DIARY OF WHITE HOUSE LEADERSHIP MEETINGS -- 91st CONGRESS

May 20, 1969

At 8:35 a.m., Nixon said that foreign aid had originally been scheduled on the agenda but was removed because it was felt it would be more appropriate for a bipartisan leadership meeting.

Mitchell discussed extension of the Voting Rights Act which expires August 5, 1970. In practical effect, its major provisions apply to only 6 Southern states, and it would appear that the trigger mechanism was so devised as to exclude another southern state (Texas). The President said often during the campaign that he was opposed to legislation targetted against a particular section of the country. For that reason, when the Justice Department testifies, it will propose amendments which will make the statute applicable to the country at large. The 50% formula will be retained for a transitional period but then eliminated. Those who have been registered under the present system will be protected. Those who have served 6 months in the military service and those who have a 6th grade education will have a presumption of literacy. Examiners and observers will be available to go into any area where discrimination is shown. McCulloch said that he welcomes the proposals and felt that they would substantially improve the Act. Rhodes asked if the old law applies only to Negroes. Mitchell replied that it applies to all and that many whites have been registered. Wilson and Tower asked about states which require periodic reregistration. Mitchell said that the legislation would not affect any part of that process outside the literacy test area. Anderson asked if it had been made permanent. Mitchell replied it was difficult to make a decision on this point. New census information is necessary, but it was learned that the questions necessary to include would delay the completion of the census by 6 months. Cramer asked if the vote fraud section could not be tightened. McCulloch said he agreed it could be and should be and if so,

the President should message a bill to the Congress, for which purpose, the Attorney General's appearance before the Judiciary Committee could probably be postponed a few days. Scott said he believed the Cramer suggestion would help.

RMN said that he felt that the Attorney General had handled the Fortas matter with great restraint and sound discretion. There has been a great deal of speculation about the appointments of successors. Any discussions that RMN has on the subject are to be off the record. This is because he feels that he should leave preliminary matters to the Attorney General and maintain for himself a posture of detachment which will permit him to make the best appointments. He said that a number of people in this room have strong views and that recommendations should be conveyed to the Attorney General. "I consider these appointments even more important than Cabinet appointments, and I will not feel bound to make appointments from any particular area of from any particular group. I will appoint judges who will interpret the Constitution and law and not attempt to make the law. Of course, there is a grey area between the two." As to appointments, I will be "looking into the matter shortly." Members of Congress have been under consideration, but it now appears that none will be eligible until the 92nd Congress. Mitchell was asked to confirm. He said that Office of Legal Counsel had given the opinion that the pay raise raised a Constitutional barrier.

Scott asked if there was any objection to suggesting names to the press. RMN said that such suggestions would be welcome, that he wanted to look at the whole field.

Blount said that he has examined all of the several proposals for reform in the Post Office Department and has concluded that a government-owned corporation similar to that recommended by the Kappel Commission is the best. He does have certain major differences with the Kappel Report. Under the

plan which he wants to present to the Congress by June 1, the management of the corporation would be a Board of Directors of 9 members, 7 nominated from outside by the President and confirmed by the Senate on a staggered basis over a 7-year term and 2 others, including the manager, named by the first 7. Actions of the Board involving rate changes would be subject to a 60-day veto by Congress. The right to strike would be denied, but in lieu thereof, employees would be granted the collective bargaining rights and the binding arbitration proposal which they have publicly demanded. With respect to the latter, a permanent dispute panel would be established and empowered to engage in fact-finding, mediation and final arbitration.

Something has to be done to improve efficiency and reduce the deficit promptly or the postal establishment will be in terrible trouble 3 to 5 years hence. Today, the Department is moving 82 billion pieces of mail a year and by that time, the total will be 100 billion. H.R. 10,000 now championed by the unions, would cost for wage increases some $2.7 billion a year; if this deficit is not to be taken out of the public treasury, this will require a 5¢ postage increase on first class mail. The corporation would be given power to raise money to modernize facilities by borrowing up to $10 billion. It would not be required to act under a balanced budget for a transitional period of 5 years, but thereafter, income would have to equal outgo. Allott inquired about public service subsidied. Blount replied that they would be continued as at present with the new corporation being compensated out of the public treasury. Rhodes asked about government guarantees on the bonds. Blount said that this would be authorized up to $2 billion. Wilson reminded that the Post Office Department reaches every citizen; that the postal workers have the strongest lobby in Washington; that some thought must be given to what the workers can be told to justify the proposal. Blount said that he realized that the

union leaders have their own positions to maintain and that they know a great deal more about the process of lobbying than about the collective bargaining process. However, they have publicly endorsed both collective bargaining and compulsory arbitration. It can be shown that workers will fair better under the new system. The Vice President voiced the concern felt by lawyers who have practiced labor law about compulsory arbitration. Rhodes asked if there would be a Congressional veto procedure following a final aribtration settlement. Scott said that this would be unworkable because it would result in a union appeal whenever the decision was not to their liking. Allott said that it was absolutely necessary to passage of the bill to offer postal workers a "bigger carrot." Cramer suggested that the new plan emphasize comparability as one of the primary objectives. Blount said that he believes in that concept. Corbett warned that the legislation would die unless the Administration first won the support of the postal unions. He suggested that the leaders be called in and consulted and that if they proved to be viblently opposed to some particular part, it would be necessary to hunt for an acceptable alternative." Public service subsidies should be charged against the public treasury. He anticipates no union complaint about the bond proposals. RMN asked how many employees the POD has. Blount said 730,000. RMN said "Times two" in terms of votes. Ford said that public opinion polls showed broad public support (about 2 to 1). Some effort should be made to compromise with the unions, but the Administration should be firm and stay on the side of the people, not with the employee leaders who have a vested interest. Blount said that Ford had just made his speech for him.

The Vice President asked why this lobby was so powerful. Scott said, "It is the only lobby that gets into the kitchen every day." RMN said that most postal workers, particularly letter carriers, are "mini-politicians." He agreed that a "good carrot" would be well advised, and he suggested

that the message emphasize those features which tend to show that the employee will fair better under the new system than under the old. It is not necessary to emphasize the goal of efficiency because most people instinctively understand that a better postal service is what this proposal is intended to achieve. Postal workers will "stand a lot taller" if they "don't have to go, hat in hand, to their Congressman about every little grievance and every pay raise." Anderson suggested that it might be possible to arrange some trade with the unions; their support of this plan in exchange for Administration support of some part of H.R. 10,000. Corbett said that union leadership had admitted to him that H.R. 10,000 is merely their bargaining position and that they are willing to accept something less. RMN pledged his full support to the Postmaster General and to the reform measure he has recommended. He also said that he would appreciate the support of each member of the Leadership.

At the President's invitation, Ford mentioned that the only major legislation in the House this week is the $3.6 billion Supplemental Appropriations bill. It will be under debate today and the rest of the week. He said that ABM opponents may attempt to write an expenditure limitation into the bill. RMN said, "Don't argue the germaneness question too strongly; let them offer their amendment."

The President then introduced Henry Kissinger to give a summary of world reaction to the President's Vietnam speech. RMN interrupted to announce that on June 8 he will meet with Rogers, Laird, Bunker and Thieu at Midway Island, where they will discuss the Paris Peace Negotiations and the military progress in Vietnam. He assured that rumors of differences between the United States and Saigon were without any foundation. Kissinger confirmed the latter. He said there had been a broad gap between Thieu and the Johnson Administration. Indeed, that there was a group who promoted a "dump Thieu policy." The Nixon Administration

has approached and consulted regularly and faithfully with Saigon. For this reason, among others, the entire attitude and atmosphere changed. This accounts in large part for the favorable reception Saigon gave the Nixon speech. That approval is more than a public relations gimic. We have intelligence not only about what they have said to us but what they have said to each other. Kissinger gave a background of the preparation and timing of the speech. The first discussions took place at Key Biscaine before the Inauguration. On April 20, it was decided that the message should be delivered about the middle of May. The point here is that the message was not responsive as "the press seemed to gather" to the NLF-10 point plan. The policy of NLF has been twofold, (1) to mobilize world opinion so as to isolate the U.S. from the world community and thereby undermine support for the war on the domestic front; and (2) to use the Paris talks as a vehicle to promote a split between the U. S. and Saigon. Hanoi must be convinced that both policies have failed when it reads reaction to the Nixon speech. In this country, comments made by Members of Congress of both parties and from all points of the philosophical spectrum show unison rather than a conflict. Comments in all of the foreign press outside the Soviet sphere of influence have been unanimous, unqualified and enthusiastic in their approval. The position taken by Le Monde, the newspaper read by much of the French-speaking world, is especially significant. The Japanese reaction was favorable, the first time the Japanese have been willing to let their feelings be known publicly. Yugoslavia, which is a good bellwether, responded favorably. Elsewhere in the communist world, including Russia, criticism was muted. The communist press quoted long passages of the Nixon speech, including the conciliatory paragraphs. This is something they seldom do. In Hanoi, the reaction was different than that in response to every previous American pronouncement. They promised to study it. On Sunday, they published a commentary, knit-picking the individual proposals. This suggests their willingness to negotiate and discounts the possibility of total rejection.

RMN summarized. This is the first time in the Vietnam struggle that the President has clearly defined America's goals, offered the other side a way out, and built a platform broad enough to accommodate most viewpoints on the domestic front. In this connection, the President made a conscious effort to move away from the old LBJ position which assumed that "you are either with us or against us." We cannot settle for the old communist "talk-fight" strategy. There will be a time lag of from 2 to 3 months before the true enemy reaction can be fully judged. However, we are in the position of "controlling events rather than simply reacting to them."

RICHARD H. POFF

FOR IMMEDIATE PELEASE MAY 20, 1969

OFFICE OF THE WHITE HOUSE PRESS SECRETARY

THE WHITE HOUSE

PRESS CONFERENCE
OF
CONGRESSMAN GERALD R. FORD
AND
RONALD L. ZIEGLER
THE ROOSEVELT ROOM

AT 10:35 A.M. EDT

CONGRESSMAN FORD: Good morning. I regret to say that Senator Dirksen was unable to attend the meeting this morning because he is out at Walter Reed for one of his more or less regular check-ups; no crisis, no unforeseen problem. He is simply out there for the purpose of a regular check-up.

The meeting this morning with the Leadership and the President covered generally four areas: One, the Attorney General was at the meeting and discussed the forthcoming Presidential message in the area of the extension of voting rights legislation. The present act expires in August of 1970. The Attorney General is coming up to the House Committee on the Judiciary sometime this week or early next week to make recommendations and coincidental with that testimony by the Attorney General will be a Presidential message proposing the extension of the Voting Rights Act.

The Postmaster General also appeared before the Leadership to discuss in broad terms the anticipated Presidential message and the recommendations of the Post Office Department for the reorganization of the Post Office Department.

Dr. Kissinger took time this morning to discuss their estimate of the President's speech, both domestically and internationally. It was also pointed out that it was more or less anticipated that there would be a follow-up meeting with the Saigon government. It was reported by Dr. Kissinger that the Saigon government is enthusiastically favorable to the specifics, the recommendations of the President in his speech of last Wednesday.

It was also indicated that within a week or so there undoubtedly would be a foreign aid message from the President.

Those are the four areas we covered. I will be glad to answer any questions.

Q In view of Dr. Kissinger's statement that Saigon was enthusiastically favorable, why is there such a hurried meeting with President Thieu?

CONGRESSMAN FORD: I don't believe this could be called a hurried meeting. It is my understanding that this had been to some extent anticipated in the overall plans that had been made both prior to the speech and subsequently. It doesn't necessarily coincide with the speech, but it was a part of the overall plan that had been worked out since the President took office.

Q What was Dr. Kissinger's estimate of the domestic effect of the speech?

CONGRESSMAN FORD: The domestic effect, editorial-wise and otherwise, he reported was favorable. I can assure you that from the mail I have received and the editorials that I have seen from various newspapers throughout the country, it indicates that the President got a good public response domestically.

According to Dr. Kissinger, the survey of the newspaper editorials world-wide in the Free World was extremely favorable. The French press, the Indian press, the British press, all seemed to consider it a great forward step in an effort to resolve the problem in Vietnam.

Q Jerry, did you get an estimate from Dr. Kissinger of the Communist reaction to the speech?

CONGRESSMAN FORD: I think it can be best summarized that he felt their response a day or so after the President's speech was a rebuttal, but not a rejection.

Q Did you have a feeling that troop withdrawals would be discussed at this forthcoming meeting at Midway?

CONGRESSMAN FORD: The agenda was not discussed except that it would include the political as well as the military, and none of the details other than that were outlined.

Q You said Dr. Kissinger said that this meeting between the two Presidents was more or less anticipated. What did he mean by that; that they expected that President Nixon would have to talk to him?

CONGRESSMAN FORD: No, it was anticipated that as we move down the road trying to find an answer that the two Heads of State would get together to make certain and positive, not only in the present but in the future, that they would be going down the same track.

In the past, as you know, not during this Administration, but previously, there had been some public differences between Saigon and Washington. I think this Administration wants to make sure we don't make that mistake again.

Q Are you talking specifically about the Midway meeting?

CONGRESSMAN FORD: Yes, sir.

Q Mr. Ford, was there any discussion about the process by which the President is picking some nominees for the Supreme Court or where that stands?

CONGRESSMAN FORD: There was no discussion.

Q What is the general shape of the Post Office reorganization that is going to be proposed?

CONGRESSMAN FORD: Until we have another meeting and have an opportunity to try and iron out some of the areas where there are some uncertainties at the moment, I think it is best not to discuss the details.

Q Mr. Ford, is the Speaker's decision to let the Senate take the ABM first a setback for you, for those who are proponents of the ABM?

CONGRESSMAN FORD: As I indicated, I think it would have been helpful to have the issue in the House first. I don't think it is a setback for the Administration at all, because I still feel that the Administration will be successful in getting Congressional approval for the ABM Safeguard system.

I ought to mention that in the supplemental appropriation bill that is on the Floor of the House today and tomorrow I am told that some of the ABM opponents might take the initiative and try to write in some limitation preventing the Defense Department from obligating or spending any money for ABM research and so forth. I personally would welcome their initiative in this regard, because I think we might be very helpful on the cause by giving them a pretty good licking.

Q You control the motion to recommit on that bill. Do you anticipate you might get something to put in a bill so you could recommit?

CONGRESSMAN FORD: The motion to recommit is usually used as something favorable for the Administration. I don't think we would relinquish this prerogative of the minority for a test on this. But if they offer a motion or an amendment during the consideration of the supplemental appropriations bill as we read it for amendment, I hope we can have a test on it.

Q But that would be a non-roll call test because you would be in committee.

CONGRESSMAN FORD: We could get a division and a teller vote and I think you sitting in the gallery could count the troops on either side, and I think it would be overwhelmingly for the Administration.

Q Are you saying we are totally in tune with the Saigon government for the goals in Vietnam, for example, the coalition government? In the speech it seems to me there are wide loopholes where it would be acceptable to us and the Saigon government has not so indicated.

CONGRESSMAN FORD: As I understand it, the Saigon government approved the words, language, and the phrases as the President gave the speech on Wednesday. There has been no modification of the President's view and the Saigon government endorsed it.

Q Did you discuss at all the problem of a coalition government?

CONGRESSMAN FORD: No discussion was held on that particular point.

Q Just a minor question -- Ron might have covered this this morning, and I was not here for that -- since this meeting with President Thieu was not a hastily called meeting, and since it could have been convened, I assumed, on June 10, for example, since the President was going to speak at Ohio State University on June 8, and since that is of significance, going to a major college campus, what is your feeling at this moment that he is not going to a major college campus?

MR. ZIEGLER: I can respond to that. I did not cover that particular question this morning.

The date of the meeting, of course, was arranged at a time which could best fit both President Thieu and President Nixon's schedule, and that was the reason for the date. As Congressman Ford indicated, the President's meeting had been anticipated. The President has not had an opportunity to meet personally with President Thieu since he has been in office, and the President wanted to do this at the earliest possible time.

Q Did you establish whether he has met him before as a privite citizen?

MR. ZIEGLER: The President indicated that he has met President Thieu on two different occasions. But he has not met with President Thieu since he has been President, of course.

One additional fact that I didn't give you this morning in relation to a question on this, Ambassador Bunker, Secretary Rogers and Secretary Laird will accompany the President to Midway.

Q Could I ask you a corollary question? Is the President speaking at another college commencement exercise to make up for Ohio State?

MR. ZIEGLER: There is nothing on the schedule now.

Q Will Bunker be coming back to this country after Midway?

MR. ZIEGLER: No. Again, the schedule is not totally firm, but the information I can give you is that Ambassador Bunker, Secretary Rogers and Secretary Laird will be at the meeting in Midway.

Q Will General Wheeler be there?

MR. ZIEGLER: Those are all the individuals I have now that I can indicate to you.

Q You don't rule out General Wheeler then?

MR. ZIEGLER: I just don't know. As soon as it is firmed up we will give it to you.

Q Will Secretary Rogers be coming back here and then going to Midway or will he go from Asia?

MR. ZIEGLER: It would be my feeling that he would be here, but I don't have his schedule.

Q He is due back here on May 27th.

Q Can I ask how long the voting rights legislation will be extended for?

CONGRESSMAN FORD: The actual term was not discussed. There was at least one who raised the question of whether it would be permanent legislation. I think this is something that will be resolved prior to the President's recommendation, but no firm decision was made on it.

Q Do you want any changes in that?

CONGRESSMAN FORD: Yes, I think there can be some beneficial changes. I think in general I can say that it will be broadened to be all-encompassing as to geography and it will have stronger provisions related to vote frauds, the corruption aspect.

Q Congressman Ford, did the situation on the surtax come up and could you give us your assessment on whether the surtax extension is in trouble in the House now?

CONGRESSMAN FORD: There was no discussion at the meeting this morning concerning the proposed tax bill, the surtax, the investment tax credit, repeal and the other tax reforms represented by the President. But it is my personal feeling that in the final analysis the Congress will take affirmative action and if we don't, I think the Congress can be charged with failing to face up to a serious economic threat, inflation, and so forth.

So I personally strongly support the President's proposal and I hope the Congress has the good sense to move ahead and do something about the overall problem.

Q How about the spending limit?

CONGRESSMAN FORD: There was no discussion about the spending limit. I don't mind reiterating that I believe that the provision in the supplemental appropriation bill is good legislation. I think the Congress will eventually approve it in one form or another.

Q When do the messages go up?

CONGRESSMAN FORD: The voting rights -- no special date, but I would say within a week or maybe before. The one on Post Office reorganization, probably sometime next week.

MR. ZIEGLER: Possibly.

Q Was there any discussion on drug control, Federal legislation, in light of the Supreme Court decision yesterday?

CONGRESSMAN FORD: There was no discussion on that.

Q Was there any discussion on Supreme Court vacancies?

CONGRESSMAN FORD: No.

THE PRESS: Thank you.

END (AT 10:50 A.M. EDT)

HOUSE ACTION, PERIOD MAY 13 THROUGH MAY 19, 1969

Tuesday, May 13, 1969

The House passed by voice vote 11 Bills from the House Committee on Ways and Means.

Wednesday, May 14, 1969

SALT WATER CONVERSION

The House passed by voice vote, S.1101, to authorize appropriations for the saline water conversion program for fiscal year 1970.

CRIME COMMITTEE FUNDS

The House passed by voice vote, H.Res.399, a funding resolution for a select committee on crime.

Thursday, May 15, 1969

MARITIME AUTHORIZATION

The House passed by voice vote, H.R.4152, to authorize appropriations for certain maritime programs of the Department of Commerce.

Monday, May 19, 1969

SUSPENSIONS (THREE BILLS)

The House under suspension of the rules, passed the following three Bills by voice vote:

1. H.R.10595 - extension of Great Plains Conservation Program
2. H.R.6808 - relating to Education Benefits provided Veterans and certain dependents
3. S.402 - relating to various Veterans' housing programs

Tuesday and Balance of Week

H.R.11400 - Second Supplemental Appropriation Bill, FY 1969 (subject to rule being granted Tuesday, May 20, 1969)

Working Paper for the Task Force on Productivity and Competition

THE CONGLOMERATE MERGER

By

Ronald H. Coase

There is a loud clamour to proceed against conglomerate mergers under the antitrust laws and the political pressures exerted for such action are strong. It is my view that such pressures should be resisted, an opinion which I know is shared by some other members of the Task Force.

The acquiring of an enterprise by a firm which has interests in other unrelated enterprises, unlike a horizontal merger, has no direct anti-competitive effects. It leaves the competitive situation essentially unchanged. Indeed, the main complaints about the conglomerate relate to other things. It is said that a firm with a high price/earnings ratio (based on the assumption that its profits will grow rapidly) is able, through acquiring firms with a low price/earnings ratio, to produce an apparent rise in the per-share earnings and thus justify the pre-existing belief in the rise in its profits. It is, of course, clear that this process cannot go on for long, (if this is the real basis for the conglomerate's rapid growth in profits) since it needs more and more acquisitions of organizations with low price/earnings ratios to maintain this apparent rapid growth in the earnings of the conglomerate, as the acquired firms are presumably ones in which there is little prospect of a rise in earnings or a considerable chance of decline. Whether investors are, in fact, misled about what is going on, I do not know. But if there is a problem, it seems clear that it is one for the Securities and Exchange Commission.

It is also claimed that these conglomerates will be inefficient. A more likely result is that some will be inefficient and some will be efficient. Competition will sort them out. Those that are inefficient will find resources hard to get and may indeed be forced to dispose of some of their constituent parts. As it is impossible to determine by court proceedings which of these mergers will be efficient and which will not, and competition will in fact do this (and probably in less time than the court proceedings would take), there seems little point in using the efficiency issue as a basis for antitrust actions.

Some support for antitrust action against conglomerate mergers has been based on the fact that the firms might engage in reciprocal buying between constituent units. This practice might, of course, lead to greater efficiency (for example, by reducing marketing costs) or it might lead to inefficiency (by substituting a subsidiary's higher cost supplies for an outsider's lower cost supplies). If this practice leads to efficiency, there is no reason to stop it; if it leads to inefficiency, there is no reason why the conglomerate should adopt it (since it would reduce its overall profits).

No convincing case has as yet been made for taking antitrust action against conglomerate mergers. Until it has, the Antitrust Division should resist the pressures and devote its resources to combatting clear threats to the competitive process.

I do not regard this conclusion as inconsistent with the view that there are other values to be taken into account apart from the efficiency, narrowly conceived, with which society uses its resources. One of these values is that it is undesirable to hang a man for an imaginery crime.

If policy is to be based on "fear of size," it is surely desirable to discover what is really feared, whether it results from size and whether this comes about in all circumstances or only in some. Even if these fears are properly based and size in certain circumstances is found to have consequences that ought to be feared, and these consequences are such as to be properly dealt with under the antitrust laws, it is by no means clear that the Department of Justice should give first priority to recent conglomerate mergers, most of which are outranked in size by a hundred or more other firms in the United States. What I urge (with no more than that modicum of moral fervour proper in the circumstances) is that antitrust actions should not be brought unless there is reason to believe that the practices attacked have serious adverse consequences, properly handled by the antitrust laws. This does not seem to me to have been established, as yet, in the case of the conglomerate merger. A regard for procedural decency may indeed often reduce one's chance of influencing policy but not, I hope, when one is dealing with the Department of Justice.

Working Paper for the Task Force on Productivity and Competition

RECIPROCITY

By

George J. Stigler

The allegation of reciprocity in the dealings between independent companies is extremely widespread, although systematic quantitative study of the extent of reciprocity has never been made. The doubts of the importance of reciprocity (except in one important and identifiable class of dealings) held by the economist may be stated.

Consider first the fully competitive situation in which seller S produces X, and purchases Y in producing it, and buyer B produces Y, and purchases X in producing it. Now let B initiate reciprocity, refusing to buy X from S unless S buys Y from B. The possibilities are:

1. B sells Y on the same terms as his rivals (and, in each of these cases, S sells X on the same terms as his rivals). There is no cost-or-gain to either party in the reciprocity.
2. B sells Y on more favorable terms than his rivals. Then compulsion is not necessary to get S's patronage.
3. B sells Y on less favorable terms than his rivals. Then S will be injured by purchasing from B.

Clearly, in case 2 there need be no compulsion to reciprocity and in case 3 the reciprocity will be refused. Case 1 is harmless and pointless, and I assert that it is quantitively negligible. The non-economist will often object to case 1:

(a) The preference given B's product is unfair to rivals selling on equal terms. The answer is double: the preference will not be

given if it imposes any cost on S; and if there is competition the rivals are not injured in the least: they can sell elsewhere the quantity they previously sold to S, and without a reduction of price. Differently put: neither supply nor demand has changed, so price will not change.

(b) The reciprocity eliminates "selling expenses". Putting aside the question of fact (for often reciprocity complicates trading), if there are economies from the reciprocity, the practice should spread, and will not injure competition.

The opposite situation, where S is the only seller, B the only buyer, raises no interesting questions of reciprocity, which is inherent and unavoidable. There remains the case of one-sided monopoly.

So long as the seller (or buyer) with monopoly power has a single price, reciprocity has no real effect. Suppose the monopolistic seller extorts a preferential price from the buyer--then he is using a portion of his monopoly powers indirectly when he could be obtaining the same extra sum directly by selling at a higher price. If the seller (or buyer) with monopoly power sets a different price for some buyers than for others (and so practices price discrimination), it is possible that he may increase his profits. But the only purpose in varying prices through reciprocity (paying different prices to different customers for their products) would be to conceal the discrimination.

The case for reciprocity arises when prices cannot be freely varied to meet supply and demand conditions. Suppose that a firm is dealing with a colluding industry which is fixing prices. A firm in this collusive

industry would be willing to sell at less than the cartel price if it can escape detection. Its price can be reduced in effect by buying from the customer-seller at an inflated price. Here reciprocity restores flexibility of prices.

In short reciprocity is probably much more talked about than practiced, and is important chiefly where prices are fixed by the state or a cartel.

February 18, 1969

SUMMARY OF RECOMMENDATIONS OF THE TASK FORCE

ON PRODUCTIVITY AND COMPETITION

We present here a summary of the recommendations of the Task Force on Productivity and Competition. These recommendations are elaborated and defended in the accompanying Report.

1. We recommend that the President issue a general policy statement (a) establishing the Antitrust Division as the effective agent of the Administration in behalf of a policy of competition within the councils of the Administration and before the independent regulatory commissions; (b) urging those commissions to enlarge the role of competition in their industries; (c) marshaling public support for the policy of competition.

2. We urge the commissions to permit free entry in the industries under regulation and to abandon minimum rate controls, whenever these steps are possible-- and we think they usually are; and we urge the President, when occasion permits, to appoint at least one economist to membership in each of the major commissions, and institute effective procedures for the review of the performance of the commissions.

3. To enhance the effectiveness of the Antitrust Division, we urge the Attorney General and the Assistant Attorney General in Charge of Antitrust to insist that every antitrust suit make good economic sense, and to institute semi-public conferences to assist in the formulation and frequent reevaluation of enforcement guidelines.

4. We recommend that the Department of Justice establish close liaison with the Federal Trade Commission at the highest levels, with a view toward fostering a harmonious policy of business regulation.

5. We recommend that the Department bring a series of strategic cases against regional price-fixing conspiracies, which we believe to be numerous and economically important.

6. We cannot endorse, on the basis of present knowledge of the effects of oligopoly on competition, proposals whether by new legislation or new interpretations of existing law to deconcentrate highly concentrated industries by dissolving their leading firms. But we urge the Department to maintain unremitting scrutiny of highly oligopolistic industries and to proceed under section 1 of the Sherman Act--which in our judgment reaches all important forms of collusion--in instances where pricing is found after careful investigation to be substantially noncompetitive.

7. The Department of Justice Merger Guidelines are extraordinarily stringent, and in some respects indefensible. We suggest a number of revisions in the accompanying Report.

8. We strongly recommend that the Department decline to undertake a program of action against conglomerate mergers and conglomerate enterprises, pending a conference to gather information and opinion on the economic effects of the conglomerate phenomenon. More broadly, we urge the Department to resist the natural temptation to utilize the antitrust laws to combat social problems not related to the competitive functioning of markets.

9. We recommend new legislation to increase the monetary penalties, at present largely nominal, for price fixing.

10. We urge a new policy for antitrust decrees. The Department should not seek the entry of regulatory decrees: decrees that envisage a continuing relationship with the defendant. Save in exceptional circumstances, all decrees should contain a near termination date, ordinarily no more than 10 years from the date of entry. And the Department should undertake a review of existing decrees to determine which should be vacated as obsolete or inappropriate.

11. The Expediting and Webb-Pomerene Acts should be repealed, and the Robinson-Patman Act substantially revised.

12. Mr. Alexander L. Stott dissents from certain parts of the Report and from certain of the above recommendations. Mr. Raymon H. Mulford dissents from two recommendations.

REPORT OF THE TASK FORCE
ON PRODUCTIVITY AND COMPETITION

The Task Force on Productivity and Competition submits its report on the problems which will be confronted by the new administration in this area, and the steps which we recommend to be taken. The report is presented under three general headings:

I. The Administration's Policy of Competition and the Role of the Antitrust Division and the Regulatory Commissions in This Policy.

II. Organization and Procedure in the Antitrust Division.

III. Recommendations for Change in Antitrust Policy.

Individual task force members would often change the emphasis of the Report, and larger differences are presented as dissents.

I. General Policy

A. Antitrust Policy

The American Way, as we are constantly told, is to rely upon competitive private enterprise to do most of the work of allocating resources to industries and firms, organizing production, and providing economic progress. We are constantly travelling a shorter distance down this Way, however: for good reasons and for bad we have almost continuously expanded the governmental controls over economic life, and in recent years important restrictions have been placed upon private enterprise to protect the balance of payments. Some of the vast arsenal of public controls are unnecessary, and a large proportion of the necessary controls are excessively

restrictive of competition. As one example, the safety of financial institutions is of course a major public concern, but this safety can often be achieved by insurance or similar devices, and hardly ever requires that competition be suppressed to the extent that the most incompetently managed institution will be prosperous, and hence safe.

The traditional American policy of seeking to minimize regulation of economic life is a profoundly wise policy, and deserves to be reasserted and implemented. Both logic and political expediency--not always close allies--dictate that economic freedom be subjected to the discipline of competitive markets. We believe, therefore, that the President should issue a general policy statement on competition and public regulation, to achieve at least three important purposes:

1. To establish the Antitrust Division as the effective agent of the Administration in behalf of a policy of competition, in intragovernmental groups, and before independent regulatory bodies.
2. To encourage and urge the regulatory bodies--which cannot ignore the clear policy positions of the President even when his appointive power is dormant--to enlarge the role of competition in their respective industries.
3. To revive and strengthen public support for the policy of competition, and to establish the bona fides of the Administration as the protector of <u>both</u> consumer and businessman.

An executive order or a major presidential address would be an appropriate vehicle for this declaration. Whether or not a formal statement commends

itself, we believe that the correct policy is one of persistent and resourceful exploitation of competition wherever possible.

B. The Policy of Competition in the Regulated Industries

Our mandate to examine productivity and competition in the American economy compels us to brief examination of the work of the regulatory commissions themselves. The regulated industries comprise one-eighth or more of the economy in terms of income, and are too important to be omitted from our Report.

The tasks assigned to the regulatory agencies are various: to prevent monopoly pricing (as with telephone and pipelines); to prevent congestion (as with radio and television frequencies); to provide safety to savers (as with financial institutions); and so on. It is not possible for us here to examine these purposes critically, although it is notorious that in certain industries (such as motor trucking) there is no respectable case for economic regulation. There is widespread disenchantment with regulatory purposes as well as regulatory processes, and a general belief that excessive rigidity, expensive review of economically trivial details, and frequent failure to achieve any important results have characterized our regulatory efforts.

In two directions, we are convinced, there should be a major reorientation of the regulatory policy:

1. Entry of new firms should be encouraged wherever an absolute contradiction with regulatory goals is not involved. At present the practice is universally the opposite: to prohibit or ration with utmost severity the entrance of new firms.

2. Allow much freedom in price competition. The regulatory bodies should abandon minimum rate regulation whenever possible (and it is usually possible), and rely chiefly on maximum rate regulation.

Where rates are regulated, it is essential to make both changes: there is little merit in allowing additional firms to enter if they are not held to the test of unfettered competition with the existing firms.

We urge the Administration to pursue three complementary paths of reform in the regulated industries:

First, the commissions should have the merits of competition pressed upon them. Competition is not a matter of all or none, and the fact of regulation should not exclude competition as a force at each of a hundred points where it is relevant and feasible. If there must be only one railroad there can still be several truckers, several freight forwarders, and the possibility of inter-modal competition.

Second, the primary method of giving a larger role to competition is by appointing commissioners who understand and believe in a policy of competition. We believe that every regulatory body should have at least one economist as a commissioner. Quite aside from the implementation of the desire for more competition, this proposal has a decisive defense: economic regulation poses more economic than legal problems, and an economist knows more about economics than a non-economist. The economic triviality and irrelevance of much activity of the regulatory commissions is patent and inexcusable.

Third, the regulatory commissions are largely out of public control. Once in a decade or two, at most, a commission will be investigated by

Congress. The Administration should explore methods of getting more meaningful and effective reviews than we now get. We do not know whether the best method is an enlarged Bureau of the Budget section, a national commission, the creation of academic review committees, or a special adviser to the President. The best method, however, is surely not infrequent, partisan Congressional review. The present rule of the regulatory bodies is undirected, unmeasured, and unevaluated.

II. Organization and Procedure in the Antitrust Division

A. The Utilization of Economic Knowledge

We anticipate little opposition to the proposition that the Antitrust Division make full and effective use of economists and their special skills. These skills are often necessary to understand the effects of economic practices (an example is market-sharing in fixed proportions), to assess the economic importance of individual cases, and to assist in devising remedies that will not shatter on economic realities. We endorse the policy of having a highly professional economist serving as adviser to the head of the Division, and a strong permanent staff of economists.

The problem is not the goal of an economically sophisticated antitrust policy, but its implementation. A division charged with the enforcement of a statute must of course be directed and largely staffed by lawyers. Unless there are substantial incentives to the staff to utilize economics--whether by central direction, or vastly more powerfully, by demonstrated assistance in winning cases--the non-lawyer will often be viewed by the lawyers as a mysteriously necessary obstacle to smooth operations. The Assistant Attorney General will have succeeded in making a truly major contribution to antitrust policy if he establishes the relevance of economic knowledge.

B. The Development of Criteria for Classes of Cases (Guidelines)

When the Antitrust Division is confronted by a large number of similar cases--and it must now be scanning many hundreds of mergers each year--it will inevitably have rules to guide the numerous men who pass on individual cases. The question is not whether to have criteria or guidelines, but how to arrive at them.

We believe, for reasons we discuss below, that the present merger guidelines are questionable in important respects. Here we consider the procedures for formulating guidelines.

A set of rules for a class of cases will be desirable only if two conditions are fulfilled:

1. There are a large number of uncontroversial, easily identified cases. If there are not, the rules give little help to either business or the Division.
2. Controversial or objectionable cases cannot be repackaged to avoid scrutiny.

The way to determine whether mergers, for example, meet these conditions is to examine a large number of them in the light of legal and economic knowledge. The Antitrust Division will perform this task vastly better if it uses the large amount of professional expertise available outside the Division. We therefore recommend that the Division have semi-public conferences to explore difficult areas of policy, inviting legal and economic experts to propose or discuss guidelines. Some members of the task force would prefer to have formal notice and public hearings in establishing rules. If rules are adopted, a periodic review of them by the

same procedure will be a useful method of conferring flexibility upon them. A specific application of this method is proposed below for mergers.

C. The Role of the Federal Trade Commission

No review of antitrust policy would be complete that ignored the Federal Trade Commission, which is charged with enforcement of, among other statutes, the Clayton Act, of which Section 2, the Robinson-Patman Amendment, and Section 7, prohibiting mergers and acquisitions that may substantially lessen competition, are particularly important; and the Federal Trade Commission Act, whose operative provision, Section 5, forbids "unfair or deceptive acts or practices", a term that has been interpreted to embrace even more than the vast area of anticompetitive behavior proscribed by the Sherman and Clayton Acts, as well as consumer fraud and some "immoral" sales methods such as lotteries. As is evident, the Commission's jurisdiction largely overlaps that of the Antitrust Division.

In its antitrust work, the FTC has concentrated on price discrimination, on practices believed to oppress or coerce small dealers, and on mergers, especially vertical and conglomerate, and usually in industries such as food products, groceries, and cement--industries which by long-established understanding with the Antitrust Division have been assigned as the Commission's sphere of primary competence.

Unhappily, little that the Commission undertakes in the antitrust area can be defended in terms of the objective of maintaining and strengthening a competitive economy. Consider price discrimination. There is now an impressive body of literature arguing the improbability that a profit-maximizing seller, even one with monopoly power, would or could use below-

cost selling to monopolize additional markets. Yet, not only has the Commission continued to bring predatory price discrimination cases, but the alleged danger of predatory pricing remains a principal prop of its vertical and conglomerate antimerger cases. As for "secondary line" discrimination (that is, giving discounts to some dealers or distributors but not to others who compete with them), the Commission has never attempted to differentiate those cases (if there are any) in which a monopsonistic buyer is able to extract unjustified price concessions from his suppliers to the prejudice of his competitors from those in which discrimination is employed by oligopolistic sellers who wish to cut prices secretly,--and should be encouraged to do so--and those in which price differences (which the Commission tends to equate, erroneously, with discriminations) are not, in fact, discriminatory. Over the last eight years the Commission, often under the prodding of reviewing courts, has pulled some of the sting from enforcement of Robinson-Patman against secondary-line discrimination. It has demanded somewhat stronger proof of competitive injury; the meeting-competition and cost-justification defenses have been rendered meaningful; and the provisions of the Act relating to advertising allowances and brokerage payments are, in general, no longer used to compel sellers to compensate for services that are not economically beneficial to the seller (such as advertising by tiny retail outlets or brokerage when a broker's services can be dispensed with). Although the retreat from per se rules against secondary-line discrimination has led to a general diminution of enforcement activity by the FTC (private suits continue, of course, and are discussed later) the Commission still brings many cases that impair,

rather than promote, competition and efficiency. For example, the Commission has in recent years waged vigorous war against "functional discounts", which are discounts offered to middlemen who perform certain distributive functions (such as warehousing) that other middlemen, who are not given the discounts, do not perform. Moreover, as explained later in this Report, we can conceive of no case of discrimination in which the Sherman Act would not provide an adequate remedy--adequate, that is, to protect the interest in maintaining an effectively competitive economy--and so we view Robinson-Patman enforcement as inherently likely to be pushed beyond proper limits.

The efforts of the Commission to protect small dealers from allegedly unfair and coercive business practices constitute a dark chapter in the Commission's history. Much of this enforcement activity does not eventuate in formal proceedings. What happens is that a dealer who is terminated, for whatever reason, is likely to complain to the Commission, knowing that the relevant Commission staff is well disposed toward "small business". The staff uses the threat of an FTC proceeding to get the supplier to reinstate the dealer, and if threats fail--usually they succeed--the FTC may file a complaint charging the supplier with having cut off the dealer because he was a price cutter, or for some other nefarious reason. Our impression, in sum, is that the Commission, especially at the informal level, has evolved an effective law of dealer protection that is unrelated and often contrary to the objectives of the antitrust laws. The Commission is supported in this endeavor by the Supreme Court's rulings that Section 5 of the FTC Act empowers the Commission to suppress practices that resemble antitrust violations.

With respect to the Commission's enforcement policy in the merger field, it is illuminating to compare the recent statements of Commission merger policy with the Department of Justice Merger Guidelines, discussed elsewhere in this Report. The Commission is even more severe. Unlike the Department, it attaches a good deal of significance to the absolute size (independent of market share) of merging firms; to the alleged power that large firms have over small; and to the dangers of "price squeezes". It will, for example, challenge virtually any acquisition by a cement producer of a ready-mix concrete company, virtually any substantial acquisition by a large food chain, etc. The Merger Guidelines are models of restraint compared to those promulgated by the Commission, which are as hard on economic theory as on mergers.

We conclude that substantial retrenchment by the Commission in the antitrust field is highly desirable. In addition to retrenchment (at least by stopping the increase of the Commission's appropriations), its resources devoted to regulating competition might be redeployed. The two principal possibilities are (1) consumer protection, and (2) economic studies utilizing the very broad fact-gathering powers vested in the Commission by its enabling legislation. Unhappily, either route could be followed in a way that endangered competition. An incompetent economic study can be influential on policy makers--witness the influential 1948 FTC study which erroneously suggested that concentration was on the rise in American industry. Overzealous enforcement of consumer-protection legislation can also have errant results. We note that the application of consumer-protection law is almost always invoked not by consumers but by

competitors, whose interest lies in protecting their market, not in giving consumers full information; and that elaborate requirements relating to packaging, safety, etc. can curtail consumer choice, limit competition, reduce the consumer's incentive to exercise care, and--what is most serious--impose substantial costs on society.

The Federal Trade Commission urgently needs a basic reform, but this need will be difficult to fulfill. Quite apart from the fact that there are no vacancies on the Commission, any dramatic or far-reaching Presidentially-inspired reforms would run up against the long tradition of regarding the independent agencies in general--and the FTC in particular--as "arms of the Congress". That has at times meant an office of economic opportunity for Congressmen; more important, it means that a strong showing of Presidential interest in the operations of the Commission will not be welcome on the Hill.

Perhaps the best short-run path of improvement runs through the offices of the Attorney General and the Assistant Attorney General in charge of Antitrust. Since the jurisdictions of the Commission and of the Antitrust Division are so largely overlapping, no one could object to the establishment between the Commission and the Division of close liaison at the highest levels. Indeed, it is something of a wonder (though explicable in terms of bureaucratic rivalry) that such liaison has been wholly lacking heretofore; the only coordination between the agencies is at very low levels, and consists largely of haggling over who shall sue in cases where both agencies are interested. Especially at the beginning of a new Administration, it should be quite feasible, as well as wholly appropriate, for the Attorney General and Assistant Attorney General to establish a close cooperative

relationship with the Chairman of the Commission. We think it likely that the Commission will pay some heed to the Department's views, if forcefully expressed, on antitrust and trade-regulation policy.

III. Recommended Changes in Antitrust Policies

The general policies of the Antitrust Division are profoundly good, and we propose no major change in its emphasis or directions of policy. In fact, the main thrust of the following recommendations is that certain recent developments of policy or doctrine should not be allowed to divert the agency from its basic task of striking down conspiracies and mergers in restraint of trade.

A. Price-Fixing

The price-fixing cases of the Antitrust Division are its bread and butter, and understandably its staff would prefer more cake. We emphasize the great economic and social importance of continued, vigilant, aggressive seeking-out and conviction of conventional price-fixers. Every victory weakens the efficiency of undetected collusion in that area of economic life. We strongly recommend the bringing of a series of strategic cases against regional conspiracies, which we believe to be numerous and economically important.

B. Concentration and Oligopoly

Oligopoly--the industry composed of a small number of independent enterprises--undoubtedly presents the most difficult problems in a policy for competition. The difficulties arise because of a combination of three circumstances. The first is factual: there are many important industries in our economy whose structure is oligopolistic--how large a number depends

upon what a "small number of firms" means. The second is interpretive: the economists have not succeeded in fully identifying the characteristics of an industry which determine whether it will behave competitively or monopolistically. The third is the matter of action: if firms in an oligopolistic industry are convicted of collusive behavior, must one press for a remedy so radical as dissolution in order to stop future repetitions of the offense? (And should the standards of permissible concentration be wholly different for pending mergers than for established enterprises?)

The circumstances which determine whether or not the firms in an oligopolistic industry will usually behave more or less competitively (seeking by independent actions to improve their individual profits at the cost of rivals' profits, with the eventual general erosion of unusual profits) are partly known:

1. The easier (quicker and cheaper) new firms can enter the industry, the smaller and more short lived will be the monopolistic restrictions.
2. The more elastic the demand for the product of the oligopolistic industry the less the reward from restrictions of output below the competitive level, and hence the less the inducements to act collusively. This in turn usually depends upon what alternative products the buyers may turn to.
3. The larger the effective number of firms the less the probability of collusive behavior--collusion increases in expense (including probability of detection) as numbers increase. However, a given number of firms is more likely to result in collusion, the more concentrated is production in the hands of a few firms. If we

correct for this and take the effective number of rivals to be the number of rivals of equal size which would produce the same competitive situation as the firms (not of equal size) actually in the industry, the effective number may be very roughly estimated at twice the number there would be if all firms were as large as the largest in the industry. That is, if the largest firm has 1/5 of the industry's output and the remaining firms fall off in size regularly, the effective number of firms is of the order of magnitude of 10. By this is meant that the concentration in the industry is equivalent to what would exist if there were 10 firms of equal size.

There are other influences which probably but less certainly affect the probability of competitive behavior. One of these is the size of buyers: larger buyers, for a variety of reasons including possibility of backward integration, make for more competitive prices.

Numerous statistical studies have been made of the relationship between concentration and rates of return on investment, and these studies generally yield positive but loose relationships: concentration is not a major determinant of differences among industries in profitability, although it may sometimes be a significant factor. It appears also to be true that somewhere between five and ten effective rivals (i.e., a largest firm with a share of 1/3 to 1/5) are usually enough to insure substantial elimination of the influence of concentration upon profitability.

Concern with oligopoly has led to proposals to use the antitrust laws (perhaps amended) to deconcentrate highly oligopolistic industries by

dissolving their leading firms. We cannot endorse these proposals on the basis of existing knowledge. As indicated, the correlation between concentration and profitability is weak, and many factors besides the number of firms in a market appear to be relevant to the competitiveness of their behavior. While a flat condemnation of oligopoly thus seems to us unwise, we commend to the Antitrust Division a policy of strict and unremitting scrutiny of the highly oligopolistic industries. If, in any of these industries, pricing is found after careful investigation to be substantially noncompetitive, the Division will have a clear basis for proceeding against the leading firms under Section 1. Collusion that can be incontrovertibly inferred from behavior (such as persistent, stable price discrimination in the economist's sense) should not bring immunity from the Sherman Act, and we are confident that structural remedies will be sanctioned by the courts in cases where, due to number of firms and the other conditions of the market, lesser remedies are likely to be unavailing. In assessing the gain from such structural remedies, account should be taken of any reduction in efficiency which the remedy entails.

The concern with oligopoly is also quite visible in the Department of Justice's major recent innovation, the Merger Guidelines, to which we now turn.

C. Mergers and the Guidelines

The present merger Guidelines impose stringent restrictions upon the relative sizes permitted to companies which desire to merge. The impact of these percentages is reinforced by a definition of the market (within which shares of companies are reckoned) so loose and unprofessional as to

be positively embarrassing. We propose to reverse this emphasis: not to tell companies which mergers are forbidden, but which mergers are permitted. We are persuaded that this orientation better serves the interests of both business and the Antitrust Division. Before we turn to the methods by which more appropriate Guidelines for mergers are achievable, we shall briefly discuss the present Guidelines, and indicate our reasons for dissatisfaction with them in their present orientation.

Market Definition. The delineation of a relevant market within which to appraise the lawfulness of a merger is crucial, for if the market is drawn narrowly enough, virtually any merger can be made to seem monopolistic in its effects. Unfortunately, as they are presently drafted the Guidelines seem to invite a substantial degree of market gerrymandering, especially in delineating regional or local markets. The Guidelines' test of whether a product is sold in less than a national market is loose. Any group of competing sellers in the industry is a relevant market, unless the defendant can show that there is no "economic barrier" preventing other sellers from selling in the particular area. Such a barrier may consist of freight costs, customer inconvenience, customer preference for the brands presently sold in the area, or the absence of good distribution facilities.

This is a misleading test. An industry may be riddled with the kind of "barriers" cited in the Guidelines and yet still not contain any meaningful local markets. An example will illustrate. Assume that the price of steel bars is $2 in Minnesota and $1.60 in Chicago, and the cost of shipping the bars from Chicago to Minnesota is 41 cents. On these facts, it is plain that the Minnesota sellers could not raise their price significantly without

immediately losing their business to the Chicago sellers. Minnesota is thus not a meaningful local market even though, at the existing price, freight costs do impose an effective economic barrier against the Minnesota sellers. Moreover, additional firms will establish production or distribution facilities in Minnesota if it becomes profitable to do so. The same analysis can be extended to the other barriers discussed in the Guidelines.

In criticizing the test of "economic barrier", we do not mean to deny the difficulty of devising rules of market definition that will be at the same time simple and sensible. This is most probably not an area in which Guidelines provide a useful enforcement tool. If there are to be Guidelines, though, they should at least not misstate the applicable economic theory. It would, accordingly, be a decided improvement if the Guidelines were revised (at a minimum) to explain that a distant seller of a product must be included in the local market if a modest price increase in the local area--a price increase unrelated to his costs--would bring him in forthwith.

Horizontal Mergers. The provisions of the Guidelines governing horizontal mergers--that is, mergers between direct competitors--are extraordinarily strict. If a market is "highly concentrated" (defined as where the 4 largest firms account for at least 75 percent of the sales in the market), then a merger between two firms, each of which has a 4 percent market share, will be challenged: and if the acquiring firm has a share as large as 15 percent, then the acquired firm need have only a 1 percent share for the merger to be challenged. Different levels of permissible size are stated for less concentrated industries, and some account is taken of the trend of concentration.

We agree with the basic premise of the horizontal-merger provisions of the Guidelines that market-share percentages are the appropriate touchstone of illegality for such mergers. We would favor levels of concentration modestly lower than those now used (but differently structured), with the purposes of (1) allowing all mergers below the Guidelines levels, and (2) not prohibiting, but reviewing, those above the critical level, with an implied probability that the more a proposed merger lies above the level of automatic approval, the less the probability of its acceptance. We discuss below the procedure that should be followed better to utilize existing knowledge in fashioning the Guidelines.

Vertical Mergers. A merger that involves the acquisition not of a competitor but of a customer or a supplier is a vertical merger, and the present Guidelines contain strict provisions limiting such mergers. For example, if the supplying firm in the merger has a 10 percent share of its market and the purchasing firm has 6 percent of the purchases in that market, the merger will be challenged.

Our task force is of one mind on the undesirability of an extensive and vigorous policy against vertical mergers: vertical integration has not been shown to be presumptively noncompetitive and the Guidelines err in so treating it. Within this area of agreement there are two positions around which the task force members cluster.

The one position asserts that many, and perhaps most, vertical mergers which do not have direct horizontal effects are innocuous, but that in certain situations a vertical merger will have anti-competitive effects. These situations include: increases in the capital or other requirements

for an integrated firm may reduce the possibility of new entry; or price discrimination may be implemented when a monopolist integrates forward or backward. A showing that an anticompetitive effect of these sorts exists is essential before a vertical merger is challenged.

The other position denies that a vertical merger has the potentiality for economic harm in the absence of horizontal effects. To some of our members, it is wholly implausible that vertical integration places entering firms at a disadvantage. A seller who fails to minimize his input and distribution costs will be undersold by his competitors: he cannot afford to sell to or buy from an affiliate if there are more efficient alternative means of supply and distribution available to his competitors (and to him). Even if the seller is a monopolist, the desire to maximize profits will lead him to seek the most efficient methods of supply and distribution, and there will be ample opportunities for nonaffiliated suppliers and outlets to compete for his patronage. Except in the case of the monopolist who cannot discriminate in price effectively without control of his outlets, vertical integration will be initiated and maintained only if and so long as it is justified by the cost savings it permits. It is not a method of extending monopoly power.

The two positions coalesce on one policy conclusion: vertical mergers should not be forbidden as a class.

The Conglomerate Merger. The large conglomerate enterprise with an aggressive acquisition policy has only recently become prominent and newsworthy. Almost by definition such a firm poses at most a minor threat to competition, but nevertheless criticism of it is beginning to mount. Some critics deplore the disappearance of independent enterprises and find a

threat of sheer bigness to political or economic life. Other critics believe that the conglomerate firm is spawning unhealthy speculation in the securities markets.

Antitrust law has seemed to some a convenient weapon with which to attack large conglomerate mergers. If one interprets "elimination of potential competition", "reciprocity", and "foreclosure" as threats to competition, one can always bring and usually win a case against the merger of two large companies, however diverse their activities may be. These are often makeweights. The economic threat to competition from reciprocity (reciprocal buying arrangements) is either small or nonexistent: monopoly power in one commodity is not effectively exploited by manipulating the price of an unrelated commodity. The argument advanced against the simpliste treatment of vertical mergers--essentially that one cannot use the same monopoly power twice--also challenges the fears of reciprocity.

Potential competition, on the contrary, can be a decisive limitation on the exercise of market power, and a merger which eliminates an imminent new competitor is anticompetitive. If entry into a field is relatively easy, however, there are a vast number of potential entrants and the elimination of one or a few has no effect. If entry is difficult, and only a select few firms are capable of entry and on the record likely to enter, their independence should be preserved. The identity of potential entrants should not be established by introspection. If the producer of X is truly a likely entrant into the manufacture of Y, the likelihood will have been revealed and confirmed by entrance into Y of other producers of X (here or abroad), or by the entrance of the firm into markets very similar to Y in enumerable respects.

We seriously doubt that the Antitrust Division should embark upon an active program of challenging conglomerate enterprises on the basis of nebulous fears about size and economic power. These fears should be either confirmed or dissipated, and an important contribution would be made to this resolution by an early conference on the subject. If there is a genuine securities market problem, probably new legislation is necessary. If there is a real political threat in giant mergers, then the critical dimension should be estimated. If there is no threat, the fears entertained by critics of the conglomerate enterprises should be allayed. Vigorous action on the basis of our present knowledge is not defensible.

The central task of the Antitrust Division is to preserve competition in the American economy. This is a splendid and challenging task and deserves and requires the full resources of the Division. We shall be much the losers if we compromise the discharge of this central task by burdening the Division also with tasks such as the combatting of organized crime or the achievement of general political goals.

The Use of Conferences. We have proposed that conferences be used to revise the Guidelines and to identify the problems, if any, created by the large conglomerate enterprise. The conference will allow the Antitrust Division to utilize the expertise and wide factual knowledge of economists, lawyers, securities analysts, and other groups without the laborious machinery of formal hearings. We strongly recommend that before such conferences are held, leading students and exponents of particular positions be asked to prepare position statements which present explicit and specific theories and evidence. Then the conference members will have specific questions to address and specific views to combat or support.

D. Antitrust Sanctions

The cutting edge of law is not the abstract statement of a legal duty but the sanction provided for its nonperformance, and that is true of the antitrust laws as of other systems of legal obligation. It is essential that those laws clearly and accurately define and forbid the practices that impair competition and efficiency but it is equally essential that the sanctions for violation be effective in compelling compliance and with a minimum of undesirable side effects.

In testing the antitrust sanctions by this standard, it will be helpful to distinguish two purposes of sanctions: that of preventing (or, if it has already occurred, undoing) a specific violation; and that of deterring violations that might not always be detected. Sanctions of the first type--remedial sanctions--suffice where there is no problem of detection (e.g., in the case of an illegal merger). But take the case of price-fixing. Price-fixing conspiracies can be, and one suspects often are, successfully concealed. A sanction that merely prevented the continuation of the conspiracy, such as an injunction, or one that merely restored the losses of the injured consumers, such as ordinary damages, would in these circumstances probably be insufficient. For in deciding whether to comply with the law, a seller would discount the very modest (or negligible) injury to him if his participation in a price-fixing conspiracy was detected, and he was required to stop and to pay actual damages, by the considerable probability that he would escape detection altogether; and he could conclude that he had little to lose by participating. That is why punishment by fine or imprisonment is an appropriate sanction for illegal price-fixing; it provides deterrence, as the purely remedial sanction does not.

But the deterrent sanction in antitrust is weak. A price fixer can be imprisoned and fined but prison terms are almost never imposed in price-fixing cases and when they are, they are nominal in length; and the maximum fine of $50,000 will deter only a very small corporation. The possibility of a private treble-damage suit doubtless provides additional deterrent effect, but there are serious limitations: judges are reluctant to authorize damage awards that seriously hurt a company; damages are difficult to prove in price-fixing cases; and most important, the injury caused by a price-fixing conspiracy is often so widely diffused (for example, among millions of consumers) that no one has an incentive to bring a suit. The government itself can sue for damages only when it was the victim of the unlawful conspiracy.

If concealable offenses under the antitrust laws are to be effectively deterred, either the resources devoted to the detection of such offenses must be vastly augmented--and there are obvious limitations to this route--or the fines must be increased to a point where they will give even the large corporation considerable pause before participating in (or condoning its officers' individual participation in) an illegal conspiracy. Precedent for much more severe sanctions can be found abroad. The European Economic Community, for example, may impose penalties of up to $1,000,000, or, in the case of willful violations, up to 10 percent of annual sales. We have not attempted to determine the appropriate level of antitrust fines, but we urge the Department of Justice to accord high priority in its legislative program to the upward revision of these penalties.

The creation of a more realistic scheme of antitrust fines would enable a long-overdue reexamination of the punitive aspects of the private antitrust suit. It is anomalous that private plaintiffs who have done nothing to uncover or prove an antitrust violation (the usual case) should be permitted to claim treble damages on the basis of a judgment obtained by the Antitrust Division. In such circumstances, the excess over actual damages and costs represents a pure windfall to the private plaintiff. Today, one can defend this arrangement on the ground that it furnishes an element of added deterrence which is necessary in light of the inadequacy of the existing criminal fines. But that ground would be removed if the fines were revised to a more appropriate level; and a more rational scheme of deterrence would become feasible. We are also deeply concerned that private treble damage suits provide undesirable opportunities for harrassment and the furtherance of a variety of anticompetitive practices.

With regard to remedial sanctions, the principal question involves the undesirable side effects that frequently accompany a poorly formulated decree. Ideally--and it is an attainable ideal--an antitrust decree should be a "one shot" affair: dissolving the monopoly, or divesting the acquired assets, or terminating the basing-point system, etc. The antitrust laws were never intended to be a system of continuing regulation. Antitrust policy has as its basic principle the preservation of a competitive environment within which individual enterprises are free from continuing supervision. When a decree says, in effect, "Let us return to the court, or give the power to the Antitrust Division, to adjudge the propriety of various behavior of the defendant for years to come," one can be sure that the suit has failed in its purpose of restoring competitive conditions. Nor is the

Department equipped to function as a regulatory agency, and it is not likely to escape that common pitfall of economic regulation, the suppression of competition. Nonetheless, such decrees are frequently entered, especially by consent of the parties in cases where the Department (or the Federal Trade Commission, to which these remarks apply with equal, if not greater, force) is unsure of its litigation prospects and wishes to salvage something from the investment of enforcement resources.

For the future, we urge that the Department adopt a firm policy of not proposing or accepting decrees that envisage a continuing, regulatory relationship with the defendant. A correlative policy that we suggest is that every decree contain a definite--and near--termination date, ordinarily no more than 10 years from the date the decree is entered. Such a principle would compel the Department to devise decrees that restore competition rather than establish regulation, as well as assure that decrees do not remain in effect long after the relevant industrial conditions have changed (such as with the 1920 decree against the meat packers).

Little is known of the extent to which a large number of past decrees are still operative, and if operative, of any real value in protecting competition. We recommend, therefore, some such procedure as this in dealing with outstanding decrees:

1. The past decrees still running should be compiled, and the types and duration of prescribed conduct summarized.
2. The current relevance of the decrees, or at least those running against large industries, should be examined--presumably by the economics section of the Antitrust Division.

3. The older (say 25 years and over) and obsolete younger decrees should be vacated.

E. Recommended Changes in Antitrust Statutes

Several legislative reforms could improve substantially the functioning of the antitrust laws. We have recommended above a substantial increase in the maximum level of fines. In addition, we recommend immediate repeal of the Expediting Act. The low quality of many Supreme Court antitrust opinions can be traced in no small measure to the fact that direct appeal frequently requires the Supreme Court to pass on an extensive record without the benefit of the winnowing and focusing process involved in an intermediate appeal. The Supreme Court itself has noted that direct appeal is unsatisfactory. If repeal is politically impossible, then an amendment that would drastically limit the number of direct appeals would be desirable.

The Webb-Pomerene Act should also be repealed. The creation of cartels in foreign commerce is antithetical to the underlying theory of the Sherman Act. The danger that exempted cooperation between competitors in the export field will lead to illegal cooperation at home is too great to be viewed as merely a potential abuse. Nothing in U.S. domestic competition policy or foreign economic policy warrants the retention of this outmoded approach to international competition.

On the agenda for long-term legislative reform must be the Robinson-Patman Act. The Act leads to rigidity in distribution patterns and to uniform, inflexible pricing. In industries with few sellers, price reductions are more likely to be made if they can be made covertly. Such limited reductions often lead over time to generally lower prices. Thus, a prohibition against price discrimination may preclude the kind of competition

that is most likely to lead to lower prices in oligopolistic industries. We view the Federal Trade Commission's tendency in recent times to relax the enforcement of the Act as a desirable but, so long as private treble damage actions are available, an inadequate reform.

In reforming the Robinson-Patman Act, two kinds of amendment are desirable. First, the general prohibition against price discrimination in Section 2(a) should be made more supple by broadening the meeting competition and cost justification defenses so as to make them more readily available for sellers whose price differentials do not stem from a predatory purpose and do not injure competition in the market place (as opposed to disadvantaging individual firms). Second, the more absolutist brokerage, payments and services prohibitions of subsections (c), (d) and (e) should be repealed while making clear that the standards of amended subsection (a) remain applicable to practices that would previously have been treated under those repealed subsections. The Task Force recognizes the political support that the Robinson-Patman Act retains in some quarters and the danger that an attempt to amend the Act might give particular interests an opportunity to add even more restrictive provisions. As a consequence, some of our members view amendment of the Act as a long-term, albeit important, reform; others wish to leave it alone.

Ward S. Bowman, Jr.

Ronald H. Coase

Roger S. Cramton

Kenneth W. Dam

Raymon H. Mulford *

Richard A. Posner

Peter O. Steiner

Alexander L. Stott *

George J. Stigler, Chairman

* Subject to dissent which follows

Justice Dept. to Reveal Secret Report on Antitrust Laws

By Morton Mintz
Washington Post Staff Writer

The report of a secret Johnson Administration task force on the antitrust laws will be released by the Justice Department in a few days.

This was disclosed by Assistant Attorney General Richard W. McLaren, head of the Antitrust Division, in an interview with The Washington Post.

There is no precedent for release of the report. The estimated 50 to 70 reports of other secret Johnson Administration task forces remain—along with other private presidential papers—in custody of the National Archives.

At the White House yesterday, a press aide said he did not know if additional reports will be made public.

McLaren gave no hint of the content of the antitrust paper except to say that it is a "broad-scale report on recommendations for legislative and administrative action to implement enforcement of the antitrust laws."

He said he had received "clearance" to issue the report but did not say from whom. However, he said the task force members were "quite agreeable" to releasing it.

The secret status of the report "has led to some awkwardness" for members of the task force, McLaren said. For example, members have been unable to reply to statements about the report "that were not factual," he said.

The existence of the task force, headed by Phil C. Neal, dean of the University of Chicago Law School, was disclosed in February, 1968, by the New York Times.

At the time, Sen. Philip A. Hart (D-Mich.), chairman of the Senate Antitrust subcommittee, protested that the task force should operate out in the open, so as to "surface all elements in the equation."

Aide Disagrees

But in an interview with The Washington Post, then White House aide Joseph A. Califano Jr. disagreed.

He said that in order to get "straight answers" on a variety of hard problems from "the best brains in the country," the President has to assure his sources that neither their appointments nor reports will be made public, and that their "confidential advice" will be divulged by the President only to his closest advisers.

McLaren said he felt the report should be available not only to scholars, but more immediately to a committee of the American Bar Association that, at the request of President Nixon, now is appraising the antitrust and consumer protection roles of the Federal Trade Commission.

Califano, now a member of the law firm of Arnold & Porter, yesterday declined to comment on the impending release of the task force report.

He did say, however, that the task force reports generally contain "a lot of valuable material" and some "frontier thinking." He said that "maybe 10 or 15" of the papers are worthy of publishing in a book by a university.

In the interview at the Justice Department, McLaren said he favors increasing the present maximum fine for a criminal antitrust violation from the present $50,000 to $500,000. (Donald F. Turner, his predecessor during most of the Johnson Administration, once told a reporter that a maximum fine of $1 million "would not be unreasonable.")

McLaren said he prefers such direct penalties as fines and jail sentences to "indirect" increases in penalities such as would result from legislation favored by the chairmen of the Congressional antitrust subcommittees, Hart and Rep. Emanuel Celler (D-N.Y.), and Sen. Russell B. Long (D-La.), chairman of the Senate Finance Committee.

The legislators want to reverse a 1964 Internal Revenue Service ruling that permits convicted antitrust violators to deduct as "necessary business expense" payments made to settle treble-damage suits brought by victims of price-fixing.

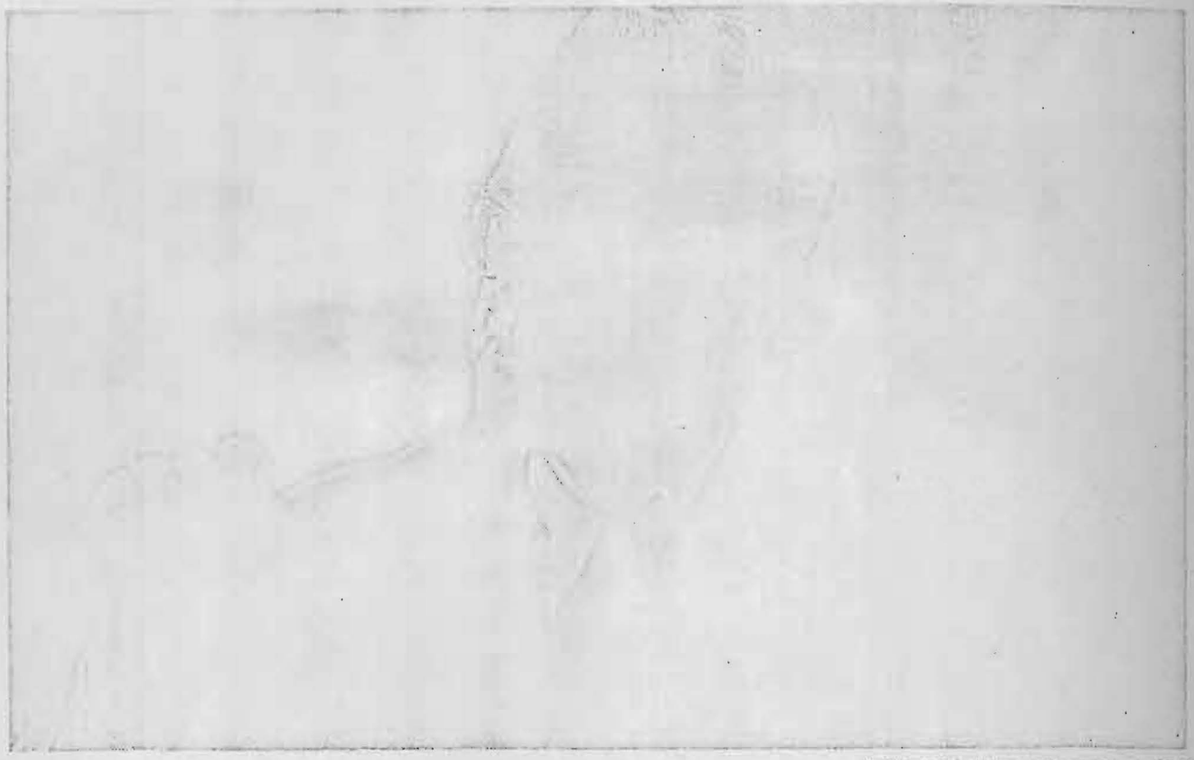
The Justice Department had opposed the IRS. In 1963, for example, Assistant Attorney General William H. Orrick Jr. said the impending ruling would "encourage disrespect" for the antitrust laws and reduce their "deterrent effect."

But McLaren, expressing "serious reservations" about the proposed legislation, said it could force out of business some small firms that "just went along with what the bigger guys did" and thus have an "extremely anti-competitive effect."

End to Court Backup

"Perhaps more importantly," he said, the bill would eliminate incentives to settle treble-damage claims and thus "clog the courts from here to Canarsie."

Unlike Donald Turner, McLaren believes existing laws give him the weapons he needs—and already has used—to attack big conglomerate mergers that have "anti-competitive consequences." And again unlike Turner, McLaren prefers a "flexible approach" to such proposals as a requirement that giant firms spin off assets equal to new acquisitions.



By Harry Naltchayan—The Washington Post

Assistant Attorney General McLaren: The secret status of the antitrust report "has led to some awkwardness."