The original documents are located in Box 7, folder "Congressional - Antitrust Bill (3)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

September 2, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHILIP BUCHEN

FROM: JAMES E. CONNOR JEC

SUBJECT: Senate Consideration of Omnibus Antitrust Legislation

The President reviewed your memorandum of September 1 on the above subject and made the following notations:

"What is Attorney General's view?"

"What is view of business community?"

"I think we should have a conference on this soon."

"I would veto if no modification but suggest conference as soon as possible."

Please follow-up with appropriate action.

cc: Dick Cheney
Max Friedersdorf

Pfizer **AGRICULTURAL DIVISION**
PFIZER INC., 235 EAST 42nd STREET, NEW YORK, N.Y. 10017

R. M. HENDRICKSON
President
212-573-2444

September 3, 1976

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

If Congress has its way, corporations will soon be subject to blackmail on the part of a bunch of money-hungry lawyers who handle parens patriae on a contingency fee basis. If Congress would tell businessmen the specific kinds of conduct which raise problems under the Sherman Act, maybe this kind of a lawsuit would be all right, but as things now stand, in many situations businessmen would not be able to protect themselves even with the best of legal advice. No one can tell businessmen what the courts will later decide under the Sherman Act as to each and every business practice. You can hire the best law firms on Wall Street or in Atlanta and they cannot tell you. Yet Congress would impose this burden of blackmail on American corporations. That is not justice. It is a corruption of justice.

I hope, Mr. President, that you will veto H.R. 8532 when it is sent to you.

Sincerely yours,

Roland M. Hendrickson

Roland M. Hendrickson
President - Agricultural Products

cc: Hon. Philip W. Buchen
Hon. John O. Marsh, Jr.
Hon. Edward Schmults
Hon. John J. Rhodes
Hon. Hugh Scott
Hon. Stewart B. McKinney

PFIZER INC., 235 EAST 42nd STREET, NEW YORK, N. Y. 10017

HENRY L. ROSS, JR.
Vice President
Consumer Products Operations

September 7, 1976

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

It is my understanding that Congress is about to pass and send to you another terrible piece of legislation on the theory that if it passes, and you do not veto it, the full burden will fall on the nation's corporations, and if you do veto it the Democrats will be able to use it to their political advantage. If the legislation were not so bad, I would be tempted to suggest that you not veto it but unfortunately, once again, it is only your veto which stands in the way of catastrophe.

I am speaking of H.R. 8532 and in particular the portion of that legislation which would give to Attorneys General the authority to institute law suits as "parens patriae" for treble damages for Sherman Act violations. The proponents of this legislation know full well that such suits would be brought, not for the purpose of deciding the issues in litigation, but for the purpose of inducing corporations to settle. It is pure and simple blackmail. Class actions which have been brought on behalf of far fewer claimants than those which would be represented in parens patriae litigation are never tried. They are always settled, and the reason is that corporations simply cannot bear the risk, even though small, of losing such a suit.

The original House version had at least limited the more far-reaching effects of this legislation to "willful" violations. However, the word "willful" was stricken so that these blackmail suits could be brought for the most innocent kinds of violations, which can easily occur in this constantly expanding area of the law.

Certainly, blackmail actions should not be allowed in the ill-defined areas of the Sherman Act. Businessmen do not

know what kind of conduct will or will not later be found to be a violation of the Sherman Act. We operate in the dark because Congress has been unwilling to face up to the challenge of telling businessmen precisely what kind of conduct falls within the prohibitions of this statute, leaving the development of antitrust laws to the courts. To impose the kind of risks created by parens patriae in areas of the law which are not clear but which are still being developed by the courts is unfair and unjust.

Businessmen simply cannot live with H.R. 8532 and we must therefore ask, Mr. President, that, as politically painfull as it might be, you veto this terrible piece of legislation.

Sincerely yours,

Henry L. Ross, Jr.
Vice President - Consumer Products

cc: Hon. Philip W. Buchen
Hon. John O. Marsh, Jr.
Hon. Edward Schmults
Hon. John J. Rhodes
Hon. Hugh Scott
Hon. Stewart B. McKinney

QUIGLEY COMPANY, INC.
235 E. 42ND ST., NEW YORK, N. Y. 10017

DEAN R. THACKER · PRESIDENT
212 LR 3-3454

September 7, 1976

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

There is every indication that Congress is about to pass legislation that would give the Attorneys General of all fifty states the right to bring suit as "parens patriae" and recover treble damages for violations of the Sherman Act. The parliamentary rules of Congress, I understand, have created a rather complicated situation, but the bill presently before the Congress is H.R. 8532. I most strongly urge that, if Congress should pass such legislation, you exercise your veto power to save American business.

We here at Quigley - and I am sure this is true for the vast majority of American businessmen - make every effort to comply with the law in every respect. However, the antitrust laws present a particular problem in that the rules seem to be in a constant state of flux as the result of court decisions and changes in agency policies and personnel. A well-meaning businessman can easily run afoul of those laws despite conscientious efforts to comply.

Now Congress would add to this problem the hazard of treble damage claims by any number of Attorneys General on behalf of vast numbers of people within their states. Even the largest business organizations could be severely crippled if a court should find in favor of plaintiffs in such gigantic actions, so the defendants are compelled - no matter what the actual merits of the claim - to capitulate and settle. This is certainly not the type of justice our founding fathers contemplated, and it's nothing more than legalized blackmail on a grand scale.

I sincerely hope that, if Congress should pass legislation such as H.R. 8532 containing parens patriae provisions, you will save American business from its truly terrible effects by exercising your veto power.

Very truly yours,

Dean R. Thacker

Dean R. Thacker
President

cc: Hon. Philip W. Buchen
Hon. John O. Marsh, Jr.
Hon. Edward Schmults
Hon. John J. Rhodes
Hon. Hugh Scott
Hon. Norman F. Lent

PFIZER INC., 235 EAST 42nd STREET, NEW YORK, N. Y. 10017

SHELDON G. GILGORE, M.D.
PRESIDENT
PFIZER PHARMACEUTICALS

September 3, 1976

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

Congress is about to enact, and send to your desk, H.R. 8532 containing, among other things, parens patriae provisions. Although it might seem reasonable on the surface to permit states to sue as "parens patriae" to redress wrongs to their citizens arising out of Sherman Act violations, the evils of this legislation are direct and serious.

Violations of the Sherman Act can be, and in the past have been, based on the flimsiest kind of evidence. Nevertheless, courts have permitted inferences of such violations to be drawn from weak circumstantial evidence. If such charges are made when only one claim is involved, the charge can be defended against in court, but when states represent as parens patriae claims on behalf of all of their citizens and when such suits by a number of states are consolidated by the multi-district panel so that in one law suit are involved claims on behalf of most, if not all citizens of the United States, the risk of litigation is far too large for a corporation to accept. The proponents know that this provides them with an opportunity for blackmail and that is exactly what they intend. H.R. 8532 would deny the courts to business.

Another factor in the unfairness of this legislation is the uncertainty of the antitrust laws. Antitrust law is still developing through court decisions. No one knows today what the law will be tomorrow. Before creating the legal monster of parens patriae Congress should at least provide businessmen with a clear expression of what is and what is not a violation of the Sherman Act. Certainly Congress should not be permitted to avoid its responsibility to enact just laws by enacting this kind of legislation which would give the states Attorneys General the power of life and death over corporations which are earnestly trying to abide by the law.

Sincerely,

Sheldon G. Gilgore, M.D.
President - Pfizer Pharmaceuticals

cc: Hon. Philip W. Buchen
Hon. John O. Marsh, Jr.
Hon. Edward Schmults
Hon. John J. Rhodes
Hon. Hugh Scott
Hon. Stewart B. McKinney

THE WHITE HOUSE

WASHINGTON

September 18, 1976

MEMORANDUM FOR: JACK MARSH
JIM LYNN
WILLIAM SEIDMAN

FROM: PHILIP BUCHEN

Attached is a draft of a proposed Statement of the President on The Antitrust and Competition Policy of the Ford Administration. It was prepared originally at the Department of Justice and was revised slightly by me.

I suggest that such a statement accompany the President's action on the new antitrust bill, just passed by Congress. It could be a part of his signing or vetoing statement or could be issued at the same time as such a statement.

Please let me have your comments.

Attachment

STATEMENT OF THE PRESIDENT

THE ANTITRUST AND COMPETITION POLICY OF THE FORD ADMINISTRATION

This country has become the economic ideal of the free world because of its dedication to the free enterprise system. Full and vigorous competition has been the watchword of America's economic progress.

This Administration has long recognized that competition is the driving force of our economy. Competitive markets promote efficiency and innovation by rewarding firms that produce desired products at low costs. In a competitive industry, inefficient producers are forced to become efficient or be driven out of business.

Competition is also a mighty stimulus to the development of new products and manufacturing processes. The free market system rewards the successful innovator. In today's international economy, members of a vigorously competitive economic system enjoy unlimited worldwide opportunities and contribute significantly to the stability of their domestic economies.

In the United States, promotion of competition is consistent with our political and social goals. The undue concentration of economic and political power has traditionally been seen as a threat to individual freedom.

Under competitive conditions, economic power is fragmented; no one firm can control prices or supply. Political power is also decentralized by competition because there is no need for massive governmental bureaucracies to oversee business operations.

But perhaps the most compelling justification for a free market economy is that it best serves the interests of our citizens. In a freely competitive market, consumers enjoy freedom of choice from a wide range of products of all sizes, kinds, and varieties. Consumers, through their decisions in the marketplace, transmit their preferences and desires to businessmen who then translate those preferences into the best products at the lowest prices.

The Federal Government must play an important role in protecting and advancing the cause of competition.

Through enforcement of the antitrust laws, the Antitrust Division of the Department of Justice and the Federal Trade Commission must assure that competitors do not engage in anticompetitive practices.

A vigorous antitrust enforcement policy is most important in deterring price-fixing agreements between competitors that result in higher costs to consumers. As we come out of an inflationary period and into a period of economic growth and expansion, we must assure that the price mechanism is not artificially manipulated for private gain.

This Administration has been the first one in forty years to recognize that there is a second respect in which the Federal Government vitally affects the state of competition. Not only must the Federal Government seek to restrain private anticompetitive conduct, but so, too, must the Federal Government see to it that the governmental process does not impede free and open competition.

Too often in the past, the Federal Government has itself been a major source of restraints on competition. Many of our most vital industries have over the years been subjected to pervasive regulation. Although regulation has been imposed in the name of the public interest, there is a growing awareness that the consumer is often the real loser.

Too many important managerial decisions are made today not by the marketplace responding to the forces of

supply and demand but by the bureaucrat. The innovative and creative forces of major industries are suffocated by governmental regulation. In many instances a businessman cannot raise or lower prices, enter or leave markets, provide or terminate services without the prior approval of a Federal regulatory body.

This is not the economic system that made this country great. Government regulation is not an effective substitute for vigorous competition in the marketplace.

To be sure, in some instances governmental regulation may well protect and advance the public interest. But the time has come to recognize that many existing regulatory controls were imposed during uniquely transitory economic periods that bear no relation to today's economic conditions. We must repeal or modify those controls that suppress rather than support competition.

The Administration's competition policy has proceeded along those very lines. We have set in motion a far-reaching regulatory reform program. This program has been accompanied by a policy of vigorous antitrust enforcement to implement our commitment to competition.

In the last two years, the antitrust laws have been vigorously enforced by strengthened antitrust enforcement agencies. The resources for the Antitrust Division and the Federal Trade Commission's Bureau of Competition have been increased by over 50 percent since Fiscal Year 1975. For the Antitrust Division, this represented the first real manpower increases since 1950.

The Antitrust Division's crackdown on price fixing resulted in indictment of 183 individuals during this period, a figure equalled only once in the 86 years since enactment of the Sherman Act. The fact that the Division presently has pending more grand jury investigations than ever in history proves these efforts are not slackening.

To preserve a competitive market structure by preventing competitive mergers and acquisitions, the Antitrust Division is devoting substantial resources to merger investigations. At the same time, the Division is litigating large and complex anti-monopoly cases in two of our most important industries. Cases have also been filed involving such anticompetitive restraints as allocation of customers and markets which interfere with the free interaction of competitive forces.

The cause of vigorous antitrust enforcement was measurably advanced when I signed the Antitrust Procedures and Penalties Act of 1974, which made violation of the Sherman Act a felony punishable by up to three years' imprisonment of individuals and a corporate fine of up to $1 million.

I also signed legislation repealing Fair Trade enabling legislation. This action alone, according to various estimates, will save consumers $2 billion annually.

Two regulatory reform proposals I have signed -- the Securities Act Amendments of 1975 and the Railroad Revitalization and Regulatory Reform Act inject strong dosages of competition into industries that had long rested in the shade of Federal economic regulation.

The Administration has also sponsored important legislative initiatives to reduce regulation of other modes of transportation and the regulation of financial institutions. An important element of the regulatory reform proposals has been the narrowing of legislative antitrust immunities which had been granted to industry rate bureaus and which permitted these groups to restrain competition under official government sanction. Congress has not yet acted on these proposals.

The Administration also has underway a broad in-depth review of many other legislative immunities to the antitrust laws, to eliminate those immunities that are not truly justified. All industries and groups, however regulated and by whom, should be subject to the interplay of competitive forces to the maximum extent feasible.

A full measure of the Administration's commitment to competition is its proposed Agenda for Government Reform Act that would include a comprehensive, disciplined look at ways of restoring competition in the economy. This would require in-depth consideration of the full range of Federal regulatory activities in a programmatic manner that would allow for an orderly transition to a more competitive environment.

This competition policy, which includes regulatory reform and invigorated antitrust enforcement, will protect the businessman who desires to be competitive from both government regulators and anti-competitive competitors. In turn, the American consumers will benefit from full and open competition within the business community.

HART/SCOTT/RODINO ANTITRUST IMPROVEMENTS ACT

The action I am taking today should further strengthen competition and antitrust enforcement.

This bill contains three titles. The first title will significantly expand the civil investigatory powers of the Antitrust Division. This will enable the Department of Justice not only to bring additional antitrust cases that would otherwise have escaped prosecution, but it will also reduce the possibility that unmeritorious suits will be filed. These amendments to the Antitrust Civil Process Act were proposed by the Administration two years ago, and I am pleased to see that the Congress has finally passed them.

The second title of this bill will require parties to large mergers to give the Antitrust Division and the Federal Trade Commission advance notice of the proposal. This will allow these agencies to conduct investigations prior to consummation and thereby bring suit before the parties have taken irreversible steps toward consolidation of operations. Again, this proposal was supported by the Administration, and I am pleased to see it enacted into law.

This legislation also includes a third title about which I have previously expressed serious reservations.

It would permit state attorneys general to bring antitrust suits on behalf of the citizens of their states to recover treble damages.

As I have said before, the states have authority to amend their own antitrust laws to authorize such suits in state courts. If a state legislature, representing the citizens of the state, believes that such a concept is sound policy, it ought to allow it. Therefore, I questioned whether the Congress should bypass the state legislatures.

However, Congress has narrowed this title in order to remove the possibility of significant abuses. Earlier I had urged that the scope of this legislation be narrowed to price-fixing activities, where the law is clear and where the impact is most directly felt by consumers. Given the broad scope of the bill, I also recommended that damages be limited to those actually resulting from the violations. The Congress addressed these concerns by confining the scope of the controversial provision, of statistically aggregating damages, to price-fixing violations. Thus, this bill will be confined to hard-core antitrust violations. The more complex antitrust questions, where the law is less clear, will properly be reserved for Federal enforcement efforts.

Also, I have been concerned about the provision that would allow states to retain attorneys on a contingent fee basis, thereby encouraging suits against business in which

the principal motivation would be attorney enrichment. The present bill has made steps to narrow these arrangements and has required Federal court approval of attorney fees.

With these and other changes that have been made in this title since its introduction have narrowed and focused this legislation. In this form, it should contribute to deterring price fixing violations. Price fixers must be denied the fruits of their illegal conduct, and remedies must be available to those injured by price fixing.

Individual initiative and market competition must remain the keystones to our American economy. I am today signing this major antitrust legislation with the expectation that it will contribute significantly to our free enterprise system.

September 21

THE WHITE HOUSE
WASHINGTON

TO: PHIL BUCHEN

FROM: JOHN O. MARSH, JR.

_____ For Direct Reply

_____ For Draft Response

XX For Your Information

_____ Please Advise

HUGH SCOTT
PENNSYLVANIA

United States Senate

OFFICE OF THE MINORITY LEADER
WASHINGTON, D.C. 20510

September 21, 1976

The President
The White House
Washington, D. C.

Dear Mr. President:

Early in the first session, Senator Hart and I introduced an ambitious omnibus antitrust reform bill--the Antitrust Improvements Act of 1975. As you know, the House passed the measure last Thursday by a wide margin.

The bill we send to you bears only the slightest resemblance to the original Hart-Scott bill. It has suffered through a year and a half of intense debate. Students of history will ponder its tortured career for generations to gain insight into the mysteries of the legislative process.

At every stage in its history we have whittled away at its provisions. For example, of the original seven titles, only three survive. Wholly eliminated were the provisions dealing with the automatic TRO in certain merger cases, the provisions relating to the use of pleas of nolo contendere in civil actions, the provision authorizing the Department of Justice to issue C.I.D.'s to parties before the administrative agencies, and the provision allowing access to grand jury documents in certain civil cases. In fact, in the C.I.D. portion of the bill we made every change requested by the Administration.

The most far-reaching change occurred in the parens patriae title. While the innovative heart of the measure is intact, its scope has been severely curtailed. We have made its provision prospective only. We have eliminated the right of consumers suing under the federal rules to aggregate damages statistically. We have eliminated the right of the state Attorneys General to sue for damage to the state's general economy. We have prohibited the award of percentage contingency fees. And we have effectively limited the scope of the remedy to that most notorious of antitrust offenses--pricefixing.

I must state candidly that I had privately urged many of these changes in an attempt to accommodate what I preceived to be your views, and not merely to enhance the bill's chances of passage in either house of Congress. In the spirit of compromise, Senator Hart accepted the limiting amendments, even though he knew we had the votes.

With this history in mind, I stated last week on the Senate floor that "It is a bill that I believe President Ford can sign". I am enclosing a copy of Bob McClory's letter to me in which he expresses his pleasure with final passage of the bill. In it he also observes that we can see how responsibly the state attorneys general exercise their new authority in the course of the next year or two. If the feared abuses materialize, then Congress will trim back the law. Similarly, under the bill's provisions, the various state legislatures can themselves remove their states from the ambit of parens patriae at any time if experience shows the measure to have been ill-advised. On the other hand, if the bill has a salutary effect on antitrust enforcement and competition, as I believe, that's all to the good.

I am, of course, convinced that the entire bill has merit. By enhancing the likelihood of detection of antitrust violations, and by increasing the potential liability therefor, we will discourage future illegal anticompetitive activity. In that way we can eliminate stultifying and unnecessary governmental regulation and unleash the creative forces of our free market economy.

In my view, the measure is a necessary element of your own regulatory reform program.

I stand at the ready to answer any questions you may have as to the bill's provisions.

With warmest personal regard,

Sincerely,

Hugh Scott

Hugh Scott
Republican Leader

ROBERT McCLORY
13TH DISTRICT, ILLINOIS

ROOM 2452
RAYBURN HOUSE OFFICE BUILDING
(202) 225-5221

JUDICIARY COMMITTEE

SELECT COMMITTEE ON
INTELLIGENCE

U.S. INTERPARLIAMENTARY
UNION DELEGATION

Congress of the United States

House of Representatives

Washington, D.C. 20515

DISTRICT OFFICES

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ELGIN, ILLINOIS 60120
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LAKE COUNTY
POST OFFICE BUILDING
326 NORTH GENESEE STREET
WAUKEGAN, ILLINOIS 60085
(312) 336-4554

MCHENRY COUNTY
MCHENRY COUNTY COURTHOUSE
2200 SEMINARY ROAD
WOODSTOCK, ILLINOIS 60098
(815) 338-2040

September 17, 1976

The Honorable Hugh Scott
Minority Leader
United States Senate
Washington, D.C. 20510

Dear Hugh:

I am pleased to report that the House concurred in the Senate amendments to the antitrust bill in which you were particularly interested.

It seems unfortunate that the two parts of the bill in which I took a particular interest prior to House passage should have been retained in a watered-down and confused form -- leaving doubt as to the interpretation on the subjects of contingent fees and treble damages.

I am aware of the complete good faith which you demonstrated and your apprehension that any further House amendments might have jeopardized final passage.

I am reconciled to what has occurred notwithstanding my efforts to restore the House language on these two parts.

I am sure your position and mine are virtually identical. If the measure is interpreted later in a way which neither you nor I intended, I will then undertake to introduce corrective legislation at the next Congress.

I want to reiterate my assurances that I do indeed prize your friendship and respect your judgment in all things. In obtaining assurances from Senators Allen, Hruska and Thurmond that they would not stage another filibuster, I was convinced that if the House had acted on the amendments which I favored, there would have been ample opportunity for final passage of the antitrust bill.

Sincerely yours,

Robert McClory
Member of Congress

RMcC:mm

THE ATTORNEY GENERAL

9/27/76

TO: Philip W. Buchen

FROM: Edward H. Levi

Here are two copies of my memorandum for the President as to my personal thoughts, which you indicated he had requested.

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

24 SEP 1976

MEMORANDUM TO: Edward C. Schmults
Deputy Counsel to the President

SUBJECT: Price-fixing Cases Under the Parens Patriae Bill

This is to give you in writing the substance of our telephone conversation regarding the elements necessary to establish a violation of the Sherman Act for price-fixing. You raised the ordinary situation in which several firms raised their prices for a basic product (e.g., bread) within a short period of time.

To begin with, Sherman Act §1 prohibits contracts, combinations, or conspiracies in restraint of trade; it does not reach unilateral business conduct. There must be proof of some concerted action by at least two parties in order to establish the contract, combination or conspiracy necessary to sustain the plaintiff's burden in a Section 1 case.

It is, of course, well-established that the combination or conspiracy need not be "formal" or evidenced by signed agreements. As in the criminal area generally, the fact of a combination or conspiracy may be inferred from the conduct of the parties; and parallel conduct, combined with other factors, may establish a Sherman Act conspiracy. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). However, evidence that parties acted in a consciously similar manner does not by itself prove a violation of the Sherman Act, since such similarity of conduct may well be explained by factors other than a combination or conspiracy to restrain trade. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

Where parallel conduct is explained by market factors such as supply and demand, by costs, or by independent economic interest, a court may rule for defendants without even proceeding to trial. First National Bank v. Cities Service Co., 391 U.S. 253 (1968). See also Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 84-85 (CA 9 1969), cert. denied, 396 U.S. 1062 (1970). This authority makes it

clear that the mere similarity of a price increase by one company, followed by others in an industry, is not sufficient to establish a combination or conspiracy in restraint of trade in violation of the Sherman Act; and the plaintiff should not be able to get to a jury unless it can prove more.

In particular cases there may be additional factors that swing the scales the other way. Prices may have been increased in the face of slackening demand and falling costs; price increases may have been announced simultaneously or in such other fashion as to make it unlikely that the decisions were independently reached; or the particular conduct may be contrary to the best interests of the individual parties (e.g., by eliminating favorable differentials enjoyed by certain industry members).

Absent such special factors, however, state attorneys general would not be able to recover damages on the basis of evidence merely showing the members of a particular industry charge approximately the same prices.

Given the present state of the law, it is unlikely that parens patriae actions alleging nothing more than pricing similarity will have serious chance of success. In the unusual case where the state attorney general (or his lawyers) knew when he brought the action that there was nothing more than a parallel price rise,he might be liable for the defendants' attorneys' fees under Section 4C(d)(2) on the grounds that he had "acted in bad faith, vexatiously, wontonly, or for oppressive reasons."

DONALD I. BAKER
Assistant Attorney General
Antitrust Division

Third Draft
9/22/76 Buchen

STATEMENT OF THE PRESIDENT

THE ANTITRUST AND COMPETITION POLICY
OF THE FORD ADMINISTRATION

This country has become the economic ideal of the free world because of its dedication to the free enterprise system. Full and vigorous competition has been the watchword of America's economic progress.

My Administration has always considered competition to be the driving force of our economy. Our competitive markets promote efficiency and innovation by rewarding businesses that produce desirable products at low cost. In a competitive industry, inefficient companies are forced to become efficient or be driven out of business. Competition is also a powerful stimulus to the development of new products and manufacturing processes. The free market system rewards the successful innovator.

In the United States, promotion of competition is consistent with our political and social goals. Any excessive concentration of either economic or political power has traditionally been seen as a threat to individual freedom. Under competitive conditions, economic power is fragmented; no one firm can control prices or supply. Political power is also decentralized by our public policy which stresses reliance on competition because there is then no need for massive governmental bureaucracies to oversee business operations.

In today's international economy, members of a vigorously competitive economic system enjoy unlimited worldwide opportunities and contribute significantly to the stability of their domestic economies.

But perhaps the most compelling justification for a free market economy is that it best serves the interests of our citizens. In a freely competitive market, consumers enjoy the freedom to choose from a wide range of products of all sizes, kinds, and varieties. Consumers, through their decisions in the marketplace, show their preferences and desires to businessmen who then translate those preferences into the best products at the lowest prices.

I firmly believe that the Federal Government must play an important role in protecting and advancing the cause of competition.

Through enforcement of our antitrust laws, the Antitrust Division of the Department of Justice and the Federal Trade Commission must assure that competitors do not engage in anticompetitive practices.

A vigorous antitrust enforcement policy is most important in deterring price-fixing agreements between competitors that result in higher costs to consumers -- and less production. As we come out of an inflationary period and into a period of economic growth and expansion,

my Administration will work to assure that the price mechanism is not artificially manipulated for private gain.

It is important to realize that this Administration has been the first one in forty years to recognize a second way the Federal Government vitally affects the competitive environment in which businesses operate. Not only must the Federal Government seek to restrain private anticompetitive conduct, but the Federal Government must also see to it that the governmental process does not impede free and open competition.

All too often in the past, the Federal Government has itself been a major source of unnecessary restraints on competition. Many of our most vital industries have over the years been subjected to pervasive regulation. Although regulation has been imposed in the name of the public interest, there is a growing awareness that the consumer is often the real loser. My Administration has taken the lead in sharpening this awareness over the past two years and will vigorously continue this most worthwhile effort.

I believe that far too many important managerial decisions are made today not by the marketplace responding to the forces of supply and demand but by the bureaucrat.

In many instances a businessman cannot raise or lower prices, enter or leave markets, provide or terminate services without the prior approval of a Federal regulatory body. As a consequence, the innovative and creative forces of major industries are suffocated by governmental regulation.

This is not the economic system that made this country great. Government regulation is not an effective substitute for vigorous competition in the American marketplace.

To be sure, in some instances governmental regulation may well protect and advance the public interest. But the time has come to recognize that many existing regulatory controls were imposed during uniquely transitory economic periods which differed greatly from today's economic conditions. We must repeal or modify those controls that suppress rather than support fair and healthy competition.

My Administration's pro-competitive policy has attempted to make those necessary modifications. We have set in motion a far-reaching regulatory reform program. And this program has been accompanied by a policy of vigorous antitrust enforcement to reinforce our commitment to competition.

In the last two years, the antitrust laws have been vigorously enforced by strengthened antitrust enforcement agencies. The resources for the Antitrust Division and the Federal Trade Commission's Bureau of Competition have been increased by over 50 percent since Fiscal Year 1975.

For the Antitrust Division, this represented the first real manpower increases since 1950. I am committed to continuing to provide these agencies with the necessary resources to do their important job. This intensified effort is producing results. The Antitrust Division's crackdown on price fixing resulted in indictment of 183 individuals during this period, a figure equalled only once in the 86 years since enactment of the Sherman Act. The fact that the Division presently has pending more grand jury investigations than at any other time in history shows these efforts are being maintained.

To preserve a competitive market structure by preventing anti-competitive mergers and acquisitions, the Antitrust Division is devoting substantial resources to merger investigations. At the same time, the Division is litigating large and complex anti-monopoly cases in two of our most important industries -- computers and telecommunications. Cases have also been filed involving such anticompetitive business actions as restrictive allocation of customers and markets.

I advanced the cause of vigorous antitrust enforcement with the signing of the Antitrust Procedures and Penalties Act of 1974, which made violation of the Sherman Act a felony punishable by imprisonment of up to three years for individuals, and by a corporate fine of up to $1 million.

Also, in December 1975, I signed legislation repealing Fair Trade enabling legislation. This action alone, according to various estimates, will save consumers $2 billion annually.

Two regulatory reform proposals I have signed -- the Securities Act Amendments of 1975 and the Railroad Revitalization and Regulatory Reform Act, inject strong dosages of competition into industries that long rested comfortably in the shade of Federal economic regulation. Contrary to industry predictions, more competition has not led to chaos in the securities industry, and I am confident it will prove to be beneficial in our railroad industry and elsewhere.

My Administration has also sponsored important legislative initiatives to reduce regulation of other modes of transportation and the regulation of financial institutions. An important element of my regulatory reform proposals has been the narrowing antitrust immunities which Federal legislation currently grants to industry rate bureaus thereby permitting these groups to restrain competition under official government sanction. Although Congress has not yet acted on these proposals, I am hopeful that the elected representatives of our people will take action on these proposals soon, since every day which passes

means millions of dollars of excessive costs and inefficiencies in our economic system.

The Administration also has underway a comprehensive review of many other legislative immunities to the antitrust laws and I intend to eliminate those immunities that are not truly justified -- if the Congress will concur. All industries and groups, however regulated and by whom, should be subject to the interplay of competitive forces to the maximum extent feasible.

A full measure of my commitment to competition is the proposed Agenda for Government Reform Act. This would require a comprehensive, disciplined look at ways of restoring competition in the economy. This would involve in-depth consideration of the full range of Federal regulatory activities in a reasonable -- but rapid -- manner that would allow for an orderly transition to a more competitive environment.

This competition policy, which includes regulatory reform and invigorated antitrust enforcement, will protect those businessmen who desire to be competitive from anti-competitive actions both by government regulators and by other business competitors. In turn, the American consumers will enjoy the substantial benefits provided by full and open competition within the business community.

Bucher

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

To Mr. Schmults

I received the attached materials by Telecopier from Paul Nash, and I am sending them to you per Paul's instructions.

Felix B. Laughlin

Sept 27, 1976

September 27, 1976

Notes on Proof of Conspiracy In Cases Involving Alleged Price Fixing

A conspiracy is an agreement. In antitrust cases there is often an attempt to prove an unlawful agreement by circumstantial evidence which does not depend on direct evidence of agreement but rather depends upon the market behavior of the accused parties. As was said by the Court of Appeals in American Tobacco Co. v. United States, 147 F.2d 93, 107 (6th Cir. 1944), affirmed, 328 U.S. 781 (1946):

> "Often, if not generally, direct proof of a criminal conspiracy is not available, and the common purpose and plan are disclosed only by a development and collocation of circumstances."

The evaluation of market behavior in an antitrust case to determine whether substantially parallel business behavior among competitors constitutes evidence of conspiracy involves a study of the economics of the industry and a study of the business motives which a trier of fact, whether a judge or a jury, might decide either do or do not justify a finding of unlawful agreement.

In Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954), the Supreme Court held that conscious parallelism of business behavior among competitors, by itself, was not sufficient evidence of conspiracy and that something further would have to be shown.

It is unclear, however, what further evidence is required and the result is that the trial of cases involving alleged price fixing conspiracy is often a complicated and time consuming process in which the outcome is uncertain until the judge or jury has finally spoken.

The cases referred to below are examples of the difficulty of knowing when a price fixing conspiracy is made out and the narrow line which separates guilt from innocence in a particular case.

In United States v. National Malleable & Steel Castings Co., et al., 1958 Trade Cases, ¶ 68,890 (N.D. Ohio 1957) affirmed per curiam, 358 U.S. 38 (1958), there was an attempt to prove a price fixing conspiracy largely on the basis of market behavior. After four and one-half years of pretrial procedures and two months of trial, the trial judge concluded that the case was without merit and he expressed the opinion that if government counsel had known all the facts they would not have brought the case. Nevertheless the government appealed the case to the Supreme Court which affirmed without opinion.

In Peveley Dairy Co. v. United States, 178 F.2d 363 (8th Cir. 1949), cert. denied, 339 U.S. 942 (1950), a number of dairy companies were indicted for conspiracy to fix prices. The evidence was wholly circumstantial and it was undisputed (178 F.2d at 367). The jury brought in a verdict of guilt

as against the corporate defendants. The Court of Appeals reversed the conviction after reviewing all the evidence and concluded that the facts as to market behavior did not justify conviction.

Other examples of cases in which the government sought unsuccessfully to establish price fixing conspiracy on the basis of circumstantial evidence were United States v. Eli Lilly & Co., et al., 1959 Trade Cases, ¶ 69,536 (D. N.J. 1959) and United States v. Ward Baking Co., et al., 243 F. Supp. 713 (E.D. Pa. 1965). In both cases there were elaborate pre-trial proceedings and a full trial. In both cases it was found that the circumstances were insufficient to establish a conspiracy.

The narrow line between guilt and innocence in such cases is illustrated by Beatrice Food Co. v. United States, 312 F.2d 29 (8th Cir. 1963). There a dairy company was indicted for price fixing. There was a jury conviction based largely on evidence as to market behavior. The Court of Appeals noted that "some might regard the case as not a strong one." 312 F.2d at 43. It also noted that in certain other cases somewhat similar market behavior had been held to be insufficient to support a conspiracy charge. It nevertheless held that the jury verdict would be allowed to stand.

The reason why there are so few open and shut cases of conspiracy to fix prices, and why the line between guilt and innocence is so difficult to draw, is that most cases

require a determination of the reasons for business conduct. As was said in an article in 44 Illinois Law Review, 743, 752 (1950):

> "First, conspiracy typically has a definite subjective quality. Agreement, express or 'tacit,' has been the essence of the offence. 'Meeting of the minds,' 'unity of purpose,' 'collusion', 'common design' are some of the phrases constantly recurring in the opinions. The crime is 'predominantly mental,' and there must be an intent to be a participant."

Since the alleged crime is in most cases "predominantly mental", as is stated in the article referred to, the trial of such a case is complicated and difficult and the outcome is hard to anticipate. There are very few litigated cases which do not involve decisions of fact on which reasonable people might differ, having to do with the economics of an industry and the reasons which in fact impelled the businessmen to act as they did.

THE WHITE HOUSE

WASHINGTON

September 28, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: EDWARD SCHMULTS

SUBJECT: Recommendation on the Hart/Scott/Rodino Antitrust Improvements Act of 1976

On the merits, I recommend that you veto the antitrust bill. My reasons relate primarily to the parens patriae provisions of Title III. In particular, the mandatory treble damage and contingency fee provisions are especially troublesome. The treble damage provision aggravates the problems presented by the bill's novel statistical aggregation concept. Once parens patriae is embedded in our antitrust laws, I believe its scope will widen over time.

Substantive objections to the bill are more fully set forth in the memoranda to you from the Attorney General and the Secretary of the Treasury.

From a political standpoint, I have the following observations:

1. Opposition from the business community is widespread and deep. This bill is feared by small business. For example, real estate brokers are concerned that this bill will be used by state attorneys general and contingency fee lawyers to overturn an accommodation that the Real Estate Association has worked out with Justice.

2. Some election commentators have asserted that you lack a solid base of constituencies. A veto of the antitrust bill would be helpful with thousands of small businessmen, as well as with larger companies.

3. Carter has sought to "out Nader Nader" and he and Mondale will continue to attack you as being insensitive

to the needs of consumers, the poor and small taxpayers. It seems to me that signing the antitrust bill will not diminish their attacks one wit and will not win you any support from consumer groups or the like. Stated another way, does it really make any difference whether Carter cites the tax laws, the Consumer Protection Agency proposal and the antitrust bill, or merely has the first two to illustrate his charges.

4. Although the initial outcry, which a veto will provoke, will be sharp, I believe you can mitigate any loss by prefacing your veto statement with an outline of your antitrust and competition policy record, which is a good one. Attached is a suggested outline which is in the process of being staffed.

5. If you decide to veto the bill, I would recommend that you call upon the Senate to enact immediately the separate bills that the House has passed on the civil investigative demand and pre-merger notification provisions of Titles I and II, respectively, of the Hart/Scott/Rodino bill. This strategy would call for a prompt veto of the bill to permit the Senate to act (of course, it has the dangers of allowing time for an override vote).

Attachment

Buchan - F-41

THE WHITE HOUSE

WASHINGTON

September 29, 1976

MEMORANDUM FOR: JACK MARSH

FROM: ED SCHMULTS

SUBJECT: The Antitrust Legislation

I think the President should be made aware of the action of House and Senate Conferees yesterday to authorize $10 million of LEAA funds to increase state antitrust enforcement programs. We now have the prospect of the antitrust bill giving new powers to state attorneys general and the federal government funding the enforcement efforts. See the attached article from today's Washington Post.

If the President decides to sign the antitrust legislation, I trust we are at least considering a signing ceremony. We could decide to run with the ball and take some credit for the new bill. Additionally, as you know, Senator Hart is quite ill and a ceremony at which he and Senator Scott would attend would be well received.

Attachment

THE WASHINGTON POST - September 29, 1976

WASH POST 9/29/76

Antitrust Fund Gains Support

House and Senate conferees yesterday agreed to authorize $10 million a year for three years in seed money to increase state antitrust enforcement programs.

The authorization was part of the Senate-passed Law Enforcement Assistance Administration authorization bill and was insisted upon by Sen. Edward M. Kennedy (D-Mass.) in conference although there was no comparable House provision.

House conferees polled and voted 7-2 to okay it after Judiciary Chairman Peter W. Rodino Jr. and Rep. William J. Hughes (both D-N.J.) supported the provision. They said it was a good way to give the states money to bring antitrust suits —without hiring outside lawyers — should President Ford sign the antitrust bill giving states the power to bring antitrust damage suits on behalf of their citizens. The measure is now on his desk.

FOR IMMEDIATE RELEASE September 30, 1976

Office of the White House Press Secretary

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THE WHITE HOUSE

FACT SHEET

HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976 (H.R. 8532)

President Ford signed the Hart-Scott-Rodino Antitrust Improvements Act of 1976 today. He noted that this legislation will contribute to the Administration's overall competition policy of vigorous antitrust enforcement and regulatory reform.

This Act:

-- Broadens powers of the Department of Justice in conducting antitrust investigations.

-- Requires advance notice to the Justice Department and the Federal Trade Commission of major corporate mergers and acquisitions.

-- Authorizes state attorneys general to file suits to recover damages to citizens of the states resulting from certain antitrust violations.

MAJOR PROVISIONS

Title I. Antitrust Civil Process Act Amendments

This title adopts Administration-sponsored legislation to amend the Antitrust Civil Process Act of 1962. It authorizes the Department of Justice to issue a pre-complaint subpoena--called a Civil Investigative Demand ("CID") -- not only on targets of the investigation, as permitted under current law, but also to third parties (e.g., suppliers and customers) who have information relevant to an investigation. The bill would also allow the Department to obtain, not only documentary evidence as under current law, but also answers to oral and written questions from recipients of such a CID. These amendments also provide safeguards, including right to counsel by the recipient of the CID, to assure that these powers are not abused.

Title II. Premerger Notification

H.R. 8532 requires companies with assets or sales in excess of $100 million to notify the Department of Justice and the Federal Trade Commission in advance of the acquisition of, or merger with, any company with assets or sales in excess of $10 million. This will allow the antitrust enforcement agencies sufficient time to investigate the competitive consequences of major mergers and acquisitions and, if necessary, to obtain injunctive relief before steps have been taken toward consolidation of the operations.

(more)

Title III. Parens Patriae

H.R. 8532 would authorize state attorneys general to bring suits in Federal district court on behalf of state residents for violations of the antitrust provisions of the Sherman Act.

Mandatory treble damages would be awarded in successful suits and would either be distributed to individuals in a manner approved by the court or deposited with the state as general revenues. In price-fixing cases, damages could be proved in the aggregate by using statistical sampling or other measures without the necessity of proving damages to each individual on whose behalf the suit was brought.

The bill prohibits state attorneys general from hiring outside lawyers on a contingency fee based on a percentage of the award. However, it would allow private attorneys to bring suit on behalf of the state and their fees would be determined by the court.

SUMMARY

In his signing statement, the President noted that the first two titles of the bill--the Antitrust Civil Process Act amendments and premerger notification--were desirable. In addition, the President reiterated his concerns with the potential for abuse of the parens patriae title and said that its implementation would be carefully reviewed to assure that it was responsibly enforced.

# # #

FOR IMMEDIATE RELEASE SEPTEMBER 30, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

After careful reflection, I am signing into law today H.R. 8532 -- the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This bill contains three titles, two of which my Administration has supported and one -- the "parens patriae" title -- which I believe is of dubious merit.

COMPETITION AND ANTITRUST POLICIES

I am proud of my Administration's record of commitment to antitrust enforcement. Antitrust laws provide an important means of achieving fair competition. Our nation has become the economic ideal of the free world because of the vigorous competition permitted by the free enterprise system. Competition rewards the efficient and innovative business and penalizes the inefficient.

Consumers benefit in a freely competitive market by having the opportunity to choose from a wide range of products. Through their decisions in the marketplace, consumers indicate their preferences to businessmen, who translate those preferences into the best products at the lowest prices.

The Federal Government must play two important roles in protecting and advancing the cause of free competition.

First, the policy of my Administration has been to vigorously enforce our antitrust laws through the Antitrust Division of the Department of Justice and the Federal Trade Commission. During an inflationary period, this has been particularly important in deterring price-fixing agreements that would result in higher costs to consumers.

Second, my Administration has been the first one in forty years to recognize an additional way the Federal Government vitally affects the environment for business competition. Not only must the Federal Government seek to restrain private anti-competitive conduct, but our Government must also see to it that its own actions do not impede free and open competition. All too often in the past, the Government has itself been a major source of unnecessary restraints on competition.

I believe that far too many important managerial decisions are made today not by the marketplace responding to the forces of supply and demand but by the bureaucrat. Government regulation is not an effective substitute for vigorous competition in the American marketplace.

In some instances government regulation may well protect and advance the public interest. But many existing regulatory controls were imposed during uniquely transitory economic conditions. We must repeal or modify those controls that suppress rather than support fair and healthy competition.

During my Administration, important progress has been made both in strengthening antitrust enforcement and in reforming government economic regulation.

more

In the last two years, we have strengthened the Federal antitrust enforcement agencies. The resources for the Antitrust Division and the Federal Trade Commission's Bureau of Competition have been increased by over 50 percent since Fiscal Year 1975. For the Antitrust Division, this has been the first real manpower increase since 1950. I am committed to providing these agencies with the necessary resources to do their important job.

This intensified effort is producing results. The Antitrust Division's crackdown on price-fixing resulted in indictment of 183 individuals during this period, a figure equalled only once in the 86 years since enactment of the Sherman Act. The fact that the Division presently has pending more grand jury investigations than at any other time in history shows these efforts are being maintained.

To preserve competition, the Antitrust Division is devoting substantial resources to investigating anti-competitive mergers and acquisitions. At the same time, the Division is litigating large and complex cases in two of our most important industries -- data-processing and telecommunications.

The cause of vigorous antitrust enforcement was aided substantially when I signed the Antitrust Procedures and Penalties Act of 1974, making violation of the Sherman Act a felony punishable by imprisonment of up to three years for individuals, and by a corporate fine of up to $1 million.

Also, in December 1975, I signed legislation repealing Fair Trade enabling legislation. This action alone, according to various estimates, will save consumers $2 billion annually.

On the second front of reducing regulatory actions that inhibit competition, I have signed the Securities Act Amendments of 1975 and the Railroad Revitalization and Regulatory Reform Act, which will inject strong doses of competition into industries that long rested comfortably in the shade of federal economic regulation.

My Administration has also sponsored important legislative initiatives to reduce the regulation of other modes of transportation and of financial institutions. An important element of my regulatory reform proposals has been to narrow antitrust immunities which are not truly justified. Although Congress has not yet acted on these proposals, I am hopeful that it will act soon. All industries and groups should be subject to the interplay of competitive forces to the maximum extent feasible.

A measure of my commitment to competition is the Agenda for Government Reform Act which I proposed in May of this year. This proposal would require a comprehensive, disciplined look at ways of restoring competition in the economy. It would involve in-depth consideration of the full range of federal regulatory activities in a reasonable -- but rapid -- manner that would allow for an orderly transition to a more competitive environment.

This competition policy of regulatory reform and vigorous antitrust enforcement will protect both businessmen and consumers and result in an American economy which is stronger, more efficient and more innovative.

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HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

I believe the record of this Administration stands as a measure of its commitment to competition. While I continue to have serious reservations about the "parens patriae" title of this bill, on balance, the action I am taking today should further strengthen competition and antitrust enforcement.

This bill contains three titles. The first title will significantly expand the civil investigatory powers of the Antitrust Division. This will enable the Department of Justice not only to bring additional antitrust cases that would otherwise have escaped prosecution, but it will also better assure that unmeritorious suits will not be filed. These amendments to the Antitrust Civil Process Act were proposed by my Administration two years ago, and I am pleased to see that the Congress has finally passed them.

The second title of this bill will require parties to large mergers to give the Antitrust Division and the Federal Trade Commission advance notice of the proposed mergers. This will allow these agencies to conduct careful investigations prior to consummation of mergers and, if necessary, bring suit before often irreversible steps have been taken toward consolidation of operations. Again, this proposal was supported by my Administration, and I am pleased to see it enacted into law.

I believe these two titles will contribute substantially to the competitive health of our free enterprise system.

This legislation also includes a third title which would permit state attorneys general to bring antitrust suits on behalf of the citizens of their states to recover treble damages. I have previously expressed serious reservations regarding this "parens patriae" approach to antitrust enforcement.

As I have said before, the states have authority to amend their own antitrust laws to authorize such suits in state courts. If a state legislature, representing the citizens of the state, believes that such a concept is sound policy, it ought to allow it. I questioned whether the Congress should bypass the state legislatures in this instance. To meet in part my objection, Congress wisely incorporated a proviso which permits a state to prevent the applicability of this title.

In price-fixing cases, this title provides that damages can be proved in the aggregate by using statistical sampling or other measures without the necessity of proving the individual claim of, or the amount of damage to, each person on whose behalf the case was brought. During the hearings on this bill, a variety of questions were raised as to the soundness of this novel and untested concept. Many of the concerns continue to trouble me.

I have also questioned the provision that would allow states to retain private attorneys on a contingent-fee basis. While Congress adopted some limitations which restrict the scope of this provision, the potential for abuse and harassment inherent in this provision still exists.

more

In partial response to my concerns, Congress has narrowed this title in order to limit the possibility of significant abuses. In its present form, this title, if responsibly enforced, can contribute to deterring price-fixing violations, thereby protecting consumers. I will carefully review the implementation of the powers provided by this title to assure that they are not abused.

Individual initiative and market competition must remain the keystones to our American economy. I am today signing this antitrust legislation with the expectation that it will contribute to our competitive economy.

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