The original documents are located in Box 68, folder "Antitrust - Procedures and Penalties Act of the Edward Hutchinson Papers at the Gerald R. Ford Presidential Library.

Amendment to Amendment No. 1

Strike the third paragraph of the amendment and insert in lieu thereof the following:

On page 3, line 14, strike "and evaluation".

DJ position: delete from Sec. 2(e)2 the phrase "including consideration of the public benefit to be derived from a determination of the issues at trial" as Senate floor-amendment did.

PRO

1. Only private treble damage plaintiffs can be aided.

2. An invitation for district courts to put on a show.

2. DJ may be burdened.

CON

1. Contradicts Subcomm. Amend. No. 4: Hearings in both Senate and House concluded the necessity for this provision.

2. Sec. 2(h) making proceedings under bill inadmissible evidence defuses any fears that treble damage plaintiffs will use.

3. In any event, DJ has not expertise: the section is one of two dealing with courts and designed to cure abuse of judicial rubber stamping.

4. A main support for Part 1 of bill is that the public does have an interest in settlements; and, in the integrity of procedures related thereto.

5. The section is an exercise of legislative oversight on judicial operations - not executive branch functions.

6. Mr. Wilson, at hearings (p. 72), recognized that there are no members of public who merely seek delays of settlements for delay purposes only.

7. A question of judicial-legislative separation of powers issue is involved: entry of a proposal is a judicial act: however, legislative guidelines are appropriate.

8. Courts cannot compel entry of decrees if DJ resists; converse is true also.

9. Case law supports public issues: LTV (1970); Blue Chip (1967); Nader v. U.S. (1973); El Paso Gas (1970)(also shows supervisory powers of courts are over courts are directly involved).

10. Any conceivable burdening that can be specified, easily outweighed if a balancing test is proper.

DJ position: Delete Subcomm. Amend. No. 5 and restore Senate version.

PRO

1. A compromise worked out on Senate floor.

2. Valuable information is elicited from corporate officials who accompany counsel of record by top Antitrust Division personnel which may be chilled if such contacts are reported.

CON

1. Sen. and House Subcomm. witnesses were unanimous on this point except DJ.

2. Both Subcomm. mark-ups included this provision.

3. Owens amendment shows the Subcomm. has not gone far enough (rejects DJ "too far" position).

4. "Lawyering" can be distinguished from lobbying.

5. Abuses are sought to be remedied; DJ does not even admit abuses and, therefore, have no internal policy changes to support their position.

6. Disclosure of contacts only is required; not substance: "chilling" argument makes no sense.

7. Sponsors want "sunlight" and "courtrooms" substituted for "backrooms" in any event.

8. Ex-DJ attorneys complained bitterly that (a) Top Division officials interfere with litigation or (b) the "helpful" information is really no "help" to issues involved in cases and, in any event, never get passed to trial/staff personnel until a fait accompli occurs.

DJ position: Repeal direct review of litigated cases so that (a) Supreme Court jurisdiction is changed from obligatory jurisdiction to discretionary;(b) provide AG with power to certify important cases for direct review which, if Supreme Court agrees, will provide direct review in some cases; (c) route all litigated cases through circuit courts unless AG exercises his certification power.

PRO

1. Some cases are not being appealed because they are not significant enough to bother Supreme Court.

CON

1. Legislation is redundant therefore: this is the definition of the Solicitor General and explains the Court's deference to cases he files; moreover, no real case was ever cited by DJ - only hypotheticals.

2. Routing cases through circuit courts will create jurisdictional splits as already has happened in private cases increasing circuit and Supreme Court workloads.

3. Certiorari provides no rule of law and huge waste may be involved.

4. DJ never provided arguments for repeal in the first instance and admit their citation of history was erroneous: Since 1903, the comprehensive Judiciary Act of 1925; the 1928 Frankfurter & Landis study; and the 1974 Casper & Posner study - all were not considered or, even cited by them.

5. Only 10% of S.Ct's docket is obligatory jurisdiction and antitrust is at most 0.2%.

6. Modern antitrust litigation expands and protracts discovery phases and by definition refines issues - post-trial ought to be expedited rather than protracted.

7. Congress assumes and DJ ordinarily argues, it does not bring frivolous cases: if one or two slip in, arguendo, this does not support repeal or DJ position.

8. Legal and social national policy as well as economic and antitrust are unified in Supreme Court.

2. Present Supreme Court is hostile to Government cases; summary dispositions are increasing.

3. Defendants in Government cases do not need a certification power; the AG has a responsibility private parties do not have.

9. Legislation is based on principles not personalities; recent losses with opinions criticize DJ directly.

10. Only 2 Justices announce hostility; 2 or more announce the opposite.

11. Summary dispositions give a rule of law and do not take much Court time: 14% of S. Ct. time is for review of 3,700 cases. Antitrust is less than 8 and usually 5 at this stage with only 2.2 on annual average surviving for argument.

12. Those Justices expressing hostility rely on the Freund Report which, to the extent not totally discredited is highly controversial and legislation for a Commission has been introduced.

13. The "certainty" businessmen rely on is in rules of law at Supreme Court level.

14. Modern economic structure argues more for national rules of law than promotion of different, and regional/local rules of law.

15. Forum shopping at its worst.

16. Inequitable in essence.

17. Private cases already provide national issues and national rules of law; the growth of private antitrust in experience and sophistication allows private parties to recognize issues important to an industry or to the public.

18. Recent history confirms abuses of present responsibility for which it is illogical to ask for greater responsibility.

4. Such post-trial discretion will aid more vigorous enforcement.

5. Prospective Senate conferees support DJ.

19. The national enforcement policies are matched by business' having national and international operations for which they need certainty and uniformity in law.

20. Enforcement usually means pre-trial and trial not appeals.

21. So few cases are actually tried, the argument is, at best, de minimis.

22. The argument is superfluous: the AG-Solicitor General are not required to file an appeal in every case the Government loses; moreover, as in all trials, some cases should not have been tried in any event and should not be appealed.

23. A grant of specific discretionary power by the Congress entails major changes in areas of law other than antitrust law; DJ has not even discussed this - nor have Senate or House hearings although staff memoranda have discussed.

24. Misleading: Senate conferees have "no objection" to House work on Part 3 of bill; Senate focus was on Parts 1 and 2.

25. Inaccurate: inferences of literal statements of "no objection" are a recognition of House complementing Senate work.

(Overall)

26. DJ amendment was rejected by Senate Antitrust Subcomm. and by Sen. floor leaders.

27. The lobbying has been 11th hour and unsupported except by a request for confidence in DJ personnel.

S. 782 ANALYSIS

The Antitrust Procedures and Penalties Act, S. 782, has three unrelated main sections: the first section has seven subsections; the second, one; and the third, five. At the conclusion of its mark-up, the Monopolies and Commercial Law Subcommittee struck all after the enacting clause of S. 782 and substituted the bill it had considered, H.R. 9203. At that time, the Subcommittee's version of S. 782 differed from the Senate-passed version of S. 782 by, essentially, six substantive amendments and numerous technical and conforming amendments.

At an informal meeting of the Monopolies Subcommittee on October 3, 1974, by unanimous agreement of 9 Subcommittee Members (7 present and 2 by message), it was decided to introduce a "clean bill" that would differ in two main respects from the Subcommittee's previous work, both of which changes were supported by the Justice Department and by prospective Senate conferees and eliminated two differences with the Senate-passed bill: H.R. 17063 is that "clean bill". By unanimous consent of the Judiciary Committee, all text after the enacting clause of S. 782 will be struck and H.R. 17063 substituted therefor.

PURPOSE OF THE BILL

The first section requires the filing of an impact statement for each proposal for a consent judgment (Sec. 2(b)); and, provides mechanisms for notifying the public of the filing of such proposals (Sec. 2(c)) and, for submission of public comment and responses thereto by the Justice Department, (Sec. 2(d)). Thereupon, district courts are required to determine that the proposal is in the public interest with legislative and oversight guidelines

for the exercise of judicial discretion provided (Sec. 2(e) and (f)). Defendants are required to disclose lobbying contacts known or that should reasonably have been known as occurring in connection with a case resulting in a proposal for a consent judgment (Sec. 2(g)); "lawyering" contacts are excluded from disclosure. Impact statements filed and proceedings occurring in connection with the bill are inadmissible as evidence against defendants in private antitrust actions; and, present law denying prima facie evidentiary effect to consent judgments is preserved (Sec. 2(h)).

The second section of the bill seeks to increase maximum fines for criminal violations of the Sherman Act from $50,000 to $500,000 for corporations and $100,000 for other persons.

The third section of the bill amends the Expediting Act to: (1) facilitate and speed up antitrust trials following filing of a case; (2) provide intermediate appellate review of pre-trial denials of preliminary injunctions in merger cases; and (3) repeal present law providing Supreme Court direct review of litigated cases, merger and non-merger cases alike, but enacting a savings provision whereby direct Supreme Court review may be available in some cases. The bill also would eliminate the reference in existing law to measure for expediting civil cases brought by the United States under the original Interstate Commerce Act and the Communications Act.

STATEMENT CONCERNING S. 782 FOR FULL COMMITTEE MEETING - OCTOBER 8, 1974

The Subcommittee on Monopolies and Commercial Law this morning reports favorably on important new antitrust legislation, the Antitrust Procedures and Penalties Act, S. 782, that passed the Senate unanimously by a 92-0 vote.

The Act was the subject of intense legislative and oversight study by the Monopolies Subcommittee since not only is new legislation presented but also remedies for abuses in consent decree procedures that have been criticized for a long time and which began in a 1959 Monopolies Subcommittee Report. The Subcommittee held 4 days of hearings during which more than 200 pages of testimony were received from distinguished representatives from the public and private antitrust bars. The Subcommittee also believes that enactment of the proposed measure would be a giant step forward in restoring public confidence in the impartial execution of the antitrust laws.

As the Subcommittee observed in 1959, "The consent decree practice has established an orbit in the twilight zone between established rules of administrative law and judicial procedures." The first part of the bill, therefore, requires the filing of an impact statement explaining proposed consent decrees along with requirements for public notice; requires district courts to determine that proposals are in the public interest and provides legislative guidelines for the exercise of judicial discretion; and, requires the publication of lobbying contacts made with the Justice Department in the course of the formulation of consent decrees.

The second part of the bill would increase fines for Sherman Act offenses from $50,000 to $500,000 for corporations and $100,000 for individuals and

non-corporate business enterprises. It was in 1955, that these fines were raised from $5,000 to $50,000 and revisions upward on fine ceilings are long overdue. The need for effective deterrents to antitrust violations has not been disputed before the Subcommittee or, for that matter, in the Senate. Current events increase this need for effective deterrents since one FTC Commissioner recently estimated that unlawful price-fixing currently adds $10 billion annually to prices paid by consumers; and, the Assistant Attorney General for Antitrust observed that "vigorous enforcement" of the antitrust laws is the "true anti-inflationary road" to follow.

The third part of the bill is innovative providing measures to reduce time from filing to trial in civil cases; and, providing appellate review of district court pre-trial orders relating to preliminary injuctions in merger cases. This latter provision is expected to have the added benefit of reducing appeals to the Supreme Court following litigation.

In addition, present procedures for judicial review of litigated civil cases is altered: (1) Supreme Court discretionary review jurisdiction is substituted for present obligatory jurisdiction; and (2) post-trial review will lie to Circuit Courts rather than directly to the Supreme Court unless the Attorney General certifies that the case is one that ought to receive Supreme Court review directly. Certification by the Attorney General merely provides an opportunity for direct Supreme Court review since the legislation confers control of the Supreme Court's docket on that Court and allows it, upon certification, nevertheless to refer the case to the appropriate Circuit Court. The Monopolies Subcommittee labored long and diligently on this provision and I am confident that all arguments pro and con were effectively raised and fairly considered.

S. 782 ANALYSIS

The Antitrust Procedures and Penalties Act, S. 782, has three unrelated main sections: the first section has seven sub-sections; the second, one; and the third, five. With the exception of numerous "technical and conforming" amendments that will be offered en bloc, the Subcommittee has five amendments to the first section; no amendments to the second part; and, an amendment deleting two of the five sub-sections in the third part.

PURPOSE OF AMENDMENTS

Amendment No. 1 requires the impact statement accompanying a proposal for a consent judgment to include an explanation of the anticipated effects on competition of alternatives to settlement by a consent decree foregone. Alternatives are considered and the bill requires a description of them. However, since each alternative presumptively had different competitive effects that have been outweighed, it is reasonable to expect that the choice of a consent decree could be explained in competitive terms without difficulty since such choice was or ought to have been integral to the decision in the first instance. More importantly, a basis for comparing competitive effects foregone with those expected to be achieved by a consent decree is essential if a court is to determine that the proposal is in the public interest; and, if meaningful public comment is to be elicited and considered. Without Amendment No. 1, in addition, the impact statement's contents amount to little more than legislation of Antitrust Division press releases and abuses sought to be corrected would remain remediless. Deletion of references to the Freedom of Information Act is intended to insure that except for disclosure

required in the bill, FOIA case law, substantive and procedural, is not disturbed.

Amendment No. 2 re-labels the impact statement as a "competitive impact statement" in order to clarify the intent to distinguish impact statements required under environmental laws; and, emphasize that, since the antitrust laws are designed to promote and to protect competition, the expertise that the Congress has charged the Antitrust Division with acquiring and institutionalizing actuated and embodied in consent decree proposals is accessible and subject to scrutiny by the courts and the public.

Amendment No. 3 consists of a four-word deletion that recognizes that the "public interest" is not defined in legal dictionaries, encyclopedias, or statutes. More importantly, the Subcommittee did not intend to change case law construing the "public interest" in cases involving the antitrust laws or antitrust provisions of other laws.

Amendment No. 4 expands legislative guidelines for matters placed within a district court's discretion in making a mandated determination that the proposal for a consent judgment is in the public interest. Testimony substantiating widespread criticism of district courts' merely acting as rubber stamps in the consent decree process identified the lack of clear legislative intent as an explanation of judicial inertia and inaction. The amendment is necessary both to correct the abuse of rubber stamping and to restore public confidence in the integrity of judicial procedures. Entry of a proposed consent decree is a judicial act and an exercise of judicial power. The amendment also expresses the fruits of legislative oversight activity and increases, therefore, the propriety of legislative guidelines for the exercise of judicial

discretion. The permissive legislation of the sub-section amended is legislative acknowledgment of and deference to the judicial nature of the entry of consent decree proposals as court judgments. Finally, the amendment expresses the legislative intention of not changing case law developments that the Justice Department cannot compel courts to enter proposed consent decrees as judgments; nor can courts compel the Justice Department to enter into settlements unless it so desires.

Amendment No. 5 is intended to close loopholes in the reporting of lobbying contacts made by defendants with the Attorney General or members of the Antitrust Division in connection with cases subsequently settled by a consent decree either pre-trial or post-trial. Contacts by counsel of record alone are exempted as a balancing of "lawyering" contacts with the difficulties of legislating legal ethics confining contacts by counsel of record alone to lawyering and not lobbying.

Amendment No. 6 deletes the repeal of present law governing judicial review procedures for litigated cases contemplated by the bill. A major change in antitrust policy would be effectuated by a repeal of present law. Testimony in support of repealing present law did not outweigh the reasons leading to enactment of present law and long acquiescence therein by the many Congresses since. If the passage of time has done anything, it has increased the importance of the critical unifying role played by the Supreme Court in the reconciliation of the national legal, economic, and social policies expressed in the antitrust laws, the "referee" of the free enterprise system; and, given the development of discovery and other extensive, time-consuming pre-trial procedures in antitrust litigation, present time periods in obtaining definitive

rulings on national issues ought to be reduced rather than protracted. Moreover, testimony in support of repeal was, mainly, expression of support for establishment of a mini-Supreme Court because of overburdening of the Supreme Court. To the extent that the arguments of the mini-Supreme Court advocates were entitled to weight in antitrust law, they were amply rebutted by quantitative and qualitative analyses of their positions.

PURPOSE OF THE BILL

The first section requires the filing of an impact statement for each proposal for a consent judgment (Sec. 2(b)); and, provides mechanisms for notifying the public of the filing of such proposals (Sec. 2(c)) and, for submission of public comment and responses thereto by the Justice Department, (Sec. 2(d)). Thereupon, district courts are required to determine that the proposal is in the public interest with legislative and oversight guidelines for the exercise of judicial discretion provided (Sec. 2(e) and (f)). Defendants are required to disclose lobbying contacts known or that should reasonably have been known as occurring in connection with a case resulting in a proposal for a consent judgment (Sec. 2(g)); "lawyering" contacts are excluded from disclosure. Impact statements filed and proceedings occurring in connection with the bill are inadmissible as evidence against defendants in private antitrust actions; and, present law denying prima facie evidentiary effect to consent judgments is preserved (Sec. 2(h)).

The second section of the bill seeks to increase maximum fines for criminal violations of the Sherman Act from $50,000 to $500,000 for corporations and $100,000 for other persons.

The third section of the bill amends the Expediting Act to: (1) facilitate and speed up antitrust trials following filing of a case; (2) provide intermediate appellate review of pre-trial denials of preliminary injunctions in merger cases; and (3) repeal present law providing Supreme Court direct review of litigated cases, merger and non-merger cases alike, but enacting a three-step savings provision whereby direct Supreme Court review may be available in some cases. The bill also would eliminate the reference in existing law to measures for expediting civil cases brought by the United States under the original Interstate Commerce Act and the Communications Act.

93D CONGRESS
1ST SESSION

H. R. 9203

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 1973

Mr. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To reform consent decree procedures, to increase penalties for violation of the Sherman Act, and to revise the expediting Act as it pertains to appellate review.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Procedures and Penalties Act".

CONSENT DECREE PROCEDURES

SEC. 2. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 16), is amended by redesignating

subsection (b) as (i) and by inserting after subsection (a) the following:

"(b) Any consent judgment proposed by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which that proceeding is pending and published in the Federal Register at least sixty days prior to the effective date of such decree. Any written comments relating to the proposed consent judgment and any responses thereto shall also be filed with the same district court and published in the Federal Register within the aforementioned sixty-day period. Copies of the proposed consent judgment and such other materials and documents which the United States considered determinative in formulating the proposed consent judgment shall also be made available to members of the public at the district court before which the proceeding is pending and in such other districts as the court may subsequently direct. Simultaneously with the filing of the proposed consent judgment, unless otherwise instructed by the court, the United States shall file with the district court, cause to be published in the Federal Register, and thereafter furnish to any person upon request a public impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(3) an explanation of the proposed judgment, relief to be obtained thereby, and the anticipated effects on competition of that relief, including an explanation of any unusual circumstances giving rise to the proposed judgment or any provision contained therein;

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that the proposed judgment is entered;

"(5) a description of the procedures available for modification of the proposed judgment;

"(6) a description and evaluation of alternatives actually considered to the proposed judgment and the anticipated effects on competition of such alternatives.

"(c) The United States shall also cause to be published, commencing at least sixty days prior to the effective date of such decree, for seven days over a period of two weeks in newspapers of general circulation of the district in which the case has been filed, in Washington, District of Columbia, and in such other districts as the court may direct (i) a summary of the terms of the proposed consent judgment, (ii) a summary of the public impact statement to be filed under subsection (b), (iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the

places where such material is available for public inspection.

"(d) During the sixty-day period provided above, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposed consent judgment. The Attorney General or his designate shall establish procedures to carry out the provisions of this subsection, but the sixty-day time period set forth herein shall not be shortened except by order of the district court upon a showing that extraordinary circumstances require such shortening and that such shortening of the time period is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

"(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that entry of that judgment is in the public interest as defined by law. For the purpose of this determination, the court may consider—

"(1) the public impact of the judgment, including termination of alleged violation, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of the judgment;

"(2) the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit to be derived from a determination of the issues at trial.

"(f) In making its determination under subsection (e), the court may—

"(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

"(2) appoint a special master, pursuant to rule 53 of the Federal Rules of Civil Procedure, and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual group or agency of government with respect to any aspect of the proposed judgment of the effect thereof in such manner as the court deems appropriate;

"(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to rule 24 of the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner

and extent which serves the public interest as the court may deem appropriate;

"(4) review any comments or objections concerning the proposed judgment filed with the United States under subsection (d) and the response of the United States to such comments or objections;

"(5) take such other action in the public interest as the court may deem appropriate.

"(g) Not later than ten days following the filing of any proposed consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any officer, director, employee, or agent thereof, or other person except counsel of record, with any officer or employee of the United States concerning or relevant to the proposed consent judgment. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this section have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

"(h) Proceedings before the district court under subsections (e) and (f), and public impact statements filed under subsection (b) hereof, shall not be admissible against any

defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding."

PENALTIES

SEC. 3. Sections 1, 2, and 3 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (26 Stat. 209; 15 U.S.C. 1, 2, and 3) are each amended by striking out "fifty thousand dollars" and inserting "five hundred thousand dollars if a corporation, or, if any other person, one hundred thousand dollars".

EXPEDITING ACT REVISIONS

SEC. 4. Section 1 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the Expediting Act, is amended to read as follows:

"SECTION 1. In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff and equitable

relief is sought, the Attorney General may file with the court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of a general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."

SEC. 5. Section 2 of the Act (15 U.S.C. 29; 49 U.S.C. 45) is amended to read as follows:

"(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to section 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject

to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

"(b) An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if—

"(1) upon application of a party filed within five days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

A court order pursuant to (1) must be filed within fifteen days after the filing of a notice of appeal. When such an order or certificate is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. That Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a)."

SEC. 6. (a) Section 401(d) of the Communications

Act of 1934 (47 U.S.C. 401 (d)) is repealed.

(b) The proviso in section 3 of the Act of February 19, 1903, as amended (32 Stat. 848, 849; 49 U.S.C. 43), is repealed and the colon preceding it is changed to a period.

SEC. 7. The amendment made by section 2 of this Act shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act. Appeal in any such action shall be taken pursuant to the provisions of section 2 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in effect on the day preceding the date of enactment of this Act.

93D CONGRESS
1ST SESSION

H. R. 9203

A BILL

To reform consent decree procedures, to increase penalties for violation of the Sherman Act, and to revise the expediting Act as it pertains to appellate review.

By Mr. RODINO

JULY 11, 1973
Referred to the Committee on the Judiciary

93D CONGRESS
1ST SESSION

S. 782

IN THE HOUSE OF REPRESENTATIVES

JULY 23, 1973
Referred to the Committee on the Judiciary

AN ACT

To reform consent decree procedures, to increase penalties for violation of the Sherman Act, and to revise the Expediting Act as it pertains to Appellate Review.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Procedures and Penalties Act".

CONSENT DECREE PROCEDURES

SEC. 2. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 16), is amended by redesignating

subsection (b) as (i) and by inserting after subsection (a) the following:

"(b) Any consent judgment proposed by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which that proceeding is pending and published in the Federal Register at least sixty days prior to the effective date of such decree. Any written comments relating to the proposed consent judgment and any responses thereto, other than those which are exempt from disclosure under section 552(b) of title 5, United States Code, shall also be filed with the same district court and published in the Federal Register within the aforementioned sixty-day period. Copies of the proposed consent judgment and such other materials and documents which the United States considered determinative in formulating the proposed consent judgment, other than those which are exempt from disclosure under sections 552(b) (4) and (5) of title 5, United States Code, shall also be made available to members of the public at the district court before which the preceding is pending and in such other districts as the court may subsequently direct. Simultaneously with the filing of the proposed consent judgment, unless otherwise instructed by the court, the United States shall file with the district court, cause to be published in the Federal Register and thereafter

furnish to any person upon request a public impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(3) an explanation of the proposed judgment, relief to be obtained thereby, and the anticipated effects on competition of that relief, including an explanation of any unusual circumstances giving rise to the proposed judgment or any provision contained therein;

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that the proposed judgment is entered;

"(5) a description of the procedures available for modification of the proposed judgment;

"(6) a description and evaluation of alternatives actually considered to the proposed judgment.

"(c) The United States shall also cause to be published, commencing at least sixty days prior to the effective date of such decree, for seven days over a period of two weeks in newspapers of general circulation of the district in which the case has been filed, in Washington, District of Columbia, and in such other districts as the court may direct (i) a summary of the terms of the proposed consent judgment, (ii) a sum-

mary of the public impact statement to be filed under subsection (b), (iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the places where such material is available for public inspection.

"(d) during the sixty-day period provided above, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposed consent judgment. The Attorney General or his designate shall establish procedures to carry out the provisions of this subsection, but the sixty-day time period set forth herein shall not be shortened except by order of the district court upon a showing that extraordinary circumstances require such shortening and that such shortening of the time period is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

"(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that entry of that judgment is in the public

interest as defined by law. For the purpose of this determination, the court may consider—

"(1) the public impact of the judgment, including termination of alleged violation, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of the judgment;

"(2) the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint.

"(f) In making its determination under subsection (e), the court may—

"(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

"(2) appoint a special master, pursuant to rule 53 of the Federal Rules of Civil Procedure, and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual group or agency of government with respect to any aspect

of the proposed judgment of the effect thereof in such manner as the court deems appropriate;

"(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to rule 24 of the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

"(4) review any comments or objections concerning the proposed judgment filed with the United States under subsection (d) and the response of the United States to such comments or objections;

"(5) take such other action in the public interest as the court may deem appropriate.

"(g) Not later than ten days following the filing of any proposed consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any officer, director, employee, or agent thereof, or other person with any officer or employee of the United States concerning or relevant to the proposed consent judgment: *Provided,* That communications made by or in the presence of counsel of record with the Attorney

General or the employees of the Department of Justice shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this section have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

"(h) Proceedings before the district court under subsections (e) and (f), and public impact statements filed under subsection (b) hereof, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding."

PENALTIES

SEC. 3. Sections 1, 2, and 3 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (26 Stat. 209; 15 U.S.C. 1, 2, and 3) are each amended by striking out "fifty thousand dollars" and inserting "five hundred thousand dollars if a corporation, or, if any other person, one hundred thousand dollars".

EXPEDITING ACT REVISIONS

SEC. 4. Section 1 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the Expediting Act, is amended to read as follows:

"SECTION 1. In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with the court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of a general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."

SEC. 5. Section 2 of that Act (15 U.S.C. 29; 49 U.S.C. 45) is amended to read as follows:

"(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and

monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

"(b) An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The

Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a)."

SEC. 6. (a) Section 401(d) of the Communications Act of 1934 (47 U.S.C. 401(d)) is repealed.

(b) The proviso in section 3 of the Act of February 19, 1903, as amended (32 Stat. 848, 849; 49 U.S.C. 43), is repealed and the colon preceding it is changed to a period.

SEC. 7. The amendment made by section 2 of this Act shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act. Appeal in any such action shall be taken pursuant to the provisions of section 2 of the Act of February 11, 1903 (32 Stat. 823),

as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in effect on the day preceding the date of enactment of this Act.

Passed the Senate July 18, 1973.

Attest: FRANCIS R. VALEO,

Secretary.

93D CONGRESS
1ST SESSION

S. 782

AN ACT

To reform consent decree procedures, to increase penalties for violation of the Sherman Act, and to revise the Expediting Act as it pertains to Appellate Review.

JULY 23, 1973
Referred to the Committee on the Judiciary

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

WASHINGTON, D.C.

September 24, 1974

TO: Hon. Jack Brooks, M.C.
Hon. Walter Flowers, M.C.
Hon. John F. Seiberling, M.C.
Hon. Barbara Jordan, M.C.
Hon. Edward Mezvinsky, M.C.
Hon. Edward Hutchinson, M.C.
Hon. Robert McClory, M.C.
Hon. Charles W. Sandman, Jr., M.C.
Hon. David W. Dennis, M.C.

FROM: James F. Falco, Counsel
Subcommittee on Monopolies and
Commercial Law

In the materials I sent to you yesterday there was one mistake that had two parts, namely, one "substantive" amendment was omitted and one amendment incorrectly combined unrelated matters. The materials attached hereto should be placed in the packet and the one you have referring to the FOIA should be disposed of. My apologies for the mistake.

One amendment combining all "technical and conforming" amendments is in the process of being prepared and, so far as I know, this is the only extra paper work that I shall burden you with.

Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

Page 2, beginning in line 12, strike out "other than those which are exempt from disclosure under section 552(b) of title 5, United States Code,".

Page 2, beginning in line 19, strike out "the proposed consent judgment, other than those which are exempt from disclosure under sections 552(b)(4) and (5) of title 5, United States Code," and insert in lieu thereof "such proposal".

Page 4, line 1, after "considered", add "by the United States and the anticipated effects on competition of such alternatives".

The Subcommittee's amendment adding the words "including consideration of the public benefit to be derived from a determination of the issues at trial," is a restoration of language approved by the Senate Judiciary Committee but deleted by a Senate floor amendment. Most witnesses in hearings by the Senate Antitrust Subcommittee as well in House Monopolies Subcommittee hearings expressed support for the language as legislative solutions to two problems addressed by the bill: the "backroom" atmosphere of consent decree negotiations; and judicial rubber stamping of proposals for consent decrees.

Additional reasons for Subcommittee restoration of language are: (a) Antitrust oversight/review of compliance with Congressional guidelines enacted will be facilitated; (b) the public widely assumes that such a consideration is an integral part of consent decree formulation procedures and, in fact, such considerations are publicly acknowledged by Justice Department officials details of which are not made public; (c) inclusion in the contents of the impact statement is essential if district courts are meaningfully to assess proffers of consent decrees; (d) further legislative guidance for district courts is provided since, "Moreover . . . not only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by the Congress," Brown Shoe Co. v. United States, 370 U.S. 294 (1962), is a Supreme Court gloss on antitrust enforcement and judicial responsibilities with respect thereto in which the Congress has long acquiesced and which, in fact, expressed proper interaction of judicial and legislative functions; (e) effective public comment would be foreclosed without such language; (f) Issues are refined and possible modifications that may be necessary since a consent decree, "embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded to litigation," United States v. Armour & Co., 402 U.S. 673, 681 (1971), are facilitated; (g) Subsequent controversies between the parties over the meaning of consent decree language or the parties intentions with respect thereto, United States v. Atlantic Refining Co., 360 U.S. 19 (1959) may be avoided and judicial resources conserved.

Provisions deleted by the Subcommittee amendment are designed: (a) As a clarification of intentions not to make changes in the law that has developed under the Freedom of Information Act (see S. Rept. 93-298 (semble)); and, (b) to prevent controversies from arising seeking to establish legislative intentions other than emphasis by incorporation of parts of the FOIA.

Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

Page 6, after "plaint" on line 2, add "including consideration of the public benefit to be derived from a determination of the issues at trial".

This Subcommittee amendment is also a restoration of a provision approved by the Senate Judiciary Committee but deleted by a Senate floor amendment. Section 2(e) sets forth criteria for district courts' discretion recognized as being necessarily broad because they have a balancing-of-interests function to perform: information is necessary for district courts determining that a proposed consent decree is in the public interest yet preserving consent decrees as "viable settlement options". S. Rept. 93-298. In this respect, the amendment must be read in the light of Section 2(h) that prevents the use of impact statements as evidence; and retains present law denying prima facie evidentiary effect of antitrust violations to consent judgments.

In addition, the Subcommittee considered the Senate Judiciary Committee's further explanation: "Nor is Section 2(e) intended to force the government to go to trial for the benefit of potential private plaintiffs. The primary focus of the Department's enforcement policy should be to obtain a judgment - either litigated or consensual - which protects the public by insuring healthy competition in the future." S. Rept. 93-298, p. 6. Essentially, this recognizes present law: courts cannot compel the Government to enter into a consent decree; nor can the Government compel courts to enter proposed decrees that upon acceptance and entry by a court become judicial action. The proposed legislation does not change present law. It is expected, moreover, that, as in the past, the greater number of proposals for consent judgments will not occasion judicial resort to the calling of witnesses for the purpose of eliciting additional facts.

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

September 24, 1974

MEMORANDUM

TO: Republican Members

FROM: Frank Polk

RE: Antitrust Practices and Procedures Act

S. 782 was recommended to the full Committee with an amendment in the nature of a substitute. The bill was introduced by Senator Tunney, amended by the Senate Judiciary Committee, and further amended on the floor of the Senate. These latter amendments appear to be the result of a compromise which, in turn, brought about the unanimous approval (92-0) of the Senate.

The bill affects three different areas of antitrust law -- consent decrees, penalties, and appellate procedure. Although no part of the bill makes any substantive changes in the law, the procedural issues in the bill are significant.

1. With regard to consent decrees, it should be understood that nearly 80% of all complaints filed by the Antitrust Division of the Department of Justice are settled by the entry of a consent decree. That the consent decree would become the primary enforcement tool was probably not foreseen when Congress wrote the Clayton Act in 1914. However, in retrospect, its use is quite logical since there are compelling reasons why both sides should prefer to settle by entry of a consent decree.

Since this actual litigation of an antitrust case consumes an inordinate amount of time and manpower, the Antitrust Division would be incapable of reaching that degree of enforcement sufficient to deter violations if every case went to trial. The use of consent decrees thus allows the Antitrust Division to allocate limited resources, so that its effectiveness far exceeds its litigation abilities.

On the other side, defendants enjoy certain advantages in settling by entry of a consent decree. If the case were to go to trial and if judgment were entered for the government, then by statute aggrieved parties would be permitted in subsequent lawsuits to plead the judgment as prima facie evidence of defendant's liability. In effect, such a defendant is presumed liable and private plaintiffs need only prove their damages and collect. However, also by statute, the defendant who agrees to a consent decree, besides possibly deflecting the full force of the government's complaint, is not legally presumed liable in any subsequent lawsuit.

Although the entry of a consent decree is a judicial act, courts have traditionally not explored the merits of any proposed settlement. It is said that courts thus serve only as "rubber stamps" and that the public interest is not secured.

The bill would require that the courts make an independent determination that the consent decree is in the public interest. To enable the court to make such a determination, the Justice Department would be required to submit a competitive impact statement. Moreover, interested parties would be encouraged to comment on the proposed consent decree and the defendant would be required to disclose all contacts made with any government employee except those made by its counsel of record acting alone.

Whether the bill improves upon the present practice regarding consent decrees is debatable. On the one hand, one can point to the consent decree in the ITT case and argue that safeguards should be established to preclude settlements allegedly not in the public interest. On the other hand, one might suggest that since the efficient allocation of resources is necessary to the Antitrust Division, any proposal which significantly disrupts its operation is not beneficial. Whether the bill would cause such a disruption is unknown since the impact of the bill is largely within the discretion of 93 district courts which may, in determining whether the consent decree would be in the public interest, require anything from answering a couple of questions to a so-called mini-trial on the merits. Moreover, since the bill casts additional burdens on both government and defendant, it may become mutually advantageous to circumvent the bill. This could be achieved

if the parties made their settlement before the complaint was filed or if the Department chose not to convert the settlement into a judicial decree.

The position of the Department of Justice on the bill has been less than enthusiastic. The Department strongly opposed the version reported by the Senate Judiciary Committee (identical with H.R. 9203). After certain amendments were adopted on the Senate floor which alleviated some of the bill's problems, the Department changed its position to "no opposition." Since most of these amendments were eliminated in subcommittee, the Department opposes approval of the bill.

One might reasonably suspect that the Department's "no opposition" position with regard to the Senate-passed version is something other than a firm belief on its part. Rather, the Department may have made the best of a bad situation by bargaining for amendments that mitigate the bill's impact.

Whether consent-decree reform as prescribed in S.782 is wise is a question that must be viewed in a context broader than that set out in discussions of various amendments. Generally, the reform is founded on a need to "second guess" the Antitrust Division's prosecutorial activity. Thus the bill would require the Antitrust Division to publicize its activity (why it brought the suit, what remedies it considered, which one it decided on, the effect of the proposed remedy on competition, etc.) and defendants to publicize their so-called lobbying contacts with the government. But more than that, the bill would require that the court evaluate the record to determine whether the Antitrust Division had acted in the "public interest" in proposing a particular consent decree. Central to any such evaluation will be how the Division is utilizing its administrative resources to enforce the policy of the antitrust laws, how strong or weak its case is against the defendant, how long it would take to try the case to conclusion, and how relevant the legal issues of the particular case are to future cases. In other words, the court will be required to evaluate an exercise of prosecutorial discretion in its purest form. Although in other contexts courts are called upon to decide what is in the "public interest", it does not follow that every question of what is in the "public interest" is judicially cognizable. Here, the question is not whether prosecutorial discretion has been exercised according to a fixed standard but whether it has been exercised well or, more precisely, as well as possible. Are such questions appropriate for courts?

The next question is whether a judge's order granting or rejecting the proposed consent decree is appealable. This as a practical matter is not important unless the right of third parties to intervene is enlarged by the bill. During the subcommittee hearings, proponents of the

bill argued that it was not while opponents feared that that was exactly what the bill might authorize. The Senate version sought to preclude any expansive interpretation by tying intervention rights to those accorded under the Federal Rules of Civil Procedure. However, the subcommittee adopted a "technical" amendment deleting reference to the Federal Rules as unnecessary. In view of the controversy regarding this question, every precaution should be taken lest the consent-decree procedure be construed as some liberalizing exception to regular procedure.

In determining whether a proposed consent decree is in the public interest, a judge is authorized by the bill, as amended in subcommittee, to consider "the public benefit to be derived from a determination of the issues at trial," Section 2(e)2. What could those words mean? No proponent of the bill has sought to give those words a salutary meaning. Others both for and against the bill have criticized the language as inviting judicial suspension in particular cases of the Congressional policy enunciated in section 5 of the Clayton Act that consent decrees are not to be considered as prima facie evidence of defendant's liability in subsequent cases brought by aggrieved parties. It will generally be true from the standpoint of the antitrust laws that a consent decree will be less in the public interest than a litigated judgment by the simple fact that the latter is a benefit to private plaintiffs and the former is not. Should this Congressionally mandated difference be a factor in rejecting a proposed consent decree? The answer would clearly be negative were it not for the fact that Congress is deciding the question, and Congress may, of course, repeal in whole or in part its prior policy. However, if Congress is to undercut its prior policy on consent decrees, it should do so knowingly. If Congress wishes to preserve its prior policy, Section 2(e)2 should be rewritten to make clear that a judge may examine the proposed decree to see how by its terms it provides general and specific relief from the alleged antitrust violation without regard to the legislatively mandated legal effect of a consent decree in subsequent litigation.

The Antitrust Division for administrative reasons opposes a subcommittee amendment to Section 2(b)6 that would require that the competitive impact statement, in addition to stating what alternative remedies the Division considered, also state what effect on competition each such alternative would have if adopted. The Department suggests that the requirement would have a chilling effect on the free exchange of ideas within the Antitrust Division. And if the proposed consent decree were rejected by the court, the defendant would be well-armed with inside information if the Department decided to go to trial. Such exploration of alternatives, it is argued, would be time-consuming and speculative.

Another problem is found in Section 2(g), the lobbying-contacts provision. The Senate-passed version says that all contacts by the defendant with the U.S. government relevant to the proposed consent decree must be reported except those between defendant's counsel of record and the Department. The House subcommittee version both narrows and broadens the exception. It is narrower in that counsel of record must be "alone," that is, without any corporate officers. It is broader in that such counsel acting alone may contact anyone in government and still come within the exception to the reporting requirement. The subcommittee rationale is that when counsel is accompanied by a corporate representative, it is in fact a lobbying contact and should be reported. What is not addressed, however, is why contacts by counsel with government employees not with the Justice Department should not be reported if they relate to the particular case.

2. The second part of the bill increases penalties for Sherman Act violations. It is not controversial.

3. As originally enacted in 1903, the Expediting Act had two main purposes: (1) ensuring an effective trial court for antitrust cases instituted by the Government under the then new and untested Sherman Act; and (2) providing an expedited direct appeal to the Supreme Court in cases involving novel issues which demanded clear, concise answers from the Supreme Court.

The Expediting Act in Section 1 presently provides for a three judge federal court in cases where the United States brings an action under the Sherman Act, the Clayton Act, and certain sections of the Interstate Commerce Act and where the Attorney General files with the trial court a certificate that the action is of general public importance. This provision, while having validity when the antitrust laws were first enacted to insure a complete and effective trial of the novel and complex issues presented by these Act, has outlived its usefulness and is now rarely if ever invoked.

Thus, the bill amends Section 1 of the Expediting Act to eliminate the provision for three-judge courts and to require that, as in other government litigation, the cause be tried to a single federal district court. However, the bill does retain the provision for expeditious consideration, should the public importance of the issue require it; but, trial is before a single federal district judge.

Today the major controversy about the Expediting Act concerns its provisions for appellate review. Section 2 of the Expediting Act provides for direct review of final district court judgments by the Supreme Court. This "expediting" of the appellate process was more justified when antitrust issues were generally issues of first impression

than it is today when appeals as of right to the Supreme Court are less necessary to antitrust and more burdensome on an ever-growing Supreme Court docket, as some Justices have commented in their written opinions.

Thus both the Johnson and Nixon Administrations proposed modern compromises somewhere between the Expediting Act provisions and the general provisions for the appeal of other cases. Such proposals have sought to preserve the opportunity for direct review for certain special cases while channeling other antitrust cases through regular procedures. The difficulty with such compromises has been in finding the appropriate mechanism for determining which are the special cases.

The Senate version would permit the trial judge, on application of either party, to certify that direct review is of general public importance in the administration of justice. The problem with that mechanism is that the trial judge is not in the best position to determine how important the case at bar is to the enforcement of the antitrust laws, i.e. other cases pending in other courts in other districts or yet to be filed. The only one who can make that judgment is the Attorney General, the same party that determines that a given trial should be expedited both under current law and S. 782 (Senate and subcommittee versions).

But the subcommittee did not adopt that suggestion, which was offered by Mr. Hutchinson. Rather on a party line vote, the subcommittee decided to retain present law on the point. It chose to ensure direct review of every case so that important cases would be heard directly by the Supreme Court. But as a practical matter, the Supreme Court does not allow itself to be forced to hear non-important antitrust cases on appeal. It summarily affirms them, thereby denying any appellate review in those cases. Thus present law favors the important antitrust case but discriminates against other antitrust cases by treating them as less than any routine case. Mr. Hutchinson's amendment would have treated routine antitrust cases as routine and special cases as special.

Finally, both the Senate version and the subcommittee version agree that interlocutory appeals should be permitted to the court of appeals. This is not a matter of controversy. However, its presence in the subcommittee version points up an incongruity, that all interlocutory appeals go to the courts of appeals and all final appeals go to the Supreme Court.

FGP:slh

Amendment No. 1

Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

Page 2, beginning in line 9, strike out "other than those which are exempt from disclosure under section 552(b) of title 5, United States Code,".

Page 2, beginning line 15, strike out "other than those which are exempt from disclosure under sections 552(b)(4) and (5) of title 5, United States Code,".

Page 3, line 16, after "States", add "and the anticipated effects on competition of such alternatives".

Amendment No. 2

Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

Page 2, line 24, strike out "public" and insert in lieu thereof "competitive".

Page 4, line 3, strike out "public" and insert in lieu thereof "competitive".

Page 7, beginning in line 15 , strike out "public impact statements" and insert in lieu thereof "the competitive impact statement".

Amendment No. 3

Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

Page 5, lines 2 and 3, strike out "as defined by law".

Amendment No. 4

Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

Page 5, after line 13, add ", including consideration of the public benefit to be derived from a determination of the issues at trial".

Amendment No. 5

Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

Page 6, line 25, immediately after "person" insert ", except with respect to any and all written or oral communications on behalf of such defendant by counsel of record alone,".

Page 7, beginning in line 3, strike out "the proposed consent judgment: Provided, That communications made by or in the presence of counsel of record with the Attorney General or the employees of the Department of Justice shall be excluded from the requirements of this subsection" and insert in lieu thereof "such proposal".

Amendment No. 6

Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

Page 8, strike out line 25 and all that follows down through line 11 on page 9.

Page 9, line 12, insert the following:

(b) Section 2 of the Act of February 11, 1903 (15 U.S.C. 29; 49 U.S.C. 45), commonly known as the Expediting Act, is amended by adding at the end of such section the following:

Page 9, strike out line 23 and all that follows down through line 16 on page 10.

Page 11, strike out lines 12 through 20.

Amendment No. 1

Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

Page 2, beginning in line 9, strike out "other than those which are exempt from disclosure under section 552(b) of title 5, United States Code,".

Page 2, beginning line 15, strike out "other than those which are exempt from disclosure under sections 552(b)(4) and (5) of title 5, United States Code,".

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(Committee Print--9/25/74)

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(Committee Print--9/25/74)

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Page 5, lines 2 and 3, strike out "as defined by law".

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Amendment to S. 782
(Committee Print--9/25/74)

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Amendment No. 5

Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

Page 6, line 25, immediately after "person" insert ", except with respect to any and all written or oral communications on behalf of such defendant by counsel of record alone,".

Page 7, beginning in line 3, strike out "the proposed consent judgment: Provided, That communications made by or in the presence of counsel of record with the Attorney General or the employees of the Department of Justice shall be excluded from the requirements of this subsection" and insert in lieu thereof "such proposal".

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Amendment to S. 782
(Committee Print--9/25/74)

Offered by Mr. Rodino

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Page 9, strike out line 23 and all that follows down through line 16 on page 10.

Page 11, strike out lines 12 through 20.

Amendments to S. 782
(Committee Print--9/25/74)

Offered by Mr. Owens

Page 6, line 25, after "or other person" insert "with any officer or employee of the United States concerning or relevant to such proposal, except with respect to any and all written or oral communication on behalf of such defendant by counsel of record alone with the Attorney General or the employees of the Antitrust Division of the Department of Justice."

Page 6, line 25, strike out ",except" and all that follows down through "such proposal." on line 7, page 7.

Committee Statement

This amendment is a substitute for the Subcommittee's amendment No. 5. It merely adds another phrase to the lobbying disclosure provision of the bill. It is intended to insure the disclosure of lobbying contacts that may influence the settlement of antitrust cases. It requires the public disclosure of lobbying contacts by members of the federal government who are not members of the Antitrust Division of the Justice Department.

This amendment will thus close two significant loopholes. It will now require the disclosure of lobbying contacts made by defendants with influential individuals outside the Department of Justice. For example, it will compel the disclosure of lobbying contacts by antitrust defendants with people like the Secretary of the Treasury. Secondly, it will require the disclosure of lobbying efforts directed at individuals who may be a part of the Justice Department outside the Antitrust Division of the Department. That would include efforts to lobby, for example, the Chief of the Criminal Division in connection with antitrust cases subsequently settled by a consent decree.

This amendment will make lobbying disclosure provisions of this important bill more realistic, more comprehensive and more effective. I urge your support for this amendment.

Wells Fargo Bank Building, Suite 440
21535 Hawthorne Boulevard, Torrance, California 90503
(213) 542-7313

LOGICON

September 30, 1974

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

Dear Mr. Rodino:

We have been informed that the proposed "Antitrust Procedures and Penalties Act" (the Tunney Bill — H. R. 9203) has not yet been reported out of the Judiciary Committee even though the Monopolies Subcommittee completed hearings on the bill in October of 1973. As you are probably aware, a substantially identical version of this bill has already passed the Senate unanimously. While robust debate and careful evaluation of every bill pending in Congress are essential, we deplore a delay of this magnitude. We respectfully request that the bill be referred back to the full House with a favorable recommendation forthwith.

We feel that the effect this bill would have on the consent decree procedures of antitrust litigation are obviously and amply advantageous. Since the principles behind the antitrust laws are the protection of the weaker segments of industry as well as the public in general from the anti-competitive efforts of industrial giants, it seems only logical that the smaller companies who are likely to be affected by the antitrust action brought in their behalf should have a voice in its outcome. While we are specifically interested in seeing that the bill's mandate becomes effective before settlement of the present litigation by the United States against International Business Machines Corporation, it seems clear that opening the negotiations between a defendant and the Justice Department to public scrutiny and response is advisable as a matter of general application to antitrust litigation involving any industry.

Additionally, we feel that judicial evaluation of a proposed decree, and public opinion operating to review both court and plaintiff, increase the probable effectiveness of the ultimate decree. Too frequently has recent history seen a consent decree fail of purpose, whether by Justice Department's

lack of foresight or otherwise. A new scheme of checks and balances can only serve to tighten up the consent procedure, tend to restore public faith in the Executive Branch, and increase participation of non-parties in decisions which affect their industrial livelihood.

We urge a prompt, favorable Committee vote as soon as possible.

Sincerely yours,

LOGICON, INC.

John R. Woodhull
President

JRW:mm

CC: Judiciary Committee Members

STATEMENT CONCERNING S. 782 FOR FULL COMMITTEE MEETING - OCTOBER 2, 1974

The Subcommittee on Monopolies and Commercial Law this morning reports favorably on important new antitrust legislation, the Antitrust Procedures and Penalties Act, S. 782, that passed the Senate unanimously by a 92-0 vote.

The Act was the subject of intense legislative and oversight study by the Monopolies Subcommittee since not only is new legislation presented but also remedies for abuses in consent decree procedures that have been criticized for a long time and which began in a 1959 Monopolies Subcommittee Report. The Subcommittee held 4 days of hearings during which more than 200 pages of testimony were received from distinguished representatives from the public and private antitrust bars. The Subcommittee also believes that enactment of the proposed measure would be a giant step forward in restoring public confidence in the impartial execution of the antitrust laws.

As the Subcommittee observed in 1959, "The consent decree practice has established an orbit in the twilight zone between established rules of administrative law and judicial procedures." The first part of the bill, therefore, requires the filing of an impact statement explaining proposed consent decrees along with requirements for public notice; requires district courts to determine that proposals are in the public interest and provides legislative guidelines for the exercise of judicial discretion; and, requires the publication of lobbying contacts made with the Justice Department in the course of the formulation of consent decrees.

The second part of the bill would increase fines for Sherman Act offenses from $50,000 to $500,000 for corporations and $100,000 for individuals and

non-corporate business enterprises. It was in 1955, that these fines were raised from $5,000 to $50,000 and revisions upward on fine ceilings are long overdue. The need for effective deterrents to antitrust violations has not been disputed before the Subcommittee or, for that matter, in the Senate. Current events increase this need for effective deterrents since one FTC Commissioner recently estimated that unlawful price-fixing currently adds $10 billion annually to prices paid by consumers; and, the Assistant Attorney General for Antitrust observed that "vigorous enforcement" of the antitrust laws is the "true anti-inflationary road" to follow.

The third part of the bill is innovative providing measures to reduce time from filing to trial in civil cases; and, providing appellate review of district court pre-trial orders relating to preliminary injuctions in merger cases. This latter provision is expected to have the added benefit of reducing appeals to the Supreme Court following litigation.

93D CONGRESS
2D SESSION

H. R. 17063

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 3, 1974

Mr. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To reform consent decree procedures, to increase penalties for violation of the Sherman Act, and to revise the Expediting Act as it pertains to appellate review.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Procedures and Penalties Act".

CONSENT DECREE PROCEDURES

SEC. 2. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 16), is amended by redesignating subsection (b) as (i) and by inserting immediately after subsection (a) the following:

"(b) Any proposal for a consent judgment submitted

by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision

contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

"(5) a description of the procedures available for modification of such proposal; and

"(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

"(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

"(i) a summary of the terms of the proposal for the consent judgment,

"(ii) a summary of the competitive impact statement filed under subsection (b),

"(iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public com-

ment, and the place where such materials and documents are available for public inspection.

"(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

"(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

"(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought,

anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

"(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

"(f) In making its determination under subsection (e), the court may—

"(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

"(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspect of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

"(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as

a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

"(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

"(5) take such other action in the public interest as the court may deem appropriate.

"(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any

consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

"(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding."

PENALTIES

SEC. 3. Sections 1, 2, and 3 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1, 2, and 3), are each amended by striking out "fifty thousand dollars" whenever such phrase appears and inserting in each case the following: "five hundred thousand dollars if a corporation, or, if any other person, one hundred thousand dollars".

EXPEDITING ACT REVISIONS

SEC. 4. (a) Section 1 of the Act of February 11, 1903 (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the "Expediting Act", is amended to read as follows:

"SECTION 1. In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with such court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.".

(b) Section 2 of the Act of February 11, 1903 (15 U.S.C. 29; 49 U.S.C. 45), commonly known as the Expediting Act, is amended to read as follows:

"SEC. 2. (a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act

to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. An appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28, United States Code, but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28, United States Code.

"(b) An appeal from a final judgment entered in any action specified in subsection (a) shall lie directly to the Supreme Court if the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such certificate shall be filed within 10 days after the filing of a notice of appeal. When such a certificate is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme

Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) deny the direct appeal and remit the case to the appropriate court of appeals, which shall then have jurisdiction to hear and determine such case as if the appeal and any cross appeal in such case had been docketed in the court of appeals in the first instance pursuant to subsection (a).".

APPLICATION OF EXTENDING ACT TO COMMUNICATIONS ACT OF 1934

SEC. 5. (a) Section 401(d) of the Communications Act of 1934 (47 U.S.C. 401(d)) is repealed.

(b) Section 3 of the Act entitled "An Act to further regulate commerce with foreign nations and among the States", approved February 19, 1903 (32 Stat. 849; 49 U.S.C. 43), is amended by striking out the following: ": *Provided,* That the provisions of an Act entitled 'An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three,

shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission".

EFFECTIVE DATE OF EXPEDITING ACT REVISIONS

SEC. 6. The amendment made by section 4 of this Act shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act. Appeal in any such action shall be taken pursuant to the provisions of section 2 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in effect on the day preceding the date of enactment of this Act.

93D CONGRESS
2D SESSION

H. R. 17063

A BILL

To reform consent decree procedures, to increase penalties for violation of the Sherman Act, and to revise the Expediting Act as it pertains to appellate review.

By Mr. RODINO

OCTOBER 3, 1974
Referred to the Committee on the Judiciary

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

October 7, 1974

MEMORANDUM

OCT - 7 1974 4 pm

TO: Republican Members

FROM: Frank Polk

RE: Antitrust Practices and Procedures Act

On September 24, 1974, a memorandum was circulated analyzing S. 782, the Senate passed version of the Antitrust Practices and Procedures Act. This memo is a supplement to that analysis. In the memo of September 24, several areas of concern were outlined. To recapitulate, they are as follows:

(1) whether the consent decree provisions of the bill expand the right of any person to intervene as a party in a proceeding before a court to determine whether the proposed consent decree is in the public interest; Same right as under present law.

(2) whether in making a determination that the proposed consent decree is in the public interest, a court may consider the public benefit of a determination of the issues at a trial;

(3) whether the Department of Justice must include in its competitive impact statement a description and evaluation of the effect on competition of alternatives to the proposed consent decree that were not adopted; NO

(4) whether an exception to the general rule that the defendant must report all contacts made with government employees concerning the proposed consent decree should be made for contacts made by or in the presence of counsel of record with the Attorney General or employees of the Department; and

(5) whether antitrust cases should be appealed under the ordinary rules of appellate procedure but with the exception that the Attorney General may certify that a case is of general public importance, so as to permit a direct appeal to the Supreme Court. So Provides

On October 3, 1974, there was an informal meeting of the Antitrust Subcommittee. At that meeting the above questions were discussed. As a result of the informal discussion, the Chairman introduced a clean bill -- H.R. 17063 -- which includes some but not all of the changes thought desirable in the memorandum of September 24, 1974.

With regard to the first question, H.R. 17063 makes clear that the right of a party to intervene is no more and no less than that accorded under current law. With regard to the third question, H.R. 17063 deletes the requirement that the Department of Justice include in a competitive impact statement the effect on competition of alternatives to the consent decree that were not adopted. With regard to the fifth question, H.R. 17063 adopts the so-called Hutchinson amendment which provides for Attorney General certification of antitrust cases so that they may be directly appealed to the Supreme Court.

However, the resolution with regard to questions 2 and 4 may be considered less than satisfactory. With regard to question 4, it is generally assumed that contacts by the defendant with government employees relevant to the consent decree should be reported to the court which is determining whether the consent decree is in the public interest. Controversy has generally focused on which contacts, if any, should be exempted from the reporting requirement. The Senate bill would exempt contacts made by or in the presence of counsel with the Attorney General or employees of the Department of Justice. The Department of Justice, itself, favors this Senate provision. On the House side, the Subcommittee concluded that any contact made by a corporate officer and the counsel of record with the Department of Justice was more a "lobbying" contact than it was a "lawyering" contact and thus should be reported. The original Subcommittee version then created an exemption for any and all contacts made by counsel of record alone with any government employee within or without the Department of Justice. At the informal meeting there was a discussion of whether the Senate version or the Subcommittee version should be preferred. Although there was not unanimous agreement, a majority chose to adopt the following compromise: that the Subcommittee version would be retained with regard to meetings with counsel of record alone and the Department of Justice but that the Senate version would be preferred with regard to meetings by counsel of record and government employees outside the Department of Justice. What this means is that contacts made by the defendant with the plaintiff must be reported. The Department of Justice reasons that the reporting requirement will have a chilling effect on such contacts and that such chilling effect is undesirable because it very frequently occurs that officers of the defendant corporation are rather direct in indicating to the Department the exact nature of their questioned activity. The Department foresees under the compromise embraced by H.R. 17063 that it will become the general practice for defendant's counsel to appear

at the Department alone so that the contact will not have to be reported and that the Department will thereby by deprived of this occasional source of information.

With regard to the second question, H.R. 17063 includes language - approved earlier by the House Subcommittee but rejected by the Senate in approving S. 782 - that would authorize a court to consider "the public benefit, if any, to be derived from a determination of the issues at trial" as a factor to be weighed in determining whether the proposed consent decree is in the public interest. The problem is that this language appears to be a direct invitation to the courts to suspend the Congressional policy with regard to consent decrees that was incorporated in the Clayton Act of 1914. That Congressional policy is to make consent decrees easier to obtain by making them more attractive to defendants. Section 5 of the Clayton Act did this by providing that a litigated judgment would be prima facie evidence of liability in a subsequent case brought by a treble damage plaintiff but that a consent decree would not be. The real purpose of the Congressional policy is not to make antitrust enforcement easier on defendants but to facilitate the enforcement of the antitrust laws for the government. If the government had to actually litigate every antitrust issue, this would consume such time and manpower that violators of the antitrust laws would feel quite optimistic about escaping the sanctions of the antitrust laws. Today, 80 percent of the judgments in government cases are consent decrees. Without the useful tool of the consent decree, the government could not exert the leverage that it does in enforcing the antitrust laws unless the size of the Antitrust Division was greatly expanded. The problem with the language in H.R. 17063 is that it invites the judge to determine whether a litigated judgment will be better for individuals who are alleging specific injury from the violations set forth in the complaint. Under Section 5 of the Clayton Act a litigated judgment will <u>always</u> be better for such individuals. Therefore, the language seems to suggest that a court should refuse to enter a consent decree in such an instance. It would thus seem that this language would pull the rug out from under the current enforcement of the antitrust laws.

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-1463

ANTITRUST PROCEDURES AND PENALTIES ACT

OCTOBER 11, 1974.—Committeed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 782]

The Committee on the Judiciary, to whom was referred the bill (S. 782) to reform consent decree procedures, to increase penalties for violation of the Sherman Act, and to revise the Expediting Act as it pertains to Appellate Review, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Antitrust Procedures and Penalities Act".

CONSENT DECREE PROCEDURES

SEC. 2. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 16), is amended by redesignating subsection (b) as (i) and by inserting immediately after subsection (a) the following:

"(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the

United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

"(5) a description of the procedures available for modification of such proposal; and

"(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

"(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

"(i) a summary of the terms of the proposal for the consent judgment,

"(ii) a summary of the competitive impact statement filed under subsection (b),

"(iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

"(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

"(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

"(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

"(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

"(f) In making its determination under subsection (e), the court may—

"(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

"(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the

views, evaluations, or advice of any individual, group or agency of government with respect to any aspect of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

"(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

"(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

"(5) take such other action in the public interest as the court may deem appropriate.

"(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

"(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding."

PENALTIES

SEC. 3. Sections 1, 2, and 3 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1, 2, and 3), are each amended by striking out "fifty thousand dollars" whenever such phrase appears and inserting in each case the following: "five hundred thousand dollars if a corporation, or, if any other person, one hundred thousand dollars".

EXPEDITING ACT REVISIONS

SEC. 4. (a) The first section of the Act of February 11, 1903 (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the "Expediting Act", is amended to read as follows:

"SECTION 1. In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with such court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.".

(b) Section 2 of the Act of February 11, 1903 (15 U.S.C. 29; 49 U.S.C. 45), commonly known as the Expediting Act, is amended to read as follows:

"SEC. 2. (a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and

monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. An appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28, United States Code, but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28, United States Code.

"(b) An appeal from a final judgment entered in any action specified in subsection (a) shall lie directly to the Supreme Court if the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such certificate shall be filed within 10 days after the filing of a notice of appeal. When such a certificate is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) deny the direct appeal and remit the case to the appropriate court of appeals, which shall then have jurisdiction to hear and determine such case as if the appeal and any cross appeal in such case had been docketed in the court of appeals in the first instance pursuant to subsection (a).".

APPLICATION OF EXPEDITING ACT REVISIONS

SEC. 5. (a) Section 401(d) of the Communications Act of 1934 (47 U.S.C. 401(d)) is repealed.

(b) Section 3 of the Act entitled "An Act to further regulate commerce with foreign nations and among the States", approved February 19, 1903 (32 Stat. 849; 49 U.S.C. 43), is amended by striking out the following: "The provisions of an Act entitled 'An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three,' shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission".

EFFECTIVE DATE OF EXPEDITING ACT REVISIONS

SEC. 6. The amendment made by section 4 of this Act shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act. Appeal in any such action shall be taken pursuant to the provisions of section 2 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in effect on the day preceding the date of enactment of this Act.

COMMITTEE ACTION

Your Committee, acting through its Monopolies and Commercial Law Subcommittee, held four days of hearings from September 20, 1973 to October 3, 1973, on three bills relating to Antitrust Procedures and Penalties, the first of which was introduced in the House on July 11, 1973 by Chairman Rodino. The Subcommittee received oral and written testimony in those hearings from over fifteen witnesses including Members of Congress, the Deputy Assistant Attorney General for Antitrust, the ex-Chairman of the Federal Trade Commission, and numerous experienced and informed spokesmen for diverse industries, the private and public antitrust bars, public interest groups, and judicial procedures specialists.

On March 12, 1974 the Subcommittee recommended S. 782 with amendments to the Full Committee by voice vote.

On October 8, 1974, the House Judiciary Committee, by voice vote without objection, ordered reported S. 782, the Antitrust Procedures and Penalties Act, with one amendment in the nature of a substitute, the language of which is the text of H.R. 17063. During hearings and mark-up by the Monopolies and Commercial Law Subcommittee, H.R. 9203 had been the proposed legislation considered: H.R. 17063 represented the amended version thereof, introduced by Chairman Rodino upon the unanimous agreement of the Members of the Monopolies Subcommittee. S. 782 was passed unanimously by the Senate (92–0) on July 18, 1973. H.R. 17063 differed from S. 782 in numerous respects most of which were either technical and conforming changes or a redesignation of sections within the bill; however, several significant additions and deletions were made to S. 782 as passed the Senate by the House Committee on the Judiciary.

PURPOSES

The purposes of S. 782 are to enact legislative and oversight changes to settlements of Government civil antitrust cases with provisions applicable to all parties in interest, namely, the Attorney General, the public, federal district courts, and defendants; to increase maximum allowable fines in Sherman Act cases (15 U.S.C. 1 et seq.); and, to make a variety of changes in the Expediting Act (15 U.S.C. 28, 29) applicable to Government civil antitrust cases and to two other laws incorporating present Expediting Act procedures (47 U.S.C. 401(d) and 49 U.S.C. 43–45) to improve or to accelerate the trial and appeal of public antitrust cases.

COST

The bill does not authorize appropriations for procedures enacted. Revisions to consent decree procedures for the Justice Department and federal district courts, except for costs of publishing public notice of pending proposals for a consent decree, do not entail procedures by these agencies not already authorized or for which added manpower or other new resources are necessary. Increases in fines for Sherman Act violations will increase federal revenues but on a case by case determination for which, therefore, an overall estimate is not possible. Changes in judicial procedures for the movement of filed cases to trial and for appeals in public civil antitrust cases are based, in part, on the expectation that a significant conservation of judicial and of Justice Department resources and expenditures will occur.

GENERAL STATEMENT AND ANALYSIS

The bill is composed, essentially, of three separate sections which are directed at different aspects of enforcement and application of antitrust laws by federal agencies and institutions: the first Section relates to procedures for settlements of Government civil antitrust cases; the second Section increases fines allowable for Sherman Act violations; and, the third Section improves pre-trial and appellate procedures in public civil antitrust cases.

I. CONSENT DECREE PROCEDURES

As an annual average since 1955, approximately 80 percent of antitrust complaints filed by the Antitrust Division of the Department of Justice are terminated by pre-trial settlement; in two years during the 1955–1972 period, 100 percent of all judgments in public antitrust cases resulted from utilization of the consent decree process. Given the high rate of settlement in public antitrust cases, it is imperative that the integrity of and public confidence in procedures relating to settlements via consent decree procedures be assured. The bill seeks precisely to accomplish this objective and focuses on the various stages of consent decree procedures, including that process by which proposed settlements are entered as a court decree by judicial action.

Ordinarily, defendants do not admit to having violated the antitrust or other laws alleged as violated in complaints that are settled. The antitrust laws express fundamental national legal, economic, and social policy. Present law, 15 U.S.C. 16(a), encourages settlement by consent decrees as part of the legal policies expressed in the antitrust laws. Consent decrees, unlike decrees entered as a result of litigation, are not available as prima facie evidence against defendants in public antitrust cases in subsequent private antitrust cases. The bill preserves these legal and enforcement policies and, moreover, expressly makes judicial proceedings brought under the bill as well as the impact statement required to be filed prior thereto inadmissible against defendants of the public antitrust action in subsequent antitrust actions, if any. Various abuses in consent decree procedures by the Antitrust Division and by district courts are, however, sought to be remedied as a matter of priority since as the Senate Report on the bill, Senate Report No. 93–298, aptly observed, "by definition, antitrust violators wield great influence and economic power." (p. 5).

The first three subsections of the bill, subsections 2(b)–(d), require the filing of an impact statement by the Justice Department along with each proposal for a consent judgment offered by it to a federal district court; provide mechanisms for notifying the public of such filings; and, allow public comment thereon and Justice Department responses thereto within a specified period. In each of these areas, the Department of Justice presently, as a matter of internal policy only, has applicable procedures. When a proposal for a consent judgment is submitted to a district court: the defendant agrees that the proposal, as filed, becomes binding and final on it within thirty days and that during this period, it may not withdraw its consent; but, the Government retains the right to withdraw its consent to entry of the decree at any time during the thirty-day period. This Justice Department "30-day" policy is relatively new, being introduced by former Attorney General, the late Robert F. Kennedy, who was responding to a critical 1959 Report by the House Antitrust Subcommittee that issued as a result of House Resolution 107 of the 85th Congress and hearings during the 85th and 86th Congresses in which nearly 4,500 pages of testimony on consent decree procedures were received. In the 1959 Report, the House Antitrust Subcommittee concluded, "The consent decree practice has established an orbit in the twilight zone between established rules of administrative law and judicial procedures." The bill, in this respect, is designed to substitute "sunlight" for "twilight" and

to regularize and make uniform judicial and public procedures that depend upon the Justice Department's decision to enter into a proposal for a consent decree. Moreover, the extant 30-day policy period is expanded by legislation to 60-days as a response to criticisms that 30-days are insufficient for meaningful public analysis and comment of both antitrust complaints and proposed consent decrees, especially in those situations where, despite Congressional criticism, the Justice Department negotiates both the complaint and the proposed settlement thereof and files them simultaneously in a district court.

Similarly, present Justice Department policy calls for the issuance of a press release on the date on which a proposed consent decree is filed that: advises the public of the terms of the proposed settlement; describes the actions allegedly violative of the antitrust laws as expressed in the complaint; and, invites public comment during the 30-day period. The bill requires the Justice Department to file an impact statement with each of its proposals for a consent judgment containing:

(1) The nature and purpose of the proceedings;

(2) A description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) An explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be thereby, and the anticipated effects on competition of such relief;

(4) The remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) A description of the procedures available for modification of such proposal; and

(6) A description and evaluation of alternatives to such proposal actually considered by the United States.

Your Committee agrees with S. Rept. No. 93–298, "The bill seeks to encourage additional comment and response by providing more adequate notice to the public," (p. 5) but stresses that effective and meaningful public comment is also a goal. The United States, therefore, is charged with publishing a notice, at least 60 days prior to the effective date of the consent judgment's becoming finalized and for 7 days over a 2-week period in newspapers of general circulation, containing:

(1) A summary of the terms of the proposal for the consent judgment,

(2) A summary of the competitive impact statement filed;

(3) And a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

During the 60-day period, in addition, the United States is required to publish in the Federal Register its impact statement and its responses to written comments received concerning the proposed consent judgment. The legislation clearly prohibits a shortening of this 60-day period unless the cognizant district court so orders after it has been shown: (1) Extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest.

The fourth and fifth subsections of the bill, Sections 2(e) and (f), relate entirely to judicial practices and procedures upon the submission to it of a proposal for a consent judgment and compliance by the Justice Department with procedures set forth in the first three subsections of the bill. One of the abuses sought to be remedied by the bill has been called "judicial rubber stamping" by district courts of proposals submitted by the Justice Department. The bill resolves this area of dispute by requiring district court judges to determine that each proposed consent judgment is in the public interest. Your Committee agrees with S. Rept. No. 93–298's evaluation of this legislative requirement set forth in Section 2(e) of the bill:

> The Committee recognizes that the court must have broad discretion to accommodate a balancing of interests. On the one hand, the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option. It is not the intent of the Committee to compel a hearing or trial on the public interest issue. It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible. Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized. Only where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so.
>
> Nor is Section 2(e) intended to force the government to go to trial for the benefit of potential private plaintiffs. The primary focus of the Department's enforcement policy should be to obtain a judgment—either litigated or consensual—which protects the public by insuring healthy competition in the future. The Committee believes that in the majority of instances the interests of private litigants can be accommodated without the risk, delay and expense of the government going to trial. For example, the court can condition approval of the consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private plaintiffs which will assist in the effective prosecution of their claims. (pp. 6–7)

Your Committee wishes to emphasize, in addition, that: (1) the public does have an interest in the integrity of judicial procedures incident to the filing of a proposed consent decree by the Justice Department and the case law in this regard is not disturbed; (2) case law that district courts cannot compel entry of proposed consent judgments if the Justice Department resists such entry, and vice versa, is also not intended to be disturbed; and (3) legislative guidelines flowing from legislative oversight activity are appropriate even though actual entry of the proposed consent judgment is an exercise of judicial power. Added legislative intentions in this regard are; (1) to foreclose future disputes following entry of the proposal as a consent judgment concerning decree language or the intentions of the parties, *U.S.* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); (2) to facilitate, thereby, future modifications to consent judgments under appropriate judicial procedures that may become necessary, *U.S.* v. *Armour & Co.*, 402 U.S. 673 (1971); and (3) in merger case settlements, to insure that district courts adhere to Supreme Court directions, "not only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by the Congress," *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

Section 2(f) is permissive in language whereby added legislative guidelines for the exercise of judicial discretion are provided. It is not the intention of your Committee in any way to limit district courts to techniques enumerated therein. Nor it is intended to authorize techniques not otherwise authorized by law. The legislative language, however, is intended to isolate further and, thereby, to preclude factors identified as contributing to the rise of the so-called abuse of "judicial rubber stamping".

The sixth subsection of the bill, Section 2(g) is the only provision made applicable to defendants in public civil antitrust cases. Not later than 10 days following the date of the filing of a proposal for a consent judgment by the Justice Department, defendants are required to describe all communications made by them or on their behalf but only in connection with cases sought to be settled by a consent decree. The only communications with any officer or employee of the Government exempted from such requirements of this subsection are those made by counsel of record for defendants who meet alone with members of the Department of Justice. The limited exemption provided reflects a balancing test judgment distinguishing "lawyering" contacts of defendants from their "lobbying contacts". Numerous contacts by counsel of record with antitrust enforcers occur as an incident to the filing of a case: these, and these alone, are excepted from disclosure. A "lobbying" contact includes a communication to antitrust enforcers by counsel of record accompanied by corporate officers or employees; or by attorneys not counsel of record whether or not they are accompanied by officers or employees of defendants or prospective defendants in those situations in which a simultaneous filing of a complaint and a proposed settlement occurs. Although recognizing the difficulties of legislating legal ethics confining communications by counsel of record to "lawyering" and not "lobbying," your Committee intends to provide affirmative legislative action supporting the fundamental principle restated by the Supreme Court in the 1973 *Civil Service Comm'n* v. *Letter Carriers* decision, "[It] is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it if confidence in the system of representative Government is not to be eroded to a disastrous extent."

The seventh subsection of the bill expresses the Congressional judgment that impact statements required by and judicial proceedings that may result from enactment, shall be inadmissible in an action for damages, either by the government or by private parties. The subsection is also expressive of present law that consent judgments in public civil antitrust cases cannot be used as prima facie evidence of an antitrust violation in private antitrust actions.

II. INCREASING SHERMAN ACT FINES

The second main section of the bill, Section 3, increases maximum allowable fines for violations of the Sherman Act from $50,000 to $100,000 for individual and non-corporate business enterprises; and to $500,000 for corporations. The last time that these fine provisions were increased was in 1955. Near unanimous witness' testimony was received during hearings that revisions upward were long overdue. Indeed, some witnesses testified that fine ceilings sought were still too low since profits from antitrust violations can run into billions of dollars; and, since, by comparison, the Common Market imposes fines for antitrust violations in amounts up to 10 percent of the gross annual sales volume of the defendant. Later during the same day that your Committee approved the bill, President Ford called upon the Congress to increase fines for antitrust violations by corporations to $1 million.

III. EXPEDITING ACT REVISIONS

The third main Section of the bill, Section 4, contains three major substantive revisions to the Expediting Act of 1903.

The first such subsection, Sec. 4(a), relates to pre-trial procedures and eliminates present provisions for convening three-judge courts upon the filing of public civil antitrust cases. Provided, instead, are measures whereby, upon the filing of a certificate by the Attorney General that the case is of general public importance, district court judges or chief judges of district courts are empowered to facilitate and to speed up pre-trial procedures, including assignment of the case for trial at the earliest practicable date. Present relevant law has been criticized as obstructing rather than expediting the movement of antitrust cases from filing to trial. The bill is intended to eliminate potential and alleged clogs on antitrust litigation in this regard.

The second major revision to the Expediting Act in this part of the bill contains two important provisions. First, intermediate appellate review for district court rulings on government motions for pre-trial injunctions is provided, a procedure of particular importance in merger cases. Under present law, such denials are interlocutory in nature and not reviewable until after trial. Judicial porcedures for private antitrust cases, enacted much later than judicial procedures in public cases, presently provide for the pre-trial review that the bill would establish for government cases. In addition to restoring a balance between public and private pre-trial procedures, the Committee relied upon considerable testimony of witnesses during hearings that enactment would possibly conserve substantial enforcement resources and, in view of the legal issues in merger cases, obviate the need for some trials if such pretrial intermediate appellate review were enacted. Secondly, present law governing post-trial appeals of government civil antitrust cases is changed so that appeals from judgments of the district court will lie to the courts of appeals embracing the district in which the case was brought except as expressly provided in the bill.

The third main revision to the Expediting Act contained in this part of the bill creates an exception to post-trial appellate procedures for litigated government civil antitrust cases: a certificate may be filed with the Supreme Court stating that immediate consideration of

the appeal by the Supreme Court is of general public importance in the administration of justice, whereup the Supreme Court may either: (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) deny the direct appeal and remit the case to the appropriate court of appeals, which shall then have jurisdiction to hear and determine such case as if the appeal and any cross appeal in such case had been docketed in the court of appeals in the first instance.

The exception provided for possible direct Supreme Court post-trial review of litigated government civil antitrust cases reflects legislative recognition of the Attorney General's responsibilities to coordinate national antitrust enforcement policies and the necessary discretion incident to this legislatively imposed responsibility; and, that public antitrust cases differ in nature sufficiently from private antitrust cases and concerns to warrant providing the Attorney General with possible direct Supreme Court post-trial review in appropriate cases. Moreover, the legislative conferral of discretion in post-trial appeals on the Attorney General is expected to increase vigorous enforcement of the antitrust laws by the Department of Justice. It will, also, provide opportunity for real appellate review of cases not worthy of direct Supreme Court review, both those cases never appealed for that reason as well as those appealed but summarily disposed of by the Supreme Court.

PURPOSE OF AMENDMENT

In Section 2(b) of the bill, two express references to three portions of the Freedom of Information Act, 5 U.S.C. § 552, in the Senate bill were not included in the Committee amendment. By deleting the piecemeal incorporation of the Freedom of Information Act it was intended to insure that, except for disclosures required by the bill, Freedom of Information Act case law, substantive and procedural, was not disturbed. In addition, the Freedom of Information Act intended to relate to the public's need for information from certain agencies and does not purport to deal with the need of the courts or of the Congress for information from those agencies. Thus reference to the Freedom of Information Act here would not only be inappropriate but would confuse the legislative history of that Act with regard to its general applicability.

In section 2(e) of the bill, the Committee made one other noteworthy change. As originally expressed, district courts were charged with determining that the entry of a proposal for a consent judgment was "in the public interest as defined by law." The four words, "as defined by law" were deleted: as a recognition that the content of the phrase, "public interest," is a product of judical construction in the context of particular statutes, as evidenced by the lack of definition of the "public interest" in legal dictionaries and encyclopedias; to clarify the intention not to change case law construing the "public interest" in cases involving the antitrust laws or antitrust provisions of other laws; and to provide illumination and consistency in the usage of the phrase, the "public interest," in section 2(f)(5) of the bill. Preservation of antitrust precedent rather than innovation in the usage of the phrase, "public interest," is, therefore, unambiguous. The

original phrase either referred to "all law" and was too general or referred to "antitrust law" and was too narrow in that the policy of the antitrust laws as such would not admit of compromises made for non-substantive reasons inherent in the process of settling cases through the consent decree procedure. See, for example, *U.S.* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); *U.S.* v. *Armour & Co.*, 402 U.S. 673 (1971).

Wherever appearing in the bill, your Committee has substituted the word, "competitive" for the word, "public" in the phrase, "public impact statement" because: (a) the antitrust laws protect and promote competition; (b) the expertise the Antitrust Division is charged by the Congress with institutionalizing focuses on "competitive" effects; (c) ambiguities arising from the usage of "public impact" in environmental case law and statutes are foreclosed; (d) current proposals for inflationary "impact statements" might otherwise be thought to be adopted which they are not except to the extent that the analysis of or the prediction of competitive effects in antitrust law traditionally entail inflationary considerations; and (e) the substitutions refine and emphasize legislative purposes and guidelines for the contents of the "impact statement" mandated by the bill.

In subsection 2(e)(2) of the bill, one of the two legislative and judicial oversight guidelines expressed in permissive language in that Section, further clarification of legislative intentions regarding the district court's possible consideration of the impact of the entry of the proposed consent decree upon the public and upon individuals is provided by the addition of the words, "including consideration of the public benefit, if any, to be derived from a determination of the issues at trial." The addition accommodates further the interplay of legislative guidelines with inherent judicial discretion. The words, "if any," are added in recognition of the fact that among the diverse types of cases filed under the antitrust laws, there are some that, on their face and through a judicial examination of complaint and proposed consent judgment, clearly do not require such a determination of impact by courts. The added language expresses, further, the intentions of not replacing one mechanical procedure with another of a similar nature; of emphasizing the truism that in examining proposed settlements of particular cases, case by case judicial scrutiny is necessary; and, of insuring that, in remedying the abuse of judicial rubber stamping of proposed consent decrees, flexible judicial procedures evolve.

Language is added to Section 2(g) of the bill to insure that no loopholes exist in the obligation to disclose all lobbying contacts made by defendants in antitrust cases culminating in a proposal for a consent decree: only communication by counsel of record alone with the Attorney General or employees of the Department of Justice alone are excepted from reporting requirements. Conversely, communications by counsel of record alone with officers or employees of all government agencies other than the Department of Justice are intended to be within disclosure requirements.

Both the Senate bill and the Committee amendment agree that the Expediting Act provision insuring direct appeal to the Supreme Court in every government antitrust case wherein equitable relief is sought should be amended so that only cases of general public importance in the administration of justice may be appealed directly to the

Supreme Court while other cases may be appealed to the appropriate court of appeals. However, the Senate bill and Committee amendment disagree as to what is the best mechanism for determining what cases are cases of general public importance in the administration of justice. The Senate bill provides that the "district judge who adjudicated the case," upon application of either party, would make that determination. The Committee amendment provides that the Attorney General would make that determination.

The Committee chose that mechanism because of the special expertise of the Attorney General in administering the antitrust laws. Although the Senate bill would recognize that expertise in the Attorney General at the trial stage in providing that he may certify that the case is "of general public importance" which should be expedited, it has not equally recognized the Attorney General's expertise at the appellate stage. The Committee amendment, in contrast, recognizes the Attorney General's expertise equally at both stages. It does so in the belief that the Attorney General is in the best position to know how a given case affects other cases pending in other district courts or cases that he plans to file at a later date. The district judge is not in that position and since the Attorney General's certification will of necessity be subjected to judicial scrutiny by the Supreme Court, the Committee believed it would be unnecessarily cumbersome to require the approval, as well, of the district judge. Moreover, as a matter of policy, the Committee intends that cases certified by the Attorney General as cases of general public importance in the administration of justice which the Supreme Court believes to be such be heard by that Court. In short, if the Attorney General and the Supreme Court agree, the district judge's view should not be an obstacle to direct review. Also, by mandating that only the "district judge who adjudicated the case" can enter the order to be reviewed by the Supreme Court, an unintended loophole was created: upon the death or other disability of the adjudicating judge, the opportunity for direct review is automatically foreclosed. Amendments to provide the participation of district judges other than the district judge who adjudicated the case would be illusory: no substitute for the experience gained in "deciding" the case could be legislated. Finally, the Committee was not persuaded as to the merits of the provision in the Senate bill whereby the defendant might request the district judge to certify the case for direct review. The Committee was of the opinion that a party by being sued did not become as expert as the Attorney General in determining the importance of the particular case to the whole of antitrust enforcement.

Both the Senate bill and the Committee amendment agree that once the mechanism for certification becomes operative and the case comes before the Supreme Court on direct review, the Supreme Court may hear the case or remit it to the appropriate court of appeals. It should be emhapsized that the fact that the Supreme Court is accorded this option does not mean that the Supreme Court is intended to have a free and absolute discretion to hear or not hear a case on direct review. The Committee was well aware that under current law—Section 1254 of title 28, U.S. Code, which is not affected by this legislation—either party may by-pass the court of appeals and seek direct review by the Supreme Court. The Committee does not intend to duplicate or dis-

place that law through its amendment. Section 1254 does bestow on the Supreme Court an unqualified discretion to hear or not hear a case. The Committee amendment does not. It is intended that the Supreme Court hear cases on direct review that are of general public importance in the administration of the antitrust laws. Moreover, it is anticipated that the Supreme Court will accord the certification of the Attorney General due weight in view of his special expertise.

The Committee amendment recognizes that public antitrust cases are unlike other federal cases, that they have an impact on the economic welfare of this nation, and that consequently they should be treated accordingly.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Section 5 of the Act of October 15, 1914

SEC. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and publish by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposad for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for the consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b),

(iii) and a list of the materials and documents under subsection (b), which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) In making its determination under subsection (e), the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspect of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendent shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

[(b)] *(i)* Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right

of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

ACT OF JULY 2, 1890

AN ACT To protect trade and commerce against unlawful restraints and monopolies

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding [fifty] *five hundred thousand dollars if a corporation, or, if any other person, one hundred* thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempts to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding [fifty] *five hundred thousand dollars if a corporation, or, if any other person, one hundred* thousand dollars, or by imprisonment not exceeding oneyear, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and an State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding [fifty] *five hundred thousand dollars if a corporation, or, if any other person, one hundred* thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * * * *

ACT OF FEBRUARY 11, 1903

AN ACT To expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [That in any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, 'An Act to regulate commerce', approved February 4, 1887, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is plaintiff, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which the case is pending (including the District of Columbia). Upon receipt of the copy of such cerificate, it shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.]

SECTION 1. In any civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, or any other Acts having like purpose that have been or

hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with such court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

[SEC. 2. In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.]

SEC. 2. (a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. An appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28, United States Code, but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254 (1) of title 28, United States Code.

(b) An appeal from a final judgment entered in any action specified in subsection (a) shall lie directly to the Supreme Court if the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such certificate shall be filed within 10 days after the filing of a notice of appeal. When such a certificate is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) deny the direct appeal and remit the case to the appropriate court of appeals, which shall then have jurisdiction to hear and determine such case as if the appeal and any cross appeal in such case had been docketed in the court of appeals in the first instance pursuant to subsection (a).

SECTION 401 OF THE COMMUNICATIONS ACT OF 1934

TITLE IV—PROCEDURAL AND ADMINISTRATIVE PROVISIONS

JURISDICTION TO ENFORCE ACT AND ORDERS OF COMMISSION

SEC. 401. (a) * * *

* * * * * * *

[(d) The provisions of the Expediting Act, approved February 11, 1903, as amended, and of section 238(1) of the Judicial Code, as amended, shall be held to apply to any suit in equity arising under Title II of this Act, wherein the United States is complainant.]

SECTION 3 OF THE ACT OF FEBRUARY 19, 1903

SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper order, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction. [The provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.]

ADDITIONAL VIEWS OF MR. HUTCHINSON

My additional views are confined to the first portion of S. 782, which deals with consent decree procedures. Generally, this reform would require the Department of Justice to publish a competitive impact statement in the Federal Register and receive public comment and the defendant to reveal its "lobbying" contacts, all of which is to enable a court to determine whether a proposed consent decree is in the "public interest."

These provisions might appear to satisfy those who believe that the Department of Justice is not to be trusted in exercising its prosecutorial discretion to settle antitrust cases. However, it should be pointed out that that discretion can be abused equally by refusing to file a complaint or by trying a case to completion. But such abuses are not reached by this legislation, presumably because an expansion of the legislation to cover such situations would more clearly expose the defect of the solution that is embraced.

That defect is simply that to require federal courts to determine whether a consent decree is in the public interest is to transfer an "executive" question to the courts for resolution. The question for the court will be whether the Department of Justice has exercised its prosecutorial discretion well or, perhaps, as well as possible. The question will *not* be whether the Department has violated some legal standard. For none is established by this legislation. Rather, the court is given a plenary and unqualified authority to re-decide an executive decision.

In our system of separated powers, the courts are to decide only "judicial" questions. Functionally, courts enforce executive and legislative decisions unless they violate a superceding legal standard, in which case they enforce that standard. But under our system, courts do not determine what is wise or good for the American people. Such determinations are reserved for the executive and legislative branches, which are answerable to the people.

When a court reviews the exercise of prosecutorial discretion, it will find itself in a thicket of administrative considerations. It will have to decide how well the Department is utilizing its resources to enforce the antitrust laws, how important the legal issues are to future cases, how strong or how weak the Department's case is, how much time and manpower the particular case would consume if tried to completion, how much that trial would preclude other antitrust enforcement efforts, how much of the relief prayed for in the complaint would the Department obtain through the decree, and how much time would be saved by the entry of the decree. These administrative considerations, although they may involve legal questions, do not constitute, in my opinion, a *judicial* question.

If it is assumed that it is necessary for someone to review the Department's exercise of prosecutorial discretion to determine whether it is in the public interest, it does not follow that the federal courts, limited by the Constitution to deciding judicial questions, are the appropriate reviewing agencies.

Under the Consttution, it is the Chief Executive who is charged with the responsibility of reviewing and guiding the enforcement of the laws. It is he who is charged with taking care that the laws be faithfully executed.

Congress likewise has an oversight responsibilty to see how the laws are enforced in order to determine if new laws are needed. It was just such an exercise of responsibility by the House Committee on the Judiciary in its report on the Consent Decree Program of the Department of Justice in 1959 that prompted the Department to initiate reforms in its program.

Thus the actions of the Department of Justice are not without their checks within the two branches responsible to the people. Consistent with that, I endorse those provisions that permit greater public knowledge of the Department's consent decree activities. But I do not agree with those provisions which suggest that the question of whether those activities are wise or good for the people, even in particular cases, is a judicial question.

EDWARD HUTCHINSON.

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U.S. House of Representatives
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Republican Policy Committee
Rep. Barber B. Conable, Jr. (R-N.Y.),
Chairman

93rd Congress
Second Session

November 18, 1974
Statement #13

S. 782 - The Antitrust Procedures and Penalties Act

The House Republican Policy Committee urges passage of S. 782, the Antitrust Procedures and Penalties Act.

We advocate firm and vigorous enforcement of antitrust laws as a key element of any effective long-term anti-inflationary economic policy. Promotion of brisk business competition encourages lower prices for goods and services and more creative and efficient companies.

Republican commitment to this objective is evidenced by the establishment earlier this year of the House Republican Task Force on Antitrust and Monopoly Problems. That group has urged prompt consideration and enactment of this bill.

Although we believe that all antitrust laws and regulatory practices should be thoroughly reviewed, we welcome this modest bill as at least a good first step in the direction of improving antitrust enforcement.

Some 80 percent of all antitrust complaints never come to trial but are settled by consent decrees. S. 782 opens these pre-trial settlement procedures to public scrutiny. Publication of the terms of consent decrees is required at least 60 days before they become effective and mechanisms are established for public comment and Justice Department response. The Justice Department is required to file a "competitive impact statement" for each consent judgment detailing the alleged violations, the proposed decree, the remaining remedies for private persons damaged by the antitrust violations and the alternatives considered to the proposed consent judgment. Federal judges are to determine that proposed consent judgments are in the public interest -- a provision intended to eliminate district court "rubber-stamping"

(OVER)

of proposals submitted by the Justice Department. To eliminate both the appearance and the occurence of "political justice" in public civil antitrust cases because of heavy lobbying, defendants are required to report all their "lobbying" contacts in connection with the pending antitrust case.

The bill contains several provisions for expediting pre-trial and appellate procedures to assure prompt action on antitrust complaints and to prevent clogging the Supreme Court docket.

Finally, the bill increases the penalties for criminal violation of the Sherman antitrust act.

The Policy Committee supports an amendment embodying President Ford's October 8 suggestion that these penalties be set even higher. Under this amendment, violation of the Sherman Act would be punishable as a felony with an increased maximum sentence, while maximum fines would be one million dollars for corporations and one hundred thousand dollars for individuals.

These stiff penalties are consistent with our belief that antitrust violations should not be dismissed as merely misdemeanors or technical violations; they cause greater economic injury to the public than do many other felonies. Administering increased jail sentences and higher fines will deter individuals and companies from flouting antitrust prosecution because the potential financial benefits outweigh the existing penalties.

Enactment of S. 782, amended to include increased penalties, will help to curb commercial crimes that adversely impact the economy and contribute to rising prices. It will aid in assuring that antitrust settlements are in the best public interest and will expedite and open to full public view the procedures by which these settlements are reached.

We urge passage of S. 782.

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The Policy Committee supports an amendment embodying President Ford's Oct. 8 suggestion that these penalties be set even higher. Under this amendment, violation of the Sherman Act would be punishable as a felony with a maximum sentence of five years, while maximum fines would be one million dollars for corporations and one hundred thousand dollars for individuals.

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We urge passage of S. 782.

Committee To Sit: Committee on the Judiciary received permission to sit during the 5-minute rule today.

Page H 11585

Antitrust Procedures and Penalties: House concurred in the Senate amendment to the House amendment to S. 782, to reform consent decree procedures, to increase penalties for violation of the Sherman Act, and to revise the Expediting Act as it pertains to appellate review—clearing the measure for the President.

Pages H 11585–H 11586

Late Reports: Committee on Public Works received permission to file reports by midnight tonight on the following bills: S. 3934, to authorize appropriations for the construction of certain highways in accordance with title 23 of the United States Code; H.R. 17558, to amend the act of May 13, 1954, relating to the Saint Lawrence Seaway Development Corporation to provide for a 7-year term of office for the Administrator; S. 4073, to extend certain authorizations under the Federal Water Pollution Control Act, as amended; and H.R. 17589, to designate the new Poe lock on the Saint Marys River at Sault Sainte Marie, Mich., as the "John A. Blatnik lock."

Page H 11586

Real Estate Settlement Procedures: By a voice vote, the House agreed to the conference report on S. 3164, Real Estate Settlement Procedures Act of 1974—clearing the measure for the President. Pages H 11586–H 11591

Farallon Wildlife Refuge: House concurred in the Senate amendment to H.R. 11013, to designate certain lands in the Farallon National Wildlife Refuge, San Francisco County, Calif., as wilderness—clearing the measure for the President. Page H 11591

Agriculture-Environmental and Consumer Protection Appropriations: It was made in order to consider tomorrow, December 12, or any day thereafter, the conference report on H.R. 16901, Agricuture-Environmental and Consumer Protection Appropriations for fiscal year 1975. Page H 11591

Foreign Assistance: By a yea-and-nay vote of 201 yeas to 190 nays, the House passed H.R. 17234, to amend the Foreign Assistance Act of 1961.

Rejected a motion to recommit the bill to the Committee on Foreign Affairs with instructions to report it back to the House with a new section on Security Assistance and Human Rights prohibiting all aid until the receiving country demonstrates that it is not violating internationally recognized human rights by condoning such practices as torture or imprisonment without charge.

Agreed to:

An amendment that strikes $85 million for the procurement of fertilizer by South Vietnam (agreed to by a recorded vote of 291 ayes to 98 noes);

An amendment that provides for a complete cutoff of military aid to Turkey until the President certifies to Congress that Turkey is in compliance with the Foreign Aid and Foreign Military Sales Acts (agreed to by a recorded vote of 297 ayes to 98 noes);

An amendment that prohibits all aid to UNESCO until that organization refrains from adopting politically oriented resolutions;

An amendment that limits military aid to South Korea to $145 million until the President certifies to Congress that progress is being made in expanding human rights in that country (agreed to by a division vote of 64 ayes to 44 noes);

An amendment that limits military assistance to Cambodia to $200 million and limits all aid to that country to $377 million;

An amendment that adds language requiring the strengthening of international nuclear safeguards and requires a report to Congress from the President on the efforts being made in that area;

An amendment that authorizes an additional $25 million for famine and disaster relief in Cyprus;

An amendment that inserts "and until" after "unless" in a section prohibiting funds for CIA operations in foreign countries unless the President finds that those operations are necessary to American national security;

An amendment that adds language providing for the dispersal of assistance funds only if the receiving country agrees to trade strategic raw materials with the United States and providing for the stockpiling or sale of those materials by the Federal Government (agreed to by a recorded vote of 244 ayes to 136 noes); and

An amendment that adds a new section making it the sense of Congress that any country in default of a debt owed to the United States begin to pay off its debt.

Rejected:

An amendment that sought to withhold security assistance funds from any state until the receiving country demonstrates that it is not violating human rights by condoning such practices as torture or detention without charges;

An amendment that sought to reduce funds for international organizations and programs by $26.6 million (rejected by a recorded vote of 165 ayes to 226 noes);

An amendment to the amendment limiting military assistance to Cambodia to $200 million and imposing a $377 million ceiling on all Cambodian aid that sought to raise the overall ceiling to $527 million and to strike the $200 million limit on military aid (rejected by a division vote of 29 ayes to 54 noes);

An amendment to the Cambodia amendment that sought to strike the $200 million limit on military assistance and to exclude humanitarian and refugee assistance from the $377 million ceiling;

An amendment that sought to add language allowing the President to withhold aid unless the receiving country agrees to trade strategic raw materials with the United States;

An amendment that sought to strike the section on prohibitions on aid to nations trading with North Vietnam;

An amendment that sought to end all aid and military credit sales to India (rejected by a recorded vote of 159 ayes to 223 noes with 1 voting "present");

An amendment that sought to insert "vital to the national defense" in lieu of "important to the national security" in a section allowing the President to approve CIA operations in foreign countries;

An amendment that sought to cut all funds authorized by 10 percent;

An amendment that sought to add a new section on control of Turkish opium;

An amendment that sought to reestablish the present $150 million ceiling on sales of military equipment to Latin America;

An amendment that sought to reduce funds for international organizations and programs by $13.4 million; and

An amendment that sought to limit contributions to the United Nations to $156 million.

Subsequently, this passage was vacated and S. 3394, a similar Senate-passed bill, was passed in lieu after being amended to contain the language of the House bill as passed. The House then insisted on its amendment and asked a conference with the Senate. Appointed as conferees: Representatives Morgan, Zablocki, Hays, Fascell, Frelinghuysen, Broomfield, and Derwinski.

Pages H 11591 H 11653

Privacy Protection: House passed amended S. 3418, to establish a Privacy Protection Commission, to provide management systems in Federal agencies and certain other organizations with respect to the gathering and disclosure of information concerning individuals.

Agreed to an amendment inserting the provisions of H.R. 16373, a similar House-passed bill. Agreed to amend the title of the Senate bill. Pages H 11661–H 11666

Late Reports: Committee on the Judiciary received permission to file reports by midnight tonight on the following bills: S. 663, to improve judicial machinery by amending title 28, United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission; and S. 1083, to amend certain provisions of Federal law relating to explosives. Page H 11666

Quorum Calls—Votes: One quorum call, one yea-and-nay vote, and five recorded votes developed during the proceedings of the House today and appear on pages H11586, H11594–H11595, H11604, H11611, H11625–H11626, H11631, and H11639–H11640.

Program for Thursday: Met at noon and adjourned at 7:55 p.m. until noon on Thursday, December 12, when the House will consider the conference report on H.R. 16901, Agriculture-Environmental and Consumer Protection Appropriations for fiscal year 1975; consider the following two measures under suspension of the rules: conference report on H.R. 16136, military construction authorization; and H.R. 17597, Emergency Unemployment Compensation Act of 1974; consider H.R. 16596, Emergency Jobs Act (open rule, 1 hour of debate); consider the following two bills under suspension of the rules: H.R. 17085, Nurse Training, and H.R. 17084, Health manpower; consider S.J. Res. 40, White House Conference on Libraries (open rule, 1 hour of debate), and H.R. 16204, Health Policy, Planning and Resources Development (open rule, 1 hour of debate).

Committee Meetings

COMMODITY FUTURES TRADING COMMISSION ACT AMENDMENTS

Committee on Agriculture: Met and ordered reported favorably to the House H.R. 17507, amended, to amend the Commodity Futures Trading Commission Act of 1974.

SUGAR PRICES

Committee on Agriculture: Subcommittee on Domestic Marketing and Consumer Relations continued hearings on sugar marketing conditions since defeat of sugar bill. Testimony was heard from public witnesses.

Hearings continue tomorrow.

BANK FAILURE

Committee on Banking and Currency: Subcommittee on Bank Supervision and Insurance continued hearings on failure of United States National Bank of San Diego. Testimony was heard from James Smith, Comptroller of the Currency; and James Saxon, former Comptroller of the Currency.

Hearings continue tomorrow.

TORTURE IN BRAZIL

Committee on Foreign Affairs: Subcommittee on International Organizations and Movements held a hearing on torture and oppression in Brazil. Witnesses heard were Rev. Fred Morris, former United Methodist missionary in Recife, Brazil; and Rev. J. Bryan Hehir, U.S. Catholic Conference.

FOREST RESERVES LEASING

Committee on Interior and Insular Affairs: Met and ordered reported favorably to the House H.R. 10491 amended, providing for leasing of forest reserves for commercial outdoor recreation purposes.

The Committee discharged the Subcommittee on National Parks from further consideration of H.R. 2624, Hells Canyon National Forest Parklands, and the bill is now pending before the full committee.

cluded in the congressional program, has mentioned the RFC. The distinguished majority leader of the Senate, Hon. MIKE MANSFIELD, in listing a number of measures he thought should be adopted by the Congress to try to save so many of our enterprises from disaster, spoke in favor of the RFC. In the economic statement made at the Democratic conference in Kansas City last weekend, enumerating measures that in their opinion were necessary to preserve the private enterprise system in this country, and to aid the economy, one of the essential measures proposed was the reconstitution of the Reconstruction Finance Corporation.

Mr. Speaker, I invite the Members of the House to join me in support of the bill, H.R. 16677 to reconstitute the Reconstruction Finance Corporation which I have introduced. This bill should be passed at once.

PERMISSION FOR COMMITTEE ON THE JUDICIARY TO MEET TODAY, NOTWITHSTANDING CLAUSE 31, RULE XI OF THE RULES OF THE HOUSE

Mr. RODINO. Mr. Speaker, I ask unanimous consent that the Committee on the Judiciary be granted special leave to meet this afternoon, Wednesday, December 11, 1974, without regard to clause 31, rule XI of the Rules of the House.

The SPEAKER. Is there objection to the request of the gentleman from New Jersey?

There was no objection.

ANTITRUST PROCEDURES AND PENALTIES ACT

Mr. RODINO. Mr. Speaker, I ask unanimous consent to take from the Speaker's desk the Senate bill (S. 782) to reform consent decree procedures, to increase penalties for violation of the Sherman Act, and to revise the Expediting Act as it pertains to appellate review, with a Senate amendment to the House amendment, and concur in the Senate amendment.

The Clerk read the title of the Senate bill.

The Clerk read the Senate amendment to the House amendment, as follows:

Page 8, of the House engrossed amendment, strike out all after line 4 over to and including line 14 on page 11 and insert:

SEC. 4. Section 1 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the Expediting Act, is amended to read as follows:

"SECTION 1. In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with the court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of a general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."

SEC. 5. Section 2 of that Act (15 U.S.C. 29; 49 U.S.C. 45) is amended to read as follows:

"(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to section 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

"(b) An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a)."

SEC. 6. (a) Section 401(d) of the Communications Act of 1934 (47 U.S.C. 401(d)) is repealed.

(b) Section 3 of the Act entitled "An Act to further regulate commerce with foreign nations and among the States", approved February 19, 1903 (32 Stat. 849; 49 U.S.C. 43), is amended by striking out "proceeding:" and inserting in lieu thereof "proceeding." and striking out thereafter the following: "Provided, That the provisions of an Act entitled 'An Act to expedite the hearing and determination of suits in equity pending or thereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three,' shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission".

SEC. 7. The amendment made by section 5 of this Act shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act. Appeal in any such action shall be taken pursuant to the provisions of section 2 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in effect on the day preceding the date of enactment of this Act.

The SPEAKER. Is there objection to the request of the gentleman from New Jersey?

Mr. HUTCHINSON. Mr. Speaker, reserving the right to object—and I do not intend to object—I would like to ask the chairman of the Committee on the Judiciary to explain the Senate amendment and tell us what it amounts to.

Mr. RODINO. Mr. Speaker, if the gentleman will yield, I will be happy to explain the Senate amendment.

Mr. Speaker, on December 9, 1974, the Senate agreed to the House amendment to S. 782 with an amendment highly technical and extremely minor in nature. The Senate's action expressed agreement with virtually every provision and policy approved by the House, including major amendments substantially increasing punishment for Sherman Act offenses. Moreover, the Senate amendment actually does not significantly change the intentions or will of the House as expressed in House Report 93–1463 filed with the House on Ostober 11, 1974.

The Senate amendment is confined to a change in procedures for posttrial appellate review.

At the time that S. 782 as amended was placed before the House for its approval, both the House bill and the Senate version thereof were in an agreement that present law providing for direct appeal of litigated district court judgments by either party to the Supreme Court ought to be changed with appeals henceforth made to circuit courts.

As an exception to this change in law that both House and Senate versions express and agree to, the House-approved bill would allow the Attorney General to certify directly to the Supreme Court that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. The Senate amendment restores the version originally approved by the Senate whereby either party could file for such direct Supreme Court review if the district judge who adjudicated the case enters an order to such effect.

The Senate amendment affords equal opportunity for possible direct Supreme Court review to either party to the case. This, I should add, is a position of fairness already expressed in current law whereby following the litigation, either party may file for direct review to the Supreme Court with that court.

The requirement of the concurrence of the district court judge had been eliminated in the House bill because it was the committee's intention, basically, to add safeguards against the filing of frivolous appeals and, thus, adding to the Supreme Court's docket. The Senate amendment, in effect, achieves the same result intended by the Judiciary Committee by requiring an impartial, objective concurrence in the alleged importance of the case by the judge who adjudicated the case.

For these reasons, it is readily understandable why the original Senate and House sponsors support the Senate amendment; why representatives of the President and of the Justice Department have urged House acceptance of the

Senate amendment; and why bipartisan support for the Senate amendment has been expressed by the members of the House Judiciary Committee and its Monopolies and Commercial Law Subcommittee.

Mr. HUTCHINSON. Under the present law, as I understand it, in an antitrust case, the losing party in the lower court may file an appeal directly with the Supreme Court of the United States.

Mr. RODINO. That is correct.

Mr. HUTCHINSON. Under the bill as passed by the House, it was intended that the Attorney General could determine whether or not an appeal should go directly to the Supreme Court. In all other cases an appeal would lie with the circuit court of appeals. Now, as I understand it, the Senate amendment provides that the district judge who heard the case will determine whether an appeal shall lie directly to the Supreme Court or whether the appeal will lie with the circuit court of appeals; is that correct?

Mr. RODINO. That is correct.

Mr. HUTCHINSON. With that explanation, Mr. Speaker, I withdraw my reservation of objection, and I have no objection to the Members of the House concurring with the Senate amendment.

The SPEAKER. Is there objection to the request of the gentleman from New Jersey?

There was no objection.

(Mr. RODINO asked and was given permission to revise and extend his remarks.)

The Senate amendment to the House amendment was concurred in.

A motion to reconsider was laid on the table.

CALL OF THE HOUSE

Mr. GROSS. Mr. Speaker, I make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

Mr. ROGERS. Mr. Speaker, I move a call of the House.

A call of the House was ordered.

The call was taken by electronic device, and the following Members failed to respond:

[Roll No. 668]

Alexander	Goldwater	O'Neill
Ashley	Grasso	Owens
Barrett	Gray	Parris
Beard	Gubser	Passman
Blatnik	Hanley	Peyser
Brasco	Hansen, Idaho	Podell
Breaux	Hansen, Wash.	Rarick
Brown, Ohio	Harsha	Reid
Buchanan	Hays	Roncallo, N.Y.
Burke, Calif.	Hébert	Rooney, N.Y.
Burton, John	Heckler, Mass.	Shoup
Carey, N.Y.	Holifield	Shuster
Chisholm	Howard	Smith, N.Y.
Clark	Jarman	Staggers
Collier	Johnson, Colo.	Stark
Conable	Jones, N.C.	Steiger, Wis.
Davis, Ga.	Kemp	Teague
Dent	Kuykendall	Thompson, N.J.
Diggs	Kyros	Tiernan
Dingell	Litton	Udall
du Pont	Luken	Wiggins
Esch	Mathias, Calif.	Wilson, Charles H., Calif.
Eshleman	Mills	Wyman
Fisher	Minshall, Ohio	Young, Ga.
Ford	Moakley	
Gettys	Moorhead, Pa.	
Giaimo	Murphy, N.Y.	
Gibbons	O'Hara	

The SPEAKER. On this rollcall 354 Members have recorded their presence by electronic device, a quorum.

By unanimous consent, further proceedings under the call were dispensed with.

PERMISSION FOR COMMITTEE ON PUBLIC WORKS TO FILE CERTAIN REPORTS

Mr. ROE. Mr. Speaker, I ask unanimous consent that the Committee on Public Works have until midnight tonight, December 11, 1974, to file reports on the following bills:

S. 3934, the Federal-Aid Highway Amendments of 1974;

H.R. 17558, to amend the act of May 13, 1954, relating to the Saint Lawrence Seaway Act Development Corporation to provide for a 7-year term of office for the Administrator, and for other purposes;

S. 4073, to extend certain authorizations under the Federal Water Pollution Control Act, as amended, and for other purposes; and

H.R. 17589, to designate the new Poe lock on the Saint Marys River at Sault Sainte Marie, Mich., as the "John A. Blatnick lock."

The SPEAKER. Is there objection to the request of the gentleman from New Jersey?

There was no objection.

REAL ESTATE SETTLEMENT COSTS

Mr. PATMAN. Mr. Speaker, I ask unanimous consent for the immediate consideration of the conference report on the Senate bill (S. 3164) to provide for greater disclosure of the nature and costs of real estate settlement services, to eliminate the payment of kickbacks and unearned fees in connection with settlement services provided in federally related mortgage transactions, and for other purposes.

The Clerk read the title of the Senate bill.

The SPEAKER. Is there objection to the request of the gentleman from Texas?

There was no objection.

Mr. PATMAN. Mr. Speaker, I ask unanimous consent that the statement of the managers be read in lieu of the report.

The SPEAKER. Is there objection to the request of the gentleman from Texas?

There was no objection.

The Clerk read the statement.

(For conference report and statement, see proceedings of the House of December 9, 1974.)

Mr. PATMAN (during the reading). Mr. Speaker, I ask unanimous consent that the further reading of the statement of the managers be dispensed with.

The SPEAKER. Is there objection to the request of the gentleman from Texas?

There was no objection.

The SPEAKER. The Chair recognizes the gentleman from Texas (Mr. PATMAN).

Mr. PATMAN. Mr. Speaker, the legislative agreement embodied in the conference report on S. 3164, the Real Estate Settlement Procedures Act of 1974, in my view represents the best possible resolution of the differences between the House and Senate measures.

Almost without exception, the agreement reached among the conferees reflects acceptance of the strongest consumer protection provisions of both bills. On balance, the bill emerging from the conference constitutes a highly effective tool with which both home buyers and home sellers can protect their interests and their pocketbooks. I am certain that in the months and years ahead this measure will stand as a barrier to the deceptive and fraudulent practices which have bilked home buyers and home sellers of hundreds of millions of dollars.

The provisions of the bill are of particular importance to low- and moderate-income families who have been drained of hard-earned funds at the hands of unscrupulous attorneys, appraisers, lenders, title insurers, and others involved in the real estate settlement industry. Indeed, abusive settlement practices have often resulted in robbing low- and moderate-income families of homeownership opportunities because they could not afford inflated and unjustified charges and fees they were required to pay in order to purchase a home. In a real sense, these unchecked abusive settlement practices mocked achievement of our congressionally adopted national housing goals, especially in the case of low- and moderate-income families, those most in need of decent dwellings in suitable living environments.

Concerning major aspects of the report: Both the House and Senate bills contain provisions for the preparation and distribution of special information booklets to inform home buyers about the nature and costs of real estate settlement services. In this connection, the Senate bill required that the average amount of settlement costs in the region where the settlement is made be presented in the special booklets. The House bill did not contain such a requirement.

Conferees agreed to accept the Senate provision with an amendment which directs HUD to conduct pilot demonstration programs to determine the most practical and efficient method to acquire and analyze data in order to present to home buyers the range of charges for settlement services in the housing market where the property to be purchased is located. HUD is to report its findings to Congress not later than July 1, 1976.

Mr. Speaker, the question at hand is not whether HUD can report such information to home buyers, but rather how it will acquire and analyze such information for inclusion in the special information booklets. The conferees agreed that disclosing the range of charges for settlement services would be a highly desirable and useful shopping tool for prospective home buyers. Moreover, HUD has already demonstrated its capacity to obtain such information. It did so in following a directive of the Emergency Home Finance Act of 1970 to de-