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THE WHITE HOUSE

WASHINGTON

March 31, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: L. WILLIAM SEIDMAN

FROM: JAMES E. CONNOR JEC

SUBJECT: Administration Antitrust Legislation

Confirming phone call to Roger Porter of your office earlier today, the President reviewed your memorandum of March 29 on the above subject and approved the following option:

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

The letter to Peter W. Rodino, Jr. was signed and dispatched today by Records Office.

Please follow-up with other appropriate action.

cc: Dick Cheney

THE WHITE HOUSE
WASHINGTON

Note for File -

Max Friedersdorf would not deliver - He agreed that Congressman Hutchinson from Michigan should receive a copy.

Bob Linder said he would arrange for records to deliver.

GBF 3/31/76

THE WHITE HOUSE

WASHINGTON

March 29, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: L. WILLIAM SEIDMAN

SUBJECT: Administration Position on Antitrust Legislation

In light of the House Judiciary Committee mark-up of the Antitrust bill on Wednesday, it is necessary that we have your guidance by Tuesday evening on the Administration's position on this legislation. OMB, which has responsibility for legislative clearance, requested that the EPB Executive Committee consider the issue which was discussed at this morning's Executive Committee meeting.

The attached memorandum reflects the EPB discussion.

If you wish to discuss this issue before making a decision, please let me know.

THE WHITE HOUSE

WASHINGTON

March 29, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: L. WILLIAM SEIDMAN

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, Morton

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.

TAB A

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.

TAB B

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.

TAB C

THE WHITE HOUSE

WASHINGTON

March 31, 1976

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,

Gerald R. Ford

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

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WASHINGTON

March 31, 1976

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