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THE WHITE HOUSE

WASHINGTON

April 21, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR:

EDWARD C. SCHMULTS

FROM:

JAMES E. CONNOR *J.E.C.*

SUBJECT:

Antitrust Legislation Now
Before Congress

Confirming phone call to your office earlier today, the President reviewed your memorandum of April 14 and approved the following option:

Option 3: Schedule a meeting

Please follow-up with appropriate action.

cc: Dick Cheney
Jerry Jones

THE WHITE HOUSE

WASHINGTON

April 20, 1976

MR PRESIDENT:

Anti-trust Legislation Now Before Congress

Staffing of the attached memorandum resulted in the following:

Option II -

Work affirmatively with Senators Hart and Scott to try to produce an acceptable bill prior to a Senate floor vote early next month.

Supported by Max Friedersdorf

Option III -

Schedule a meeting

Supported by Messrs. Cannon, Jones, Lynn, Marsh, Seidman and Duval.

Jerry Jones added the following comments: "I have no problem with a meeting. Generally I feel we should be aggressive in anti-trust area and should not allow Senate to take leadership role away from us."

Jim Lynn comments are at TAB A.A.

Jim Connor

THE PRESIDENT HAS SEEN.

THE WHITE HOUSE

WASHINGTON

April 14, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: EDWARD C. SCHMULTS



SUBJECT: Antitrust Legislation Now Before Congress

Issue

This memorandum outlines the status of omnibus antitrust legislation pending before the Congress and requests your guidance as to how we should proceed.

Background

The Administration has in the past been the champion of vigorous antitrust enforcement and reducing government regulation while Congress has largely been playing "catch-up" ball. Recently the Administration's positive anti-trust policy has been criticized by Members of Congress and others because of our position on antitrust legislation before the Congress. (See attached letter from Chairman Rodino at Tab A.)

Nevertheless, Senators Hart and Scott, as a culmination of years of work, are anxious to see important antitrust legislation enacted into law this year and are anxious to work with the Administration to arrive at an acceptable bill.

Status of the Legislation

On April 2, Senators Hart and Scott met with White House senior staff to urge firm Administration support for the legislation and to determine possible areas of compromise. We outlined to them the Administration's objections to this legislation and reemphasized the views expressed in your letters to John Rhodes on *parens patriae* and Peter Rodino on the CID bill (see Tab B). Shortly thereafter, on April 6, the Judiciary Committee completed mark-up on its legislative proposal, the Hart-Scott Antitrust

Improvements Act (S.1284). In the course of that mark-up, both Senators referred to the White House meeting and indicated their belief that suitable negotiations could begin soon after the mark-up. They stressed flexibility and a desire to accommodate Administration views.

In the House, three of the major provisions of S.1284 are being considered in separate legislation. Following your letter to Minority Leader Rhodes on the *parens patriae* legislation, the House passed this bill, but modified it to reflect some of your reservations concerning specific provisions. The House Judiciary Committee will soon take up the Administration's proposed amendments to the Civil Process Act. Your March 31 letter to Chairman Rodino urged favorable consideration of this legislation and requested the Department of Justice to work closely with the Committee on this bill.

Following action on the Civil Process Act amendments the House Judiciary Committee is also expected to consider premerger notification and mandatory stay legislation. The Senate bill has a similar provision.

On March 31, Justice, Treasury, Commerce and the FTC agreed on a position on the major provisions of the Senate and House legislation. We have compared this position with the bill reported from the Senate Judiciary Committee on April 6 and believe that it would be possible to negotiate an outcome close to this position. It is probable that if legislation is enacted, it will be an omnibus bill. Therefore, we are outlining below the main features of this bill.

1. Parens Patriae. Any such omnibus legislation probably would include a modified *parens patriae* provision as both Houses are determined to make *parens* a condition for enactment of the Administration's civil process bill. Your March 17 letter to Minority Leader Rhodes expressed serious reservations regarding the basic principle of *parens patriae*, which allows state attorneys general to seek damages in Federal courts as a result of Federal antitrust violations.

In addition to your problems with the basic concept of *parens patriae*, there are other major points of difference between the Administration's position and the legislation being considered in the Congress.

The current Senate version of the *parens patriae* bill is a significantly broader bill than that which recently passed the House. The Senate bill as it now stands is subject to the same criticisms we have directed at the House bill. Nevertheless, it seems quite likely that substantial amendments in this provision could be accepted by the Senate.

Negotiable areas of importance to the Administration are: limitation of scope to price fixing, elimination of statistical aggregation in private class actions, reduction to single damages, prohibition of contingency fees and discretionary rather than mandatory award of attorney's fees. For a further discussion of these issues, see Tab C.

2. Antitrust Civil Process Act Amendments. The Senate and House bills are in most respects compatible with the Administration's position.

The Administration favors deleting the use of the expanded civil process powers in regulatory agency proceedings. It is anticipated that the House will delete this provision.

The Administration also seeks exemption of information obtained through this process from public disclosure under the Freedom of Information Act. Although it is not clear that such an exemption is necessary, many businesses fear the possible applicability of the FOIA. The Senate may be reluctant to grant such exemptions, and it may be easier to achieve the exemption in conference.

Also, the Justice Department opposes a recent amendment in the Senate bill which would require them to reimburse third parties for expenses incurred in an antitrust investigation.

There appears to be a good chance that these modifications will be accepted. However, there will be some business opposition to the Civil Process Act amendments. Bill Seidman's memorandum to you on this subject is at Tab D.

3. Premerger Notification and Stay Amendments. In addition to establishing a premerger notification procedure, the Senate bill creates an automatic injunction against mergers which are challenged by Federal enforcement agencies. The Administration has stated its opposition to any stay provision, while reaffirming its support for a properly modified pre-merger notification procedure. The final Senate mark-up provides that if a merger is challenged by the Government, communication of the merger may be stayed until the court issues a decision on a request for a preliminary injunction. However, the stay can not exceed 60 days.

The burden would be on the defendant to demonstrate why a preliminary injunction should not be issued. Senator Scott has indicated a willingness to narrow this further by shifting the burden of proof from the defendant to the Government and to reducing the stay period.

The House will consider a similar provision. Although there is strong support for some such provision, the Administration has been against any automatic stay provision.

4. Miscellaneous Amendments. The Senate bill also contains a variety of miscellaneous provisions but the Administration only supports a provision which would amend Section 7 of the Clayton Act (mergers). This change is necessary because of a recent Supreme Court decision limiting the scope of Section 7 of the Clayton Act to reach only violations "in" rather than "affecting" interstate commerce. The Administration continues to oppose expanding the scope to other sections of the Clayton Act and the Robinson-Patman Act.

The Administration also opposes a provision which would authorize dismissal of claims or defenses of any party who relies upon foreign statutes to justify a refusal to comply with a discovery order. The Justice Department would also like to modify a provision requiring mandatory award of attorney's fees for injunctive relief under the Clayton Act. Justice prefers discretionary awards. No similar miscellaneous provisions are likely to be considered in the House.

5. Declaration of Policy. Finally, the Senate omnibus bill 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 criticized 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 previously taken no position on this provision.

Although some of the least supportable language has been eliminated in the Senate mark-up, the Administration would favor the elimination of this policy statement. However, the Departments do not view further modification or elimination as important as the modification of certain substantive portions of the bill which are considered above. Attached at Tab E is a table summarizing the various provisions of the House and Senate bills.

Options:

At this stage, we have the following options:

1. Do not compromise the present Administration position.
2. Negotiate with the Senate to try to produce an acceptable bill prior to a Senate floor vote early next month.
3. Schedule a meeting to discuss these options.

The first option has a number of risks. If the Administration takes no action, then it is likely that the Congress will pass an unacceptable bill thus generating pressure for a veto sometime this summer. On the other hand, there is some chance that Administration silence at this time could slow down the legislation in both Houses so that the legislation would not be enacted. For example, an effort to filibuster the bill in the Senate is possible.

Option 2 could substantially increase the chances of Congress passing an acceptable bill. With your support, it is likely that the White House staff and the Justice Department can work with Senators Hart and Scott to agree to desirable amendments prior to a Senate vote early next month and avoid undesirable amendments on the Senate floor. This

option would also help stimulate the House to move on the Civil Process Act amendments and an acceptable premerger notification bill.

Option 3 recommends a policy meeting on this subject, prior to your choosing between options 1 and 2. We believe that, in light of the complexity of the issues and the highly fluid political environment, we should meet with you as soon as possible.

Decision:

Option 1: Do not compromise Administration position until Senate and House conference a bill
(Supported by _____)

Option 2: Work affirmatively with Senators Hart and Scott to try to produce an acceptable bill prior to a Senate floor vote early next month (Supported by _____)

Option 3: Schedule a meeting
(Supported by _____)

RR7

TAB A

Congress of the United States

Committee on the Judiciary

House of Representatives
Washington, D.C. 20515

Telephone: 202-225-3951

March 17, 1976

EARL C. DUDLEY, JR.
STAFF DIRECTOR:
GARNER J. CLINE
COUNSEL:
HERBERT FUCHS
WILLIAM F. SHATTUCK
ALAN A. PARKER
JAMES F. FAIGO
MAURICE A. BARBOZA
ARTHUR P. ENDRES, JR.
THOMAS W. HUTCHISON
DANIEL L. COHEN
FRANKLIN G. POLK
THOMAS E. MOONEY
ALEXANDER B. COOK
CONSTANTINE J. CEKAS
ALAN F. COFFEY, JR.
KENNETH N. KLEE
RAYMOND V. SMETANKA

JOSE F. BROWN, TEX.
ROBERT W. KASTENMEIER, WIS.
DEN EDWARDS, CALIF.
WILLIAM L. HUNGATE, MO.
JOHN CONYERS, JR., MICH.
JOSHUA EILBERG, PA.
WALTER FLOWERS, ALA.
JAMES R. MANN, S.C.
PAUL S. SARABANES, MD.
JOHN F. SEIBERLING, OHIO
GEORGE E. DANIELSON, CALIF.
ROBERT P. DINAN, MASS.
BARBARA JORDAN, TEX.
RAY THORNTON, ARK.
ELIZABETH HOLTZMAN, N.Y.
EDWARD MEZVINSKY, IOWA
HERNAN BADILLO, N.Y.
ROMANO L. MAZZOLI, NY.
EDWARD W. PATTISON, N.Y.
CHRISTOPHER J. DODD, CONN.
WILLIAM J. HUGHES, N.J.
MARTIN A. RUSSO, ILL.
EDWARD HUTCHINSON, MICH.
ROBERT MCCLORY, ILL.
TOM RAILEBACK, ILL.
CHARLES E. WIGGINS, CALIF.
HAMILTON FISH, JR., N.Y.
M. CALDWELL BUTLER, VA.
WILLIAM S. COHEN, MAINE
CARLOS J. MOONHEAD, CALIF.
JOHN M. ASHBROOK, OHIO
HENRY J. HYDE, ILL.
THOMAS N. KINDNESS, OHIO

The President
The White House

Dear Mr. President:

I was extremely distressed to learn today that you have withdrawn your Administration's carefully articulated and frequently repeated support for H.R. 8532, the Antitrust Enforcement Improvement Act (Parens Patriae).

In my judgment, enactment of this bill would constitute unquestionably the most significant contribution to antitrust enforcement and the deterrence of widespread antitrust violations in more than a quarter century.

The basic premise of the bill is that many if not most antitrust violations have their principal impact upon the consumer, who pays more for goods and services than he would if there were free and open competition. The need for the bill arises because under our present antitrust enforcement scheme, the consumer has no effective mechanism for seeking redress, in light of the small value of individual claims and the enormous cost and complexity of antitrust litigation. As a result, many violations go unpunished and corporate violators reap -- and retain -- billions of dollars in illegal profits every year.

The bill would fill this enforcement void by empowering state attorneys general to bring antitrust suits on behalf of consumers in their states injured by antitrust violations. It would create no new substantive antitrust liability. It would merely provide for the first time an effective mechanism for the vindication of existing consumer claims and the enforcement of long-standing policy.

The case for this bill has been made repeatedly and most persuasively by authorized representatives of your own Administration. On March 18, 1974, Thomas E. Kauper, Assistant Attorney General in charge of the Antitrust Division, testified generally in favor of an earlier version of

H.R. 8532. He suggested a number of amendments, many of which were incorporated in the draft approved by the House Judiciary Committee on July 24, 1975. The Administration's views regarding the Committee bill, the present H.R. 8532, were sought again following Committee action. Once again, Mr. Kauper was forthright in his support of the measure. In a letter to me dated September 25, 1975, Mr. Kauper stated:

The Administration has taken a position in support of the basic concept of permitting a State to sue on behalf of its citizens for damages sustained because of violations of the Sherman Act. H.R. 8532 would establish a workable mechanism for assuring that those antitrust violations which have the broadest scope and perhaps the most direct impact on consumers do not escape civil liability.

Mr. Kauper went on to suggest one or two amendments designed to strengthen the enforcement potential of H.R. 8532, concluding:

While we think the further refinements suggested above would strengthen the bill, we would still urge enactment of this legislation.

Mr. Kauper's letter made it clear that this was the mature and considered position of the entire Administration:

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report from the standpoint of the Administration's program.

Within the last month, while testifying on another matter, Mr. Kauper went out of his way to praise H.R. 8532 and the Judiciary Committee's contribution to antitrust enforcement in reporting it to the House.

These views were echoed recently in a significant speech by Deputy Assistant Attorney General Joe Sims, who stated in Dallas, Texas, on February 27, 1976 that "as we put more resources into the field, we continue to find that price-fixing is a common business practice." Pointing to the need for pending legislation to provide greater antitrust enforcement capability, Mr. Sims went on:

Strangely enough, while the business community is taking a strong public stand for free enterprise as a concept, it is also mounting an enormous lobbying effort in an attempt to delay, to cut back or to prevent the passage of such legislation.

And so again, the call for a return to free enterprise takes on a somewhat hollow ring.

The Administration's support for the provisions of H.R. 8532 has likewise been repeatedly expressed in the Senate. Mr. Kauper testified in favor of Title IV of S. 1284, the counterpart of H.R. 8532, in May of 1975, and as recently as February 19, 1976, Deputy Attorney General Harold Tyler expressly reaffirmed the Administration's support for Title IV in a letter to the Minority Leader of the Senate, the Honorable Hugh Scott, who is a cosponsor of S. 1284.

Even more is at stake than the credibility of considered statements by high ranking and fully authorized officials of your Administration. Your withdrawal of this long-standing support for H.R. 8532 is utterly at odds with your own repeated statements favoring vigorous and effective enforcement of the antitrust laws.

I could not put the case for the necessity of effective antitrust enforcement to the continuation of a free competitive economy better than you have on numerous occasions. On October 8, 1974, you told a Joint Session of Congress:

To increase productivity and contain prices, we must end restrictive and costly practices, whether instituted by Government, industry, labor, or others. And I am determined to return to the vigorous enforcement of the antitrust laws.

On April 18, 1975, you told the White House Conference on Domestic and Economic Affairs that "Vigorous antitrust enforcement must be part of the effort to promote competition."

In your most recent State of the Union message, on January 19, 1976, you told the Congress that "This Administration . . . will strictly enforce the federal antitrust laws."

You put the matter perhaps most eloquently in your remarks to the American Hardware Manufacturers Association on August 25, 1975:

It is sad but true -- too often the Government walks with the industry along the road to monopoly. The end result of such special treatment provides special benefits for a few, but powerful, groups in the economy at the expense of the taxpayer and the consumer. Let me emphasize this is not -- and never will be -- an Administration of special interests. This is an Administration of public interest, and always will be just that. Therefore, we will not permit the continuation of monopoly privilege, which is not in the public interest. It is my job and your job to open the American marketplace to all comers.

Despite these ringing declarations of commitment to antitrust policy and enforcement, your actions in recent weeks have struck repeated

March 17, 1976

blows at the hopes of the American people that these goals would be realized. On February 19, 1976, despite previous affirmations of Administration support, you withdrew, through Deputy Attorney General Tyler, your blessing from important injunctive provisions of Title V of S. 1284.

On March 4, 1976, an obviously distressed Assistant Attorney General Kauper had to tell our Committee that the Administration opposed S. 1136, already passed by the Senate, which would have committed significant additional funds to the federal antitrust enforcement effort.

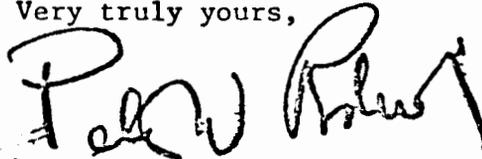
And yesterday you withdrew from almost two years of public support for the concept of H.R. 8532.

I hope that you will reconsider your pronouncement of yesterday and reaffirm your earlier support for a bill designed to put sorely needed teeth in our antitrust enforcement scheme.

Otherwise, everyone will have lost significantly. The considered pronouncements of your Administration on pending legislation will lose all credibility if the rug is to be pulled out repeatedly by last-minute presidential action. More important, the consumers and businessmen of this country who stand to benefit from free and open competition and the attendant reduction of inflation will have lost the assistance of a truly significant piece of legislation.

The antitrust laws are the basic charter of our free enterprise system, and I urge you to join in the effort to secure their vigorous enforcement in the public interest.

Very truly yours,



PETER W. RODINO, JR.
Chairman

PWR:edg

Tab B

March 17, 1976

TAB B

Office of the White House Press Secretary

THE WHITE HOUSETEXT OF A LETTER BY THE PRESIDENT
TO REPRESENTATIVE JOHN J. RHODES

March 17, 1976

Dear John:

As I outlined to you on Tuesday, March 16, I support vigorous antitrust enforcement, but I have serious reservations concerning the parens patriae concept set forth in the present version of H.R. 8532.

I question whether federal legislation is desirable which authorizes a state attorney general to sue on behalf of the state's citizens to recover treble damages that result from violations of the federal antitrust laws. The states have the ability to amend their own antitrust laws to authorize parens patriae suits in their own courts. If a state legislature, acting for its own citizens, is not convinced the parens patriae concept is sound policy, the Administration questions whether the Congress should bypass the state legislatures and provide state attorneys general with access to the federal courts to enforce it.

In addition to my reservations about the principle of parens patriae, I am concerned about some specific provisions of the legislation developed by the House Judiciary Committee.

The present bill is too broad in its reach and should be narrowed to price fixing violations. This would concentrate the enforcement on the most important anti-trust violations.

In addition, the Administration is opposed to mandatory treble damage awards in parens patriae suits, preferring instead a provision which would limit awards only to the damages that actually result from the violation. The view that federal penalties were inadequate, which has been used to justify mandatory treble damages in the past, is no longer justifiable given the substantial increases in these penalties in recent years.

The Administration opposes extension of the statistical aggregation of damages, beyond parens patriae legislation, to private class action suits because this is outside of the appropriate reach of this legislation.

Finally, the Administration prefers discretionary rather than mandatory award of attorney's fees, leaving such awards to the discretion of the courts.

During the last two years, the Administration has sought to improve federal enforcement efforts in the antitrust area and the resources devoted to antitrust enforcement have increased substantially. In December 1974, I signed the Antitrust Penalties and Procedures Act which increased maximum penalties from \$50,000 to \$1 million for corporations and \$100,000 for individuals. As I indicated above, I support vigorous antitrust enforcement, but I do not believe H.R. 8532 is a responsible way to enforce federal antitrust laws.

Sincerely,

/s/ Gerald R. Ford

The Honorable John J. Rhodes
Minority Leader
House of Representatives
Washington, D.C. 20515

THE WHITE HOUSE

WASHINGTON

March 31, 1976

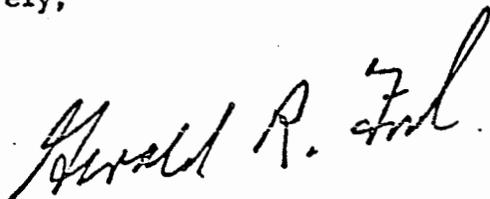
Dear Chairman Rodino:

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,



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

Tab C

Parsons Patriae

The House-passed parsons patriae bill (H.R. 8532) and Title IV of S. 1284, the Senate counterpart on which the Judiciary Committee completed action on April 6, differ in a number of respects.

Title IV had been a significantly broader bill which was narrowed in the Senate mark-up in two ways:

1. A provision which would authorize a State to recover damages to the "general economy" of that State or its political subdivisions was deleted.
2. The bill was modified to apply in general to future violations, rather than retrospectively.

The House-passed bill, which was narrowed substantially, compares with Title IV as follows:

1. Scope. The House bill was, in practical effect, narrowed to willful price-fixing violations only, by permitting statistical aggregation of damages only in such cases. The Senate version applies to violations of the Sherman Act.
2. Statistical Aggregation in Private Class Actions. The House eliminated a provision to permit aggregation in consumer class action suit. The Senate retained this provision.
3. Damages. The House provided for a court determined reduction of damages from treble to single damages if a defendant could prove he was acting in good faith or without reason to believe he violated the antitrust laws. The Senate bill provides for mandatory award of treble damage.
4. Attorneys Fees. Both the House and Senate provide that a court may award reasonable attorney's fees to a prevailing defendant upon finding the state attorney general acted in bad faith.
5. Contingency Fees. The House provided for a flat ban against contingency fee arrangement. The Senate bill requires the approval of the court for any attorney fee arrangement according to standard criteria (i.e., number of hours or time multiplied by reasonable hourly rate, adjusted up or down for risk, complexity, or other factors).

Although a fundamental issue as to the principle of *parens patriae* legislation remains, the House bill is much closer to the modifications favored by the concerned Departments. These are: limitation of scope to price-fixing; elimination of statistical aggregation in private actions and reduction to single damages in certain cases (possibly even a flat limitation to single damages); prohibition of contingency fees.

The Justice Department is also exploring options that would require prior Federal action or approval, before an action could be taken by a state attorney general under the *parens patriae* provision.

Tab D

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 anti-trust 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 over-reaching, 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.

Tab E

Antitrust Legislation

<u>Provision</u>	<u>Senate Bill (S. 1284)</u>	<u>Separate House bills</u>	<u>Administration Position</u>
<u>1. Parens Patriae (See attached explanation)</u>			
-- Scope	Sherman Act violations	Wilful price-fixing (practical effect)	Price-fixing
-- Statistical Aggregation in Private Class actions	Retained	Eliminated	Opposed
-- Damages	Mandatory award of treble damages	Court determined reduction from treble to single, if defendant acted in good faith	Favors House bill or flat limitation to single damages
-- Attorney's Fees	Court may award to a prevailing defendant if state attorney general acted in bad faith	Similar	Favors
-- Contingency Fees	Court approval according to standard criteria	Flat ban against	Favors House bill
<u>2. Civil Process Act Amendments</u>			
-- Use of civil process act powers in regulatory proceedings	Retained	House will delete, as recommended by Justice	Favors deletion
-- exemption of information from disclosure under Freedom of Information Act	No exemption	No exemption	Favors explicit exemption
-- Mandatory reimbursement of third parties for expenses, without specific authorization for appropriations	Amended to include	No provision	Justice Opposed

<u>Provision</u>	<u>Senate Bill (S.1284)</u>	<u>Separate House Bills</u>	<u>Administration Position</u>
3. <u>Premerger notification and automatic stay</u>			
--notification procedure	Retained	Retained	Supports
--automatic stay	Retained	Retained	Opposed-retain existing decisional law
4. <u>Miscellaneous Provisions</u>		None	
-- Amend Clayton Act (Violations "in" rather than "affecting" interstate commerce)	Retained		Supports provision applying to Clayton 7 (mergers); opposes applying to other sections of Clayton Act
-- Dismissal of claims of party relying upon foreign statutes to justify refusal to comply with discovery order	Retained		Opposed
-- Mandatory award of attorney's fees for injunctive relief under Clayton Act	Retained		Favors discretionary awards
5. <u>Declaration of Policy</u>	Retained with modification of most objectionable features	None	Favors elimination, but not as important as modifications above

A
A



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 16, 1976

MEMORANDUM FOR: JIM CONNOR
FROM: JAMES T. LYNN *James T. Lynn*
SUBJECT: Edward C. Schmults Memorandum 4/14/76
Re: Antitrust Legislation Now Before Congress

OMB recommends option three. Precedent to such a meeting OMB would recommend that the Justice Department develop specific legislative modifications to the *parens patriae* title that would have a potential of accommodating the President's "reservations about the principle of *parens patriae*."

The suggested recommended proposals might include:

1. the requirement that Justice Department approval be obtained before a state attorney general commences action.
2. conditioning the commencement of an action by state attorney general upon the prior finding of a suit by the Justice Department.
3. a requirement that federal current approval be obtained prior to the commencement of a suit by a state attorney general.

STAFFING

THE WHITE HOUSE

WASHINGTON

April 21, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR:

EDWARD C. SCHMULTS

FROM:

JAMES E. CONNOR *jet*

SUBJECT:

Antitrust Legislation Now
Before Congress

Confirming phone call to your office earlier today, the President reviewed your memorandum of April 14 and approved the following option:

Option 3: Schedule a meeting

Please follow-up with appropriate action.

cc: Dick Cheney
Jerry Jones

April 20, 1976

MR PRESIDENT:

Anti-trust Legislation Now Before Congress

Staffing of the attached memorandum resulted in the following:

Option II -

Work affirmatively with Senators Hart and Scott to try to produce an acceptable bill prior to a Senate floor vote early next month.

Supported by Max Friedersdorf

Option III -

Schedule a meeting

Supported by Messrs. Cannon, Jones, Lynn, Marsh, Seidman and Duval.

Jerry Jones added the following comments: "I have no problem with a meeting. Generally I feel we should be aggressive in anti-trust area and should not allow Senate to take leadership role away from us."

Jim Lynn comments are at TAB A.

Jim Connor

THE WHITE HOUSE

WASHINGTON

April 14, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: EDWARD C. SCHMULTS 

SUBJECT: Antitrust Legislation Now Before Congress

Issue

This memorandum outlines the status of omnibus antitrust legislation pending before the Congress and requests your guidance as to how we should proceed.

Background

The Administration has in the past been the champion of vigorous antitrust enforcement and reducing government regulation while Congress has largely been playing "catch-up" ball. Recently the Administration's positive anti-trust policy has been criticized by Members of Congress and others because of our position on antitrust legislation before the Congress. (See attached letter from Chairman Rodino at Tab A.)

Nevertheless, Senators Hart and Scott, as a culmination of years of work, are anxious to see important antitrust legislation enacted into law this year and are anxious to work with the Administration to arrive at an acceptable bill.

Status of the Legislation

On April 2, Senators Hart and Scott met with White House senior staff to urge firm Administration support for the legislation and to determine possible areas of compromise. We outlined to them the Administration's objections to this legislation and reemphasized the views expressed in your letters to John Rhodes on *parens patriae* and Peter Rodino on the CID bill (see Tab B). Shortly thereafter, on April 6, the Judiciary Committee completed mark-up on its legislative proposal, the Hart-Scott Antitrust

Improvements Act (S.1284). In the course of that mark-up, both Senators referred to the White House meeting and indicated their belief that suitable negotiations could begin soon after the mark-up. They stressed flexibility and a desire to accommodate Administration views.

In the House, three of the major provisions of S.1284 are being considered in separate legislation. Following your letter to Minority Leader Rhodes on the *parens patriae* legislation, the House passed this bill, but modified it to reflect some of your reservations concerning specific provisions. The House Judiciary Committee will soon take up the Administration's proposed amendments to the Civil Process Act. Your March 31 letter to Chairman Rodino urged favorable consideration of this legislation and requested the Department of Justice to work closely with the Committee on this bill.

Following action on the Civil Process Act amendments the House Judiciary Committee is also expected to consider premerger notification and mandatory stay legislation. The Senate bill has a similar provision.

On March 31, Justice, Treasury, Commerce and the FTC agreed on a position on the major provisions of the Senate and House legislation. We have compared this position with the bill reported from the Senate Judiciary Committee on April 6 and believe that it would be possible to negotiate an outcome close to this position. It is probable that if legislation is enacted, it will be an omnibus bill. Therefore, we are outlining below the main features of this bill.

1. Parens Patriae. Any such omnibus legislation probably would include a modified *parens patriae* provision as both Houses are determined to make *parens* a condition for enactment of the Administration's civil process bill. Your March 17 letter to Minority Leader Rhodes expressed serious reservations regarding the basic principle of *parens patriae*, which allows state attorneys general to seek damages in Federal courts as a result of Federal antitrust violations.

In addition to your problems with the basic concept of *parens patriae*, there are other major points of difference between the Administration's position and the legislation being considered in the Congress.

The current Senate version of the parens patriae bill is a significantly broader bill than that which recently passed the House. The Senate bill as it now stands is subject to the same criticisms we have directed at the House bill. Nevertheless, it seems quite likely that substantial amendments in this provision could be accepted by the Senate.

Negotiable areas of importance to the Administration are: limitation of scope to price fixing, elimination of statistical aggregation in private class actions, reduction to single damages, prohibition of contingency fees and discretionary rather than mandatory award of attorney's fees. For a further discussion of these issues, see Tab C.

2. Antitrust Civil Process Act Amendments. The Senate and House bills are in most respects compatible with the Administration's position.

The Administration favors deleting the use of the expanded civil process powers in regulatory agency proceedings. It is anticipated that the House will delete this provision.

The Administration also seeks exemption of information obtained through this process from public disclosure under the Freedom of Information Act. Although it is not clear that such an exemption is necessary, many businesses fear the possible applicability of the FOIA. The Senate may be reluctant to grant such exemptions, and it may be easier to achieve the exemption in conference.

Also, the Justice Department opposes a recent amendment in the Senate bill which would require them to reimburse third parties for expenses incurred in an antitrust investigation.

There appears to be a good chance that these modifications will be accepted. However, there will be some business opposition to the Civil Process Act amendments. Bill Seidman's memorandum to you on this subject is at Tab D.

3. Premerger Notification and Stay Amendments. In addition to establishing a premerger notification procedure, the Senate bill creates an automatic injunction against mergers which are challenged by Federal enforcement agencies. The Administration has stated its opposition to any stay provision, while reaffirming its support for a properly modified pre-merger notification procedure. The final Senate mark-up provides that if a merger is challenged by the Government, communication of the merger may be stayed until the court issues a decision on a request for a preliminary injunction. However, the stay can not exceed 60 days.

The burden would be on the defendant to demonstrate why a preliminary injunction should not be issued. Senator Scott has indicated a willingness to narrow this further by shifting the burden of proof from the defendant to the Government and to reducing the stay period.

The House will consider a similar provision. Although there is strong support for some such provision, the Administration has been against any automatic stay provision.

4. Miscellaneous Amendments. The Senate bill also contains a variety of miscellaneous provisions but the Administration only supports a provision which would amend Section 7 of the Clayton Act (mergers). This change is necessary because of a recent Supreme Court decision limiting the scope of Section 7 of the Clayton Act to reach only violations "in" rather than "affecting" interstate commerce. The Administration continues to oppose expanding the scope to other sections of the Clayton Act and the Robinson-Patman Act.

The Administration also opposes a provision which would authorize dismissal of claims or defenses of any party who relies upon foreign statutes to justify a refusal to comply with a discovery order. The Justice Department would also like to modify a provision requiring mandatory award of attorney's fees for injunctive relief under the Clayton Act. Justice prefers discretionary awards. No similar miscellaneous provisions are likely to be considered in the House.

5. Declaration of Policy. Finally, the Senate omnibus bill 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 criticized 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 previously taken no position on this provision.

Although some of the least supportable language has been eliminated in the Senate mark-up, the Administration would favor the elimination of this policy statement. However, the Departments do not view further modification or elimination as important as the modification of certain substantive portions of the bill which are considered above. Attached at Tab E is a table summarizing the various provisions of the House and Senate bills.

Options:

At this stage, we have the following options:

1. Do not compromise the present Administration position.
2. Negotiate with the Senate to try to produce an acceptable bill prior to a Senate floor vote early next month.
3. Schedule a meeting to discuss these options.

The first option has a number of risks. If the Administration takes no action, then it is likely that the Congress will pass an unacceptable bill thus generating pressure for a veto sometime this summer. On the other hand, there is some chance that Administration silence at this time could slow down the legislation in both Houses so that the legislation would not be enacted. For example, an effort to filibuster the bill in the Senate is possible.

Option 2 could substantially increase the chances of Congress passing an acceptable bill. With your support, it is likely that the White House staff and the Justice Department can work with Senators Hart and Scott to agree to desirable amendments prior to a Senate vote early next month and avoid undesirable amendments on the Senate floor. This

option would also help stimulate the House to move on the Civil Process Act amendments and an acceptable premerger notification bill.

Option 3 recommends a policy meeting on this subject, prior to your choosing between options 1 and 2. We believe that, in light of the complexity of the issues and the highly fluid political environment, we should meet with you as soon as possible.

Decision:

Option 1: Do not compromise Administration position until Senate and House conference a bill
(Supported by _____)

Option 2: Work affirmatively with Senators Hart and Scott to try to produce an acceptable bill prior to a Senate floor vote early next month (Supported by _____)

Option 3: Schedule a meeting
(Supported by _____)

Tab A

TAB A

Congress of the United States

Committee on the Judiciary

House of Representatives

Washington, D.C. 20515

Telephone: 202-225-3951

March 17, 1976

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GARNER J. CLINE

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HENRY J. HYDE, ILL.
THOMAS N. KINDNESS, OHIO

The President
The White House

Dear Mr. President:

I was extremely distressed to learn today that you have withdrawn your Administration's carefully articulated and frequently repeated support for H.R. 8532, the Antitrust Enforcement Improvement Act (Parens Patriae).

In my judgment, enactment of this bill would constitute unquestionably the most significant contribution to antitrust enforcement and the deterrence of widespread antitrust violations in more than a quarter century.

The basic premise of the bill is that many if not most antitrust violations have their principal impact upon the consumer, who pays more for goods and services than he would if there were free and open competition. The need for the bill arises because under our present antitrust enforcement scheme, the consumer has no effective mechanism for seeking redress, in light of the small value of individual claims and the enormous cost and complexity of antitrust litigation. As a result, many violations go unpunished and corporate violators reap -- and retain -- billions of dollars in illegal profits every year.

The bill would fill this enforcement void by empowering state attorneys general to bring antitrust suits on behalf of consumers in their states injured by antitrust violations. It would create no new substantive antitrust liability. It would merely provide for the first time an effective mechanism for the vindication of existing consumer claims and the enforcement of long-standing policy.

The case for this bill has been made repeatedly and most persuasively by authorized representatives of your own Administration. On March 18, 1974, Thomas E. Kauper, Assistant Attorney General in charge of the Antitrust Division, testified generally in favor of an earlier version of

H.R. 8532. He suggested a number of amendments, many of which were incorporated in the draft approved by the House Judiciary Committee on July 24, 1975. The Administration's views regarding the Committee bill, the present H.R. 8532, were sought again following Committee action. Once again, Mr. Kauper was forthright in his support of the measure. In a letter to me dated September 25, 1975, Mr. Kauper stated:

The Administration has taken a position in support of the basic concept of permitting a State to sue on behalf of its citizens for damages sustained because of violations of the Sherman Act. H.R. 8532 would establish a workable mechanism for assuring that those antitrust violations which have the broadest scope and perhaps the most direct impact on consumers do not escape civil liability.

Mr. Kauper went on to suggest one or two amendments designed to strengthen the enforcement potential of H.R. 8532, concluding:

While we think the further refinements suggested above would strengthen the bill, we would still urge enactment of this legislation.

Mr. Kauper's letter made it clear that this was the mature and considered position of the entire Administration:

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report from the standpoint of the Administration's program.

Within the last month, while testifying on another matter, Mr. Kauper went out of his way to praise H.R. 8532 and the Judiciary Committee's contribution to antitrust enforcement in reporting it to the House.

These views were echoed recently in a significant speech by Deputy Assistant Attorney General Joe Sims, who stated in Dallas, Texas, on February 27, 1976 that "as we put more resources into the field, we continue to find that price-fixing is a common business practice." Pointing to the need for pending legislation to provide greater antitrust enforcement capability, Mr. Sims went on:

Strangely enough, while the business community is taking a strong public stand for free enterprise as a concept, it is also mounting an enormous lobbying effort in an attempt to delay, to cut back or to prevent the passage of such legislation.

And so again, the call for a return to free enterprise takes on a somewhat hollow ring.

The Administration's support for the provisions of H.R. 8532 has likewise been repeatedly expressed in the Senate. Mr. Kauper testified in favor of Title IV of S. 1284, the counterpart of H.R. 8532, in May of 1975, and as recently as February 19, 1976, Deputy Attorney General Harold Tyler expressly reaffirmed the Administration's support for Title IV in a letter to the Minority Leader of the Senate, the Honorable Hugh Scott, who is a cosponsor of S. 1284.

Even more is at stake than the credibility of considered statements by high ranking and fully authorized officials of your Administration. Your withdrawal of this long-standing support for H.R. 8532 is utterly at odds with your own repeated statements favoring vigorous and effective enforcement of the antitrust laws.

I could not put the case for the necessity of effective antitrust enforcement to the continuation of a free competitive economy better than you have on numerous occasions. On October 8, 1974, you told a Joint Session of Congress:

To increase productivity and contain prices, we must end restrictive and costly practices, whether instituted by Government, industry, labor, or others. And I am determined to return to the vigorous enforcement of the antitrust laws.

On April 18, 1975, you told the White House Conference on Domestic and Economic Affairs that "Vigorous antitrust enforcement must be part of the effort to promote competition."

In your most recent State of the Union message, on January 19, 1976, you told the Congress that "This Administration . . . will strictly enforce the federal antitrust laws."

You put the matter perhaps most eloquently in your remarks to the American Hardware Manufacturers Association on August 25, 1975:

It is sad but true -- too often the Government walks with the industry along the road to monopoly. The end result of such special treatment provides special benefits for a few, but powerful, groups in the economy at the expense of the taxpayer and the consumer. Let me emphasize this is not -- and never will be -- an Administration of special interests. This is an Administration of public interest, and always will be just that. Therefore, we will not permit the continuation of monopoly privilege, which is not in the public interest. It is my job and your job to open the American marketplace to all comers.

Despite these ringing declarations of commitment to antitrust policy and enforcement, your actions in recent weeks have struck repeated

March 17, 1976

blows at the hopes of the American people that these goals would be realized. On February 19, 1976, despite previous affirmations of Administration support, you withdrew, through Deputy Attorney General Tyler, your blessing from important injunctive provisions of Title V of S. 1284.

On March 4, 1976, an obviously distressed Assistant Attorney General Kauper had to tell our Committee that the Administration opposed S. 1136, already passed by the Senate, which would have committed significant additional funds to the federal antitrust enforcement effort.

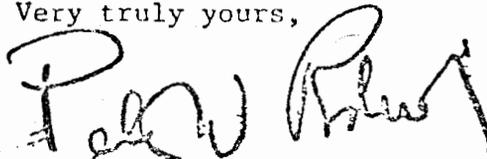
And yesterday you withdrew from almost two years of public support for the concept of H.R. 8532.

I hope that you will reconsider your pronouncement of yesterday and reaffirm your earlier support for a bill designed to put sorely needed teeth in our antitrust enforcement scheme.

Otherwise, everyone will have lost significantly. The considered pronouncements of your Administration on pending legislation will lose all credibility if the rug is to be pulled out repeatedly by last-minute presidential action. More important, the consumers and businessmen of this country who stand to benefit from free and open competition and the attendant reduction of inflation will have lost the assistance of a truly significant piece of legislation.

The antitrust laws are the basic charter of our free enterprise system, and I urge you to join in the effort to secure their vigorous enforcement in the public interest.

Very truly yours,



PETER W. RODINO, JR.
Chairman

PWR:edg

Tab B

Office of the White House Press Secretary

THE WHITE HOUSETEXT OF A LETTER BY THE PRESIDENT
TO REPRESENTATIVE JOHN J. RHODES

March 17, 1975

Dear John:

As I outlined to you on Tuesday, March 16, I support vigorous antitrust enforcement, but I have serious reservations concerning the parens patriae concept set forth in the present version of H.R. 8532.

I question whether federal legislation is desirable which authorizes a state attorney general to sue on behalf of the state's citizens to recover treble damages that result from violations of the federal antitrust laws. The states have the ability to amend their own antitrust laws to authorize parens patriae suits in their own courts. If a state legislature, acting for its own citizens, is not convinced the parens patriae concept is sound policy, the Administration questions whether the Congress should bypass the state legislatures and provide state attorneys general with access to the federal courts to enforce it.

In addition to my reservations about the principle of parens patriae, I am concerned about some specific provisions of the legislation developed by the House Judiciary Committee.

The present bill is too broad in its reach and should be narrowed to price fixing violations. This would concentrate the enforcement on the most important anti-trust violations.

In addition, the Administration is opposed to mandatory treble damage awards in parens patriae suits, preferring instead a provision which would limit awards only to the damages that actually result from the violation. The view that federal penalties were inadequate, which has been used to justify mandatory treble damages in the past, is no longer justifiable given the substantial increases in these penalties in recent years.

The Administration opposes extension of the statistical aggregation of damages, beyond parens patriae legislation, to private class action suits because this is outside of the appropriate reach of this legislation.

Finally, the Administration prefers discretionary rather than mandatory award of attorney's fees, leaving such awards to the discretion of the courts.

During the last two years, the Administration has sought to improve federal enforcement efforts in the antitrust area and the resources devoted to antitrust enforcement have increased substantially. In December 1974, I signed the Antitrust Penalties and Procedures Act which increased maximum penalties from \$50,000 to \$1 million for corporations and \$100,000 for individuals. As I indicated above, I support vigorous antitrust enforcement, but I do not believe H.R. 8532 is a responsible way to enforce federal antitrust laws.

Sincerely,

/s/ Gerald R. Ford

The Honorable John J. Rhodes
Minority Leader
House of Representatives
Washington, D.C. 20515

THE WHITE HOUSE

WASHINGTON

March 31, 1976

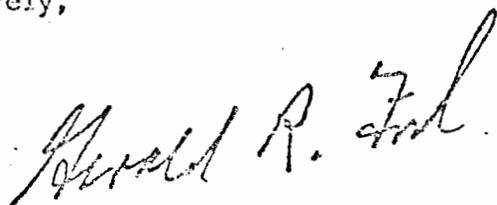
Dear Chairman Rodino:

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,

A handwritten signature in cursive script, reading "Gerald R. Ford". The signature is written in dark ink and is positioned below the word "Sincerely,".

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

Tab C

Parsons Patricia

The House-passed version of the Bill (H.R. 8532) and Title IV of S. 1781, the Senate counterpart on which the Judiciary Committee completed action on April 6, differ in a number of respects.

Title IV had been a significantly broader bill which was narrowed in the Senate mark-up in two ways:

1. A provision which would authorize a State to recover damages to the "general economy" of that State or its political subdivisions was deleted.
2. The bill was modified to apply in general to future violations, rather than retrospectively.

The House-passed bill, which was narrowed substantially, compares with Title IV as follows:

1. Scope. The House bill was, in practical effect, narrowed to willful price-fixing violations only, by permitting statistical aggregation of damages only in such cases. The Senate version applies to violations of the Sherman Act.
2. Statistical Aggregation in Private Class Actions. The House eliminated a provision to permit aggregation in consumer class action suit. The Senate retained this provision.
3. Damages. The House provided for a court determined reduction of damages from treble to single damages if a defendant could prove he was acting in good faith or without reason to believe he violated the antitrust laws. The Senate bill provides for mandatory award of treble damage.
4. Attorneys Fees. Both the House and Senate provide that a court may award reasonable attorney's fees to a prevailing defendant upon finding the state attorney general acted in bad faith.
5. Contingency Fees. The House provided for a flat ban against contingency fee arrangement. The Senate bill requires the approval of the court for any attorney fee arrangement according to standard criteria (e.g., number of hours of time multiplied by reasonable hourly rate, adjusted up or down for risk, complexity, or other factors).

Although a fundamental issue as to the principle of parens patriae legislation remains, the House bill is much closer to the modifications favored by the concerned Departments. These are: limitation of scope to price-fixing; elimination of statistical aggregation in private actions and reduction to single damages in certain cases (possibly even a flat limitation to single damages); prohibition of contingency fees.

The Justice Department is also exploring options that would require prior Federal action or approval, before an action could be taken by a state attorney general under the parens patriae provision.

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 CTD 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 anti-trust 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.

Antitrust Legislation

<u>Provision</u>	<u>Senate Bill (S. 1284)</u>	<u>Separate House bills</u>	<u>Administration Position</u>
<u>1. Parens Patriae (See attached explanation)</u>			
-- Scope	Sherman Act violations	Wilful price-fixing (practical effect)	Price-fixing
-- Statistical Aggregation in Private Class actions	Retained	Eliminated	Opposed
-- Damages	Mandatory award of treble damages	Court determined reduction from treble to single, if defendant acted in good faith	Favors House bill or flat limitation to single damages
-- Attorney's Fees	Court may award to a prevailing defendant if state attorney general acted in bad faith	Similar	Favors
-- Contingency Fees	Court approval according to standard criteria	Flat ban against	Favors House bill
<u>2. Civil Process Act Amendments</u>			
-- Use of civil process act powers in regulatory proceedings	Retained	House will delete, as recommended by Justice	Favors deletion
-- exemption of information from disclosure under Freedom of Information Act	No exemption	No exemption	Favors explicit exemption
-- Mandatory reimbursement of third parties for expenses, without specific authorization for appropriations	Amended to include	No provision	Justice Opposed

<u>Provision</u>	<u>Senate Bill (S.1284)</u>	<u>Separate House Bills</u>	<u>Administration Position</u>
3. <u>Premerger notification and automatic stay</u>			
--notification procedure	Retained	Retained	Supports
--automatic stay	Retained	Retained	Opposed-retain existing decisional law
4. <u>Miscellaneous Provisions</u>		None	
-- Amend Clayton Act (Violations "in" rather than "affecting" interstate commerce)	Retained		Supports provision applying to Clayton 7 (mergers); opposes applying to other sections of Clayton Act
-- Dismissal of claims of party relying upon foreign statutes to justify refusal to comply with discovery order	Retained		Opposed
-- Mandatory award of attorney's fees for injunctive relief under Clayton Act	Retained		Favors discretionary awards
5. <u>Declaration of Policy</u>	Retained with modification of most objectionable features	None	Favors elimination, but not as important as modifications above

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: April 15, 1976 (8:30 A.M)

Time:

FOR ACTION:

cc (for information):

~~John B. ...~~

✓ Jim Cannon

✓ Jim Lynn

✓ Jerry Jones

✓ Jack Marsh

✓ Max Friedersdorf

✓ Bill Seidman

Make Dural sent 4/19

FROM THE STAFF SECRETARY

DUE: Date: Friday, April 16

Time: 10 A.M.

SUBJECT:

Edward C. Schmults memorandum 4/14/76
re: Antitrust Legislation Now Before Congress

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments

Draft Remarks

REMARKS:

*Seidman - meet with President - option 3
Lynn - see comments
Friedersdorf - option II
Marsh - option 3
Cannon (Parsons + Seidman option 3)
Jones - see comments
Dural - option 3*

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 16, 1976

MEMORANDUM FOR: JIM CONNOR
FROM: JAMES T. LYNN
SUBJECT: Edward C. Schmults Memorandum 4/14/76
Re: Antitrust Legislation Now Before
Congress

OMB recommends option three. Precedent to such a meeting OMB would recommend that the Justice Department develop specific legislative modifications to the parens patriae title that would have a potential of accommodating the President's "reservations about the principle of parens patriae."

The suggested recommended proposals might include:

1. the requirement that Justice Department approval be obtained before a state attorney general commences action.
2. conditioning the commencement of an action by state attorney general upon the prior finding of a suit by the Justice Department.
3. a requirement that federal current approval be obtained prior to the commencement of a suit by a state attorney general.

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: April 15, 1976 (8:30 A.M)

Time:

FOR ACTION:

cc (for information):

Phil Buchen

Jim Cannon

Jerry Jones

Max Friedersdorf

Jim Lynn

Jack Marsh

Bill Seidjman

FROM THE STAFF SECRETARY

DUE: Date: Friday, April 16

Time: 10 A.M.

SUBJECT:

Edward C. Schmults memorandum 4/14/76
re: Antitrust Legislation Now Before Congress

ACTION REQUESTED:

- For Necessary Action
- For Your Recommendations
- Prepare Agenda and Brief
- Draft Reply
- For Your Comments
- Draft Remarks

REMARKS:

Jim
Option 3 is only real choice.
Mike

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Jim Connor
For the President

Date: April 15, 1976 (8:30 A.M)

Time:

FOR ACTION:

cc (for information):

Phil Buchen

Jim Cannon

Jerry Jones

Max Friedersdorf

Jim Lynn

Jack Marsh

Bill Seidjman

FROM THE STAFF SECRETARY

DUE: Date: Friday, April 16

Time: 10 A.M.

SUBJECT:

Edward C. Schmults memorandum 4/14/76
re: Antitrust Legislation Now Before Congress

ACTION REQUESTED:

..... For Necessary Action

..... For Your Recommendations

..... Prepare Agenda and Brief

..... Draft Reply

..... For Your Comments

..... Draft Remarks

REMARKS:

*Believe EPB should
meet with President on
this subject - Op 3.
JWS*

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Jim Connor
For the President

THE WHITE HOUSE

WASHINGTON

April 16, 1976

MEMORANDUM FOR:

JIM CONNOR

FROM:

MAX FRIEDERSDORF

M.F.

SUBJECT:

Edward C. Schmults memo 4/14/76
re: Antitrust Legislation Now
Before Congress

The Office of Legislative Affairs has reviewed subject memorandum and recommends Option II.

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: April 15, 1976 (8:30 A.M)

Time:

FOR ACTION:

cc (for information):

Phil Buchen

Jim Cannon

Jerry Jones

Max Friedersdorf

Jim Lynn

Jack Marsh

Bill Seidjman

FROM THE STAFF SECRETARY

DUE Date: Friday, April 16

Time: 10 A.M.

SUBJECT:

Edward C. Schmults memorandum 4/14/76
re: Antitrust Legislation Now Before Congress

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments

Draft Remarks

REMARKS:

I have no problem with a meeting - Generally I feel we should be aggressive in anti trust area & should not allow smarts to take leadership role away from us -
Jerry

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Jim Connor
For the President