crack between an "analysis of data" and a "traditional doctrinal analysis of a set of cases," and Don Regan notes: "But so far as I can tell very little of interest came out of it."

I have sympathy for Professor Hammer's dilemma with his *Columbia* data. Many empirical pieces fail when the data prove to be uninteresting or uninformative about the truth of one's hypothesis. I suspect that professors Hammer and Sage suffer a form of this problem, and that they have tried to make the best of it. But we are directed to grant tenure on the basis of work done, not on the basis of good efforts that failed, so I regard the piece as interesting and showing promise but not as a sufficient basis for tenure.

The commentators from the health care side are much more favorable to Professor Hammer's case. I give them less weight than the lawyers and look to them for different information. I treat not only Jacobson and Glied but also Bloche and Sage as health care persons. Both Bloche and Sage have law faculty appointments, so each could be included in my list above. Each is an MD and teaches in Medicine or public health as

well as in law school. Perhaps unfairly, I have chosen to lump them with the other health care persons.

I accept at face value the claims of all of the health care persons that Professor Hammer is becoming a leader among the lawyers speaking to the health care profession on antitrust. It is a virtue and a strong one that he consults frequently with these people, attends their seminars and routinely makes presentations to them. We can and should rely on their claims about Professor Hammer's status in their community as support for his tenure. But I do not believe that we can rely on the judgments of those in health care about the tenure standards that an elite law school should use, so affirmations of his high status in the health care world are not enough for me.

Others on our faculty who have written, Becky, Omri and Sallyanne can speak for themselves at the meeting. Omri seems an implacable foe of tenure; Sallyanne, a biting critic, and Becky, a moderately favorable commentator. The sum of these three comments is measurably negative.

One last point has to do with Professor Hammer's relation to the law and economics scholars. Given that he has a PhD in economics and that his writing is filled with and based on formal economic concepts, I find it strange that he seems to have little contact with law and economic scholars outside of the health care field. So far as I can tell, he has never published in any law and economics journal (e.g. The Journal of Legal Studies) nor has he ever taken part in or presented a paper at any law and economics meeting (e.g. ALEA, law and economics workshops) other than the one conducted by our faculty. Members of the majority have suggested that law and economics is like a cult to which Professor Hammer cannot gain admission. But I am not sure he has asked for

admission. I have heard Professor Hammer say that his work is "subtle and nuanced." By inference he seems to be saying that the Chicago economists' work is neither. I do not wish to make too much of this, but it is possible that he has not gained admission because his work lacks sufficient rigor or because he is unwilling to submit to the kind of harsh review that law and economics scholars might bring to it.

My concern about Professor Hammer's relation to the law and economics school was stimulated in part by comments made by two commentators. Havighurst suggests that the Robert Wood Johnson Foundation chose Professor Hammer because of the Foundation's "symbolic exaltation of 'quality' as an absolute value, and ideological distaste for markets..." and, presumably, because the Foundation thought that Professor Hammer would conform to that view. Becky Eisenberg makes an analogous point about the influence of unarticulated but influential principles: "Hammer's strong normative views on hospital mergers... seem to be driving the discussion."

I wonder if Professor Hammer's apparent disaffection from the law and economics people arises from his carrying a set of *a priori* rules in his head that are hostile in some unexpressed way to much of neo classical school of economics. I do not criticize anyone for skepticism about much of neo classical economics; I criticize only those who lack the gumption to say so.

In any case I think that it is a small minus in his file that he has never made a presentation at a law and economics meeting outside of Ann Arbor, has never published in a law and economics journal and that he apparently has little contact with the law and economics scholars.

I finish where I started. There are large virtues in Professor Hammer's file and large faults. Unlike the majority, I believe that the faults outweigh the virtues.

James J. White