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

P. Lamb
has a copy

Office of the Attorney General
Washington, D. C. 20530

March 15, 1976

Honorable Philip Buchen
Counsel to the President
The White House
Washington, D. C.

Dear Mr. Buchen:

Attached is a memorandum prepared by the Antitrust Division in response to your letter requesting suggestions to improve the Administration's articulation of its policy in the antitrust area. I should note that my proposal for an Economic Concentration Review Commission, discussed in the attached draft, has already been forwarded to the President's Council of Economic Advisors for consideration.

Sincerely,

Edward H. Levi
Attorney General

Your memorandum of February 24, indicates a concern that the Administration's antitrust and competition policies, and the actions taken to implement those policies, have not been forcefully articulated. It seems clear that a careful description of what has been done and is now being done has not been adequately articulated.

Competition policy is, of course, a broader concept than antitrust, although the two tend to be used somewhat interchangeably. Competition policy encompasses any and all activities which have or are perceived to have effects on prices, on consumers, on concentration of economic resources, on the economy generally, and even on the ability to exercise political power through economic resources. Competition is a relevant, but not necessarily determinative, consideration for practically all federal agencies.

Antitrust policy, on the other hand, is basically a law enforcement concept, albeit enforcement of federal statutes which are based on many of the same considerations of competition policy which also underlie a myriad of other governmental policies and actions. The antitrust policy of the Executive Branch is administered by the Antitrust Division of the Department of Justice, which is mandated to enforce the antitrust laws and to advocate competition policy throughout the government. The Antitrust Division carries out this mandate through law enforcement, participation before regulatory agencies, and general advocacy efforts throughout the Executive Branch and before the Congress.

I.

Preservation of competition in a free and open economy is a cornerstone of our economic democracy and economic health. An effective competitive economy should yield an allocation of our economic resources approaching the optimum. The process of competition thus provides a fairly impersonal and fairly automatic economic system; except where altered because of some other overriding purpose, a competitive system does not involve the hand of government in the myriad of economic decisions which must be made daily in a multi-billion dollar marketplace.

Competition can be and is impaired by private agreements among buyers or sellers to fix prices and allocate customers for markets, and by the exercise of monopoly power. Competition can also be adversely affected by governmental interference in the marketplace through various forms of regulations.

In the case of private agreements or monopoly power, the means for ensuring a free and open economy is vigorous enforcement of our antitrust laws. This is the primary focus of the Antitrust Division's activities. The statutory prohibitions are broad, generally forbidding most forms of anticompetitive behavior.

In the case of governmental regulatory interference with the competitive balance of an otherwise free and open economy, the answer lies in increased governmental sensitivity to issues of competition policy and a requirement that the advocates of regulation present a compelling justification for the imposition of regulatory restraints.

The Antitrust Division is not a large organization by governmental standards. It carries out its mission with about 450 lawyers and other professionals, primarily economists, and with a total staff of about 900. Its budget for Fiscal Year 1976 is $21.6 million, and for Fiscal Year 1977, $23.4 million. Compared to Fiscal Year 1972, when the budget for the Division was $12.3 million, the more recent figures indicate a growing recognition of the importance of activities which preserve and promote competition in our economy.

As set forth in this memorandum, the Antitrust Division has over the years become involved in a wide variety of activities bearing on competition policy, in addition to its basic enforcement activities. These include work in the regulatory area -- both participation before the agencies and efforts at regulatory reform; interagency activities within the Executive Branch on a variety of matters; and legislative matters. All of these are important. Still, the Division's basic mission is law enforcement.

The Division does have a careful and programmatic approach to antitrust enforcement, concentrating resources on those areas where we feel the greatest benefits to the economy can be gained. That programmatic approach has in fact produced results. This is an affirmative effort which has been successful and which, if properly articulated, can indeed be something for which this Administration can take some credit.

II.

All enforcement activities of the Antitrust Division are directed at preventing private interference with free market forces. By far the most striking illustrations are those activities directed at agreements to fix or otherwise affect the price at which goods and services are sold or offered. Such agreements as a general rule artificially inflate the price of goods and services, and thus interfere with the efficient allocation of our economic resources.

Most of our enforcement resources are, intentionally, devoted toward discovering and prosecuting this type of conspiratorial conduct. Over the last four years, more and more resources have been allocated to this objective, with special emphasis on criminal investigations and prosecutions.

Many such agreements affect the price paid by consumers throughout the country. In many cases, the impact is direct, as competitors agree to artificially increase the price of items sold to consumers: bread, milk, meat, produce, clothing and professional services. In other cases the effect upon the consumer is less direct, though no less adverse, in the sense that increased costs of manufacture are passed on to the ultimate consumer: gypsum products, concrete, packaging goods, construction steel and electrical equipment provide a few examples.

While it is impossible to precisely quantify the amount of illegal overcharges paid by consumers, responsible economists have estimated that such overcharges run into billions of dollars each year.

Our experience has shown that price fixing is a relatively frequent practice; as more resources are devoted to seeking out such arrangements, more such arrangements are found. The performance of the Antitrust Division in this area, which is the traditional and most commonly perceived antitrust enforcement mission, has been impressive and in fact provides an excellent basis for articulating the Administration's commitment to a free economy.

In Fiscal Year 1974, 84 individuals were indicted for criminal violations of the Sherman Act; in Fiscal Year 1975, 82 indictments were returned against individuals. This compares with an average of 28.4 during the preceding five-year period. In Fiscal Years 1974 and 1975, a total of 69 criminal cases (most of which involved price fixing) were filed, compared with an average of 13 per year for the immediately preceding five-year period. 1/ This record reflects our emphasis in recent years, and the results of that emphasis.

Price fixing is not an easy crime to detect, investigate and prosecute successfully. Price fixing activities are secret and surreptitious. Witnesses are reluctant, not only because they fear imprisonment but also because they may subject their employers to suits for treble the amount of the illegal overcharge. The resources devoted to detection, investigation and prosecution have, however, increased substantially in recent years. The staff devoted, in whole or in part, to activities such as the prosecution of price fixing and related activities increased from 598 in Fiscal Year 1974 to 691 in Fiscal Year 1975, or nearly 20 percent. New techniques, including the analysis of price indices and old techniques, such as grand jury proceedings, are being used increasingly and in combination for improved detection of illegal activity. Over 75 grand juries are now sitting in various parts of the country to investigate economic crimes of the price fixing type.

Indicting, prosecuting and convicting some price fixers will not, of course, mean the end to all price fixing. But for each price fixer who is successfully prosecuted, many others will be deterred from undertaking similar activities. In recognition of the need for a

strong and effective deterrent to potential price fixing, this Administration supported an increase in the maximum prison term for Sherman Act violations from one year to three years and also endorsed increases in the maximum fines both for individuals and corporations. That legislation, the effects of which are yet to be felt, is a major step forward in the effort to lessen the incidence of these activities.

Traditional antitrust enforcement involves not only protection of the economy against unlawful agreements between competitors, but also preservation of a competitive market structure where concentration has not been achieved and the dissipation of monopoly power where it does exist.

The primary means available to preserve a competitive market structure is the prevention of anticompetitive mergers and acquisitions. A variety of economic factors -- some relevant to antitrust enforcement and some not -- appear to combine at times to provide a climate conducive to such transactions. As a consequence, both merger activity and corresponding antitrust enforcement efforts show a cyclical pattern. Merger activity soared during the late 1960s and early 1970s, and enforcement activity increased correspondingly. We have recently seen a period of relatively few mergers and correspondingly relatively few merger cases. As a result, we have been more able in recent years to concentrate our efforts on conspiratorial behavior (largely price fixing). Increasing merger activity, however, will result in more activity in this area. This is largely an uncontrollable enforcement activity which, by its very nature, must be reactive.

Dissipating monopoly power where it has already been achieved is far more difficult than preventing its creation. The Antitrust Division presently has monopoly actions pending in two of our most important and somewhat related industries: communications and computers. Monopolization cases are difficult and require a substantial commitment of enforcement resources. Such a substantial commitment is, however, necessary if we are to have effective competition in such important and growing industries.

This short summary is instructive. But simple recitation of the number of individuals indicted or the number of cases brought does not accurately reflect the total activity of the Antitrust Division. In each year since Fiscal Year 1969, over 700 antitrust investigations have been pending. Some will ripen into cases; the majority will not. But even the presence of a watchdog for competition can yield greater competition and deter those who would interfere with free market forces from doing so.

It is always difficult to calculate precisely the effectiveness of an enforcement program and the difficulty is increased in the antitrust area, where we are dealing largely with conspiratorial economic crimes. It is also dangerous simply to play the numbers game and count cases, without attempting some judgment of the quality of enforcement actions. The Division does, however, have an affirmative, aggressive programmatic enforcement policy, as this summary shows. That policy can be articulated with some pride, and its impact can best be demonstrated by looking at what has been accomplished and what is being done.

III.

In addition to our basic enforcement efforts, the Division has been a major participant in a wide variety of other efforts directly relating to competition policy.

The Division has for several years become increasingly active in regulatory agency proceedings, with the goal being increased attention given to competition policy in regulatory agency decision-making. We have made over 70 regulatory agency appearances in the last year alone, before the ICC, CAB, FCC, NRC, FMC, FPC and the federal banking agencies, among others. We recently established a second line unit with responsibility for regulatory agency participation, in order to meet our increasing needs in this area. Agency participation has become a regular and essential part of the Division's competition advocacy program.

The regulatory reform activities of the Division, many undertaken in conjunction with other parts of the Administration, are far ranging. With the strong support of the Division, several pro-competitive pieces of legislation have recently been enacted or introduced. The Securities Act Amendments of 1975, signed by the President on June 4, 1975, injected a substantial measure of competition into the conduct of the securities industry. Legislation authorizing fair trade laws has been repealed effective March 11, 1976. The Division has worked with other agencies in the Administration to prepare and support the Financial Institutions Act, the Railroad Revitalization and Regulatory Reform Act, the Motor Carrier Reform Act, and the Aviation Act of 1975.

The Division has devoted substantial resources to other regulatory reform initiatives. It has reviewed the antitrust immunity for anticompetitive agreements among insurance companies, conferred by the McCarran-Ferguson Act; studied the economic effects of the conference system and Federal Maritime Commission regulation, including

the antitrust immunity for conference agreements under the Shipping Act of 1916; examined the effects of federal regulation on price, supply and efficiency in agriculture, focusing on the Agricultural Marketing Agreements Act of 1937 and the Capper-Volstead Act of 1922; provided considerable assistance and support for the Patent Reform legislation now pending before the Congress; and participated in discussions and analysis of FCC regulation of cable television. We will shortly complete a careful analysis of the economic effects of the Robinson-Patman Act, recommending appropriate reform. This list is not exhaustive; it is illustrative, however, of the comprehensive examination by the Antitrust Division and other agencies within the Executive Branch of economic regulation in its many forms.

IV.

The Division has also worked with the Congress on a variety of legislative initiatives designed to increase antitrust enforcement capabilities and deter anticompetitive conduct. These efforts resulted in the enactment of the Antitrust Penalties and Procedures Act of 1974, which substantially increased the maximum penalties for criminal violations of the Sherman Act. Legislation is pending in Congress which would amend the Antitrust Civil Process Act, in accord with the President's recommendation in his first major economic address in October 1974. Other pending antitrust bills concern Parens Patriae authority and increased merger enforcement capabilities; the Administration has supported this legislation in concept, and the Division has worked closely, and quite successfully, with Congressional staff to conform the legislative proposals to the concerns of the Administration. A variety of other legislative proposals are designed to inject additional emphasis on competition policy into the existing economic regulatory scheme. The most important of these is S. 2028, and again the Administration has supported the concept and Division staff have worked closely with Congressional staff to produce desirable statutory language.

The Division, and the Administration, have, on the whole, a commendable record in both initiating and supporting a variety of legislation aimed at increasing the vigor of competitive free markets and decreasing unwarranted governmental interference with competitive forces. These actions, when considered in conjunction with the basic enforcement and competition advocacy program of the Antitrust Division and the Administration-wide efforts on regulatory reform, may constitute the most positive support of competition policy by any Administration in recent times.

V.

As you noted, and as this discussion clearly shows, the President has generally supported strong antitrust and competition policies. As you also point out, however, the Administration's stand in this regard has been perceived as "passive and damage limiting." This perception is unfortunately magnified when the Administration fails to follow through on antitrust enforcement proposals which it has already endorsed. Perhaps the most conspicuous example of such a failure of support is in connection with amendments to the Antitrust Civil Process Act, 28 U.S.C. §§ 1311-14. With this perspective, four steps if taken, would greatly strengthen the Administration's image on antitrust and competition policy.

First, it is essential that the Administration take positive steps to reaffirm its commitment to the antitrust legislation which it has previously supported on the record, especially the amendments to the Civil Process Act. That legislation, strongly endorsed by the President over a year ago, has not yet advanced out of the House Judiciary Subcommittee on Monopolies and Commercial Law. In part, this is because the lack of affirmative efforts by the Administration has left the perception that the Antitrust Division, which has put forth considerable effort, was on its own and had only the tacit support of the Administration. To combat this perception, the President should call for early passage of this legislation

and provide legislative assistance to work with the Department of Justice in obtaining this result. In addition, affirmative Administration action on behalf of Parens Patriae legislation pending in the House, and the major provisions of S. 1284, both of which have been supported by the Administration, would help to dissipate any "passive" antitrust image which may exist. On antitrust legislation, at least, the legislative branch has been relatively more vigorous in seeking new and effective laws than the Executive Branch.

Clearly, there can be differing perspectives on the desirability of particular legislative proposals. But it is also true that, with the possible exception of fair trade legislation, the Administration has played basically a "passive" and "reactive" role on the Hill. Especially with respect to the CID Amendments, vigorous and affirmative Administration support seems required by its public commitment, and such support would go a long way toward muting its "passive" image.

Second, the President, in a major speech or otherwise, should clearly and unmistakably assert and explain his antitrust and competition policies. Such a speech should concentrate on a clear description of antitrust enforcement and regulatory efforts, the purpose of those efforts, and the pro-consumer and business goals which have been and hopefully will be achieved through these activities. This would be much more useful if dealt with on its own, without combination with such issues as capital formation problems, which may obscure the purpose and primary beneficiaries of antitrust enforcement. It is important to emphasize that antitrust policy, designed to maintain free and open markets in which private enterprise may flourish, benefits consumers, honest businessmen, and the general economy by creating incentives to lower prices and to innovate. To the extent that antitrust enforcement is more effective, these desired results of a free market economy will be more secure. Special Administration efforts, through speeches or otherwise, to obtain enactment of the CID Amendments, thus, would do much to advance

the image of the President as a strong supporter of commendable antitrust policies and goals. I would be more than happy to provide any assistance in preparing a Presidential address.

Third, the President should consider establishing a Concentration Review Commission which could stimulate creative thinking in the area of antitrust policy. The Commission would undertake a comprehensive analysis of the causes and consequences of concentration in the American economy. This important initiative would show the President's willingness to challenge long-held but largely untested assumptions about how the economy works. The Attorney General has forwarded such a proposal to the Council of Economic Advisers for its consideration.

Fourth, the Administration should give strong weight to a policy of competition in areas of significant economic impact that fall outside the area of direct antitrust enforcement responsibilities. Such areas would clearly include International Trade Commission recommendations to the President for quotas or other protective measures in the specialty steel and shoe industries. Giving substantial weight to competitive concerns in making decisions in these areas is crucial to establishing a consistent theme favoring competition policy. These areas bear directly on competition policy and even more directly on the public perception of the Administration's "antitrust" posture.

Footnote 1:

Over the past 15 years, the average number of criminal cases is just under 21 per year, and the average number of individuals indicted is just over 52 per year. Thus, in the last 2 years, we have filed criminal cases at a 50% higher rate, and indicted individuals at a 60% higher rate, than the average since 1960. In fact, the comparison to more recent years is even more dramatic. In the five-year period 1969-1973, as pointed out in the text, the average number of criminal cases was 13, and the average number of individuals indicted was 28. Thus, we have increased our criminal case filings and the number of individuals indicted since 1973 about 200%.

Already, in Fiscal Year 1976, we have filed 14 criminal cases, and indicted 90 individuals, the latter being the largest total since 1962. We fully expect the three-year total on criminal cases and individuals indicted by the end of this fiscal year to be the largest in memory.

Other indicia illustrate the same point. Our fines and recoveries, largely from price-fixing cases, have increased $2,038,000 in FY 1974 to $3,427,000 in FY 1975. Already in FY 1976, the total is $2,722,000. By comparison, only in 1963 (Electrical Equipment Cases) and 1968 (Plumbing Fixtures Cases) during the past 15 years has this figure exceeded $2.4 million.

THE WHITE HOUSE

WASHINGTON

March 15, 1976

MEMORANDUM FOR: PHIL BUCHEN

FROM: JIM CANNON

SUBJECT: Antitrust Position

I agree that the President's position on antitrust policy is not well understood. Since the President's record is quite positive and his policy inclinations seem to be toward tough, fair antitrust law enforcement, I support the idea of a major Presidential address on antitrust policy.

Since this ties in well with the President's regulatory reform initatives (i.e., more reliance on competition policed by the antitrust laws), the theme of economic regulation reform might also be raised.

Finally, if a decision to give a speech is made, there should be a review of possible new initiatives.

THE CHAIRMAN OF THE
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON

March 15, 1976

MEMORANDUM FOR: PHIL BUCHEN

FROM: Paul MacAvoy for Alan Greenspan

SUBJECT: Administration Antitrust Policy

There are two reasons for making an explicit statement on the Administration's antitrust policy. Not only will such a statement remove the impression of negative reaction to Congressional initiatives, but also it should help focus private sector reactions to policy. At the present time, the main thrust of antitrust is on prevention of collusive price-setting, anticompetitive mergers, and restrictive practices in the regulated industries. The effects of these policies are extremely difficult to determine, because they depend as much on the nonexistence of anticompetitive acts thwarted by fear of antitrust as on the actual cases themselves. But an attempt to articulate the importance of the policies and to bring together the research findings on their effects would draw attention away from the over-publicized Congressional initiatives calling for petroleum company divestiture, and so on.

The Attorney General has recently circulated a draft bill establishing an "Economic Concentration Review Commission." The Commission would be formed and report on a five-year cycle, with each commission having a life of 18 months they charge with gathering data on concentration and doing studies on market competition. This proposal should be investigated in some detail, as a possible new area of development of antitrust policy.

THE WHITE HOUSE

WASHINGTON

March 29, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: L. WILLIAM SEIDMAN LWS

SUBJECT: Administration Antitrust Legislation

Issue

Should the Administration reaffirm its support for the amendments to the Antitrust Civil Process Act (the CID bill)? If so, should a Presidential letter stating this position be forwarded to the Judiciary Committees?

Background

Congress is moving toward enactment this spring of omnibus antitrust legislation. The Senate Judiciary Committee is in the process of marking up S. 1284, "the Hart-Scott Omnibus Antitrust Act," and a final vote is expected on April 6. A brief summary, prepared by the Justice Department, of S. 1284 and the positions taken to date by the Administration on its various provisions is set forth at Tab A.

In the House, the various titles incorporated in S. 1284 are being considered separately. H.R. 8532, the parens patriae bill, recently passed the House with amendments that reflected some of the concerns raised in the March 17 letter to Congressman Rhodes. A pre-merger notification bill similar to Title V of S. 1284 will be introduced shortly by Chairman Rodino. Finally, the House Judiciary Subcommittee is scheduled to mark up on March 31 the Administration's proposal for amendments to the Antitrust Civil Process Act (H.R. 39), which would allow the Department of Justice to take testimony in pre-complaint antitrust investigations.

This legislation has come under heavy attack from the business community. The modifications of the Administration's position on the injunctive relief provisions for mergers in S. 1284 and the House parens patriae bill have been

interpreted as resulting from business pressure. Consequently, Senator Scott has requested that he and Senator Hart meet with you to explore the development of an acceptable position on the Senate bill.

The timing of legislative action requires that the Administration position on the House and Senate legislation be communicated quickly.

The Civil Process Act Amendments (H.R. 39)

These amendments, together with legislation to increase antitrust penalties, were endorsed in your Economic Address of October 8, 1974. The increase in penalties was enacted and signed into law in December 1974, but the Civil Process Act amendments died in the 93rd Congress. Attorney General Levi resubmitted this legislation to the 94th Congress and hearings have been held in both Houses.

The present Civil Process Act was enacted in 1962 to assist the Department of Justice in investigating possible antitrust violations. The Act helps the Department determine, in advance of filing a suit, whether a violation has occurred. It was enacted because pre-complaint discovery was preferable to having the government file complaints based upon sketchy or inaccurate information. It was designed to make possible more informed decisions by Justice prior to creating the burden, expense, and adverse publicity of a full government lawsuit.

The 1962 Act, however, was a limited effort. The Antitrust Division may only serve the Civil Investigative Demand (CID)--a pre-complaint subpoena--on suspected violators, the so-called "targets". The CID may only be served on businesses for the purpose of obtaining documents relevant to the investigation.

The proposed legislation would permit CID's to be issued not only to "targets" of the investigation, but also to third parties--customers, suppliers, competitors--who may have information relevant to the investigation even though they themselves are not suspected violators. CID's could thus be served not only on a business entity, but also on individuals (e.g., a witness to a meeting). Also, a CID recipient could be compelled not only to produce documents, but also to give oral testimony and answer written questions.

The Justice Department views enactment of this legislation as a vital step designed to close a gap in their antitrust enforcement authority. They believe it is necessary to assure that the major increase in funds appropriated to antitrust enforcement efforts during the last two budgets will be utilized in the most efficient and effective manner.

The bill will accord the Department of Justice essentially the same investigatory power now possessed by the FTC and numerous other Federal agencies (e.g., Treasury, Agriculture, Labor, Veterans Administration, and most regulatory agencies). In addition, at least 18 states (including Virginia, Texas, Arizona, New Hampshire, Florida, and New York) have enacted similar legislation, most within the last ten years.

Despite the inclusion in the bill of a variety of safeguards to protect against even the appearance of governmental overreaching, and numerous changes in the legislation accepted by the Justice Department and Judiciary Committee staffs, opposition to the legislation from the business community continues. Attached at Tab B is a discussion of the major objections that have been raised.

Option 1: Reaffirm Administration support for the Civil Process Act amendments and related legislation with a letter to the House and Senate Judiciary Committees.

In light of the Administration's recent modifications in its position on premerger notification and parens patriae, the Justice Department believes it is essential to reaffirm in writing our support for the amendments to the Antitrust Civil Process Act. A proposed Presidential letter to the Chairmen of the House and Senate Judiciary Committees reaffirming your support for the amendments is attached at Tab C. This letter also indicates that you have asked the Justice Department to work with the Committees to achieve passage of this legislation.

Option 2: Reaffirm Administration support for the Civil Process Act amendments by instructing Justice to indicate such support during the House mark-up session.

This approach would reaffirm the Administration's support without highlighting your personal involvement. However, Justice indicates that several members of the House Judiciary Committee have said that in light of the change of Administration position on parens patriae and much media speculation on this issue, they cannot accept an expression by the Department of Justice as a reliable expression of your position on this issue.

Option 3: Instruct Justice to indicate Administration opposition to the Civil Process Act amendments during the House mark-up session.

Such a reversal of support almost certainly would result in increased attacks on the credibility of the Administration's antitrust program. It would also tend to undermine the integrity of the Administration's process of clearing legislation.

Decision

Option 1 _____ Reaffirm Administration support for the Civil Process Act amendments and related legislation with a letter to the House and Senate Judiciary Committees.

Supported by: Treasury, Commerce, Justice, Counsel's Office, OMB, CEA

Option 2 _____ Reaffirm Administration support for the Civil Process Act amendments by instructing Justice to indicate such support during the House mark-up session.

Supported by: Marsh, Friedersdorf

Option 3 _____ Instruct Justice to indicate Administration opposition to the Civil Process Act amendments during the House mark-up session.

Justice Department Summary of Hart-Scott
Omnibus Antitrust Bill, S. 1284

S. 1284 is a wide-ranging antitrust bill co-sponsored by Senators Hart and Scott. It contains seven titles, including provisions comparable to the Civil Process Act amendments now pending in the House, and the parens patriae legislation passed last week.

Title I (Declaration of Policy)

This title contains a collection of assertions and conclusions about the commitment of this country to a free enterprise system, the decline of competition as a result of oligopoly and monopoly, and the positive impact of vigorous antitrust enforcement. It has been heavily criticized by business groups as not being based on economic consensus nor logically connected to the procedural matters dealt with in the body of S. 1284. The Administration has taken no position on Title I, and it is irrelevant to the substantive effect of the omnibus bill. This is an area where it seems likely that significant modification or complete elimination would be possible.

Title II (Antitrust Civil Process Act Amendments)

Title II is the Senate equivalent to H.R. 39, Amendments to the Antitrust Civil Process Act. It is in all major respects identical to the House bill and the Administration's original proposal, as modified by suggestions from the Administration.

Title III (FTC Amendments)

Title III would amend the FTC Act to provide increased penalties for not obeying FTC subpoena or orders. Essentially similar provisions have already passed the Senate in S. 642, and it seems likely that Title III will or could be eliminated from S. 1284. The Administration has generally supported Title III.

Title IV (Parens Patriae)

Title IV is the Senate equivalent to the parens patriae bill recently passed by the House. It is, as it presently stands, a significantly broader bill, allowing, for example, recovery of damages to the general economy of a state. In addition, the bill as it now stands is subject to the same criticisms directed at the House bill in the President's letter to Congressman Rhodes. It seems quite likely, after the House floor action on parens patriae, that substantial amendments in Title IV would be accepted by the Senate. In fact, the Administration has explicitly opposed several provisions of existing Title IV (especially the general economy language) and Judiciary staff has indicated that those provisions would likely be deleted.

Title V (Premerger Notification and Stay Amendments)

Title V establishes a pre-merger notification procedure, and creates an automatic injunction against mergers challenged by federal enforcement agencies. The Administration originally supported the basic concepts of Title V, including the automatic injunction, although suggesting some major modifications in language and scope of coverage. Although those suggested modifications were largely adopted, the Administration recently withdrew its support for the automatic injunction portion of Title V, and stated its opposition to any similar provision, while reaffirming its support for a properly modified pre-merger notification procedure. Senators Scott and Hart have announced their intention to modify the notification procedures in a way consistent with Administration suggestions and to seek to amend the automatic injunction procedure to provide a limited automatic stay, not to exceed 60 days, when a merger is challenged in order to permit a preliminary injunction hearing to be held prior to consummation. There is obviously some room for negotiation here, although there is strong support for some automatic stay provision.

Title VI (Nolo Contendere Amendments)

Title VI would grant prima facie effect in private damage actions to pleas of nolo contendere in the government's criminal antitrust actions. Title VI would also

provide more access to evidence produced in a grand jury proceeding on the part of private treble damage plaintiffs. The Administration has opposed Title VI and there seems to be a substantial possibility that Title VI could be bargained away during a period of negotiation.

Title VII (Miscellaneous Amendments)

Title VII contains a variety of miscellaneous provisions. The Administration has supported only one of these miscellaneous matters, which would amend Section 7 of the Clayton Act to expand its jurisdictional reach to the full scope of Congressional commerce power. This change is necessary because of the Supreme Court's recent decision in the American Building Maintenance case limiting the scope of Section 7 of the Clayton Act. The Administration has either opposed or taken no position on the other features of Title VII. The most significant of these is Section 704, which would amend Section 2 of the Sherman Act to lessen the burden of proof in an attempt to monopolize case. This provision has drawn considerable opposition and, while the Administration has taken no formal position on this provision, we have indicated informally our opposition. There is every reason to believe that most, if not all, of Title VII is negotiable.

Sub Issues and Allegations Regarding CID Legislation

1. It is unfair for the Justice Department to undertake an investigation and issue CIDs without notifying the target of the investigation and allowing him an opportunity to participate in the investigation and to have access to all materials and transcripts collected.

Since a civil antitrust investigation is frequently aimed at determining whether a violation has been committed, and thus targets are sometimes unknown, notification of targets is often impossible. More importantly, the concept of participation, and access to information developed, by "targets" (assuming they are known) would "make a shambles of the investigation and stifle the agency in its gathering of facts." (Hannah v. Larche). In Hannah, the Supreme Court said that such participation by "targets" is absolutely unprecedented in American jurisprudence and would transform the investigation from a fact-gathering exercise into a mini-trial. Finally, a potential defendant is not prejudiced by this procedure since he will have a full opportunity to present a defense if suit is filed. If a case is filed, the Department will have to prove its case in court, and any information gathered during the investigation will be fully subject to cross-examination in court. Any statements obtained during the pre-complaint investigation will generally be inadmissible in subsequent litigation, and all witnesses will be required to testify subject to cross examination.

2. The person who is compelled to testify by the CID should have the right of full participation of counsel.

The legislation provides that: "Any person compelled to appear under a demand for oral testimony . . . may be accompanied by counsel . . . . Such person or counsel may object on the record, stating the reason therefor, where it is claimed that such person is entitled to refuse to answer on grounds of privilege, or self-incrimination or other lawful grounds."

Clearly, all witnesses have full rights to counsel and may make any proper objections. This contrasts with the grand jury procedure where the witness is not entitled to the assistance or participation of counsel, nor can he refuse to answer questions on any grounds other than self-incrimination.

3. It is only fair to give assurances to a person that is not a target that he indeed is not a target.

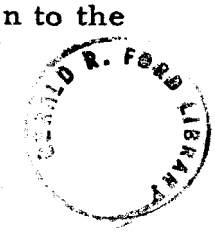
As indicated in the response to the first issue, it is frequently impossible to determine whether a person is in fact a target. In addition, any such assurances would be premature prior to the end of the investigation, since someone not considered a target may become one at a later state. The indications to persons that they are not a target will, in the context of an investigation, also make it significantly easier for others who may be targets to be identified. Since many CID investigations do not result in cases, this could have the effect of blackening reputations for no good cause. Finally, since all persons who receive a CID, whether targets or not, have all the rights and protections of the process, there is no advantage gained by such notification.

4. It is unfair for the Justice Department to have, through the CID authority, more discovery power than the other parties in regulatory proceedings.

The Justice Department agrees that the authority in regulatory proceedings is not essential to the legislation. The House committee staff will propose deletion of such authority with the endorsement of the Justice Department.

5. It is unfair for the Justice Department to compel testimony and the production of documents without the protection of a judicial proceeding.

In fact, no testimony can be compelled without a full hearing before a district court. If a recipient of a CID refuses to comply, he is under no legal obligation unless and until the Department seeks a court order after notice and a hearing, compelling his response. Only if the person continues to refuse to comply is he subject to penalties. In addition, if at any time during an oral deposition under the CID procedure, the witness declines to answer a question, or indeed even refuses to answer any questions at all, the Department cannot compel answers without seeking a court order after notice and hearing. Thus, as opposed to a grand jury investigation, no information of any kind can be compelled over the objection of the individual from whom the information is sought without a court proceeding in which the individual has full rights of participation to the extent he deems appropriate.



6. The CID legislation is not necessary. The Division could simply "borrow" or "piggyback" on the Federal Trade Commission's investigative powers, which can compel oral testimony from natural persons and third parties.

The Attorney General has no statutory power whatever to "borrow" the FTC's investigative powers. In all of Title 15 (the antitrust laws), there is no reference to any such power. Any such attempt by the Attorney General to simply utilize FTC powers would almost surely be held invalid. Finally, if this were possible, objections to H. R. 39 would be very difficult to understand, since the FTC's powers are nearly identical to those in H. R. 39.

7. Information obtained pursuant to a CID should be exempt from public disclosure under the Freedom of Information Act.

The Justice Department agrees and urges both congressional subcommittees to enact a specific exemption for information supplied pursuant to a CID. However, since material obtained pursuant to a CID is, almost by definition, commercial and obtained and compiled for law enforcement purposes, it is possible that CID information would fall within existing FOIA exemptions.

THE WHITE HOUSE

WASHINGTON

Dear Chairman Rodino:

During the last year and a half, my Administration has supported effective, vigorous, and responsible antitrust enforcement. In December 1974, I signed legislation increasing penalties for antitrust violations. In addition, I have submitted several legislative proposals for regulatory reform which would expand competition in regulated industries. Assuring a free and competitive economy is a keystone of my Administration's economic program.

In October 1974, I announced my support of amendments to the Antitrust Civil Process Act which would provide important tools to the Justice Department in enforcing our antitrust laws. My Administration reintroduced this legislation at the beginning of this Congress and I strongly urge its favorable consideration.

I have asked the Department of Justice to work closely with your Committee in considering this antitrust legislation. I would hope that the result of this cooperation will be effective and responsible antitrust legislation.

Sincerely,

The Honorable Peter W. Rodino, Jr.
Chairman
The Committee on the Judiciary
House of Representatives
Washington, D. C. 20515