The original documents are located in Box 7, folder "Congressional - Antitrust Bill (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

October 13, 1975

MEMORANDUM FOR: JAMES CANNON

THROUGH: PHILIP BUCHEN P.

FROM: RODERICK HILLS R.H.

As you know, a major antitrust bill is now pending in Congress. It raises a large number of issues of substance which to my knowledge have not been discussed on any policy level in the White House. With the approval and assistance of the Domestic Council, I suggest that the Counsel's office cause an option paper to be circulated which will stimulate full discussion.

I attach a memorandum from Breed, Abbott and Morgan which highlights the automatic stay provision in the pending legislation. If the suggestion is acceptable, I believe that either Ken Lazarus or Bobbie Kilberg could cause an appropriate memorandum to be prepared.

BREED, ABBOTT & MORGAN

September 4, 1975

M E M O R A N D U M

Re: Amended Title V of S.1284:
Automatic Stay Provision

This memorandum analyzes a key provision of amended Title V of S.1284, which requires district courts summarily to stay acquisitions pendente lite at the instance of the Antitrust Division or the FTC once either agency commences an action or proceeding challenging the acquisition under the antitrust laws.

Severely criticized at hearings last spring by spokesmen for the antitrust enforcement agencies, and others, the provision was amended in July by the Subcommittee on Administrative Practice and Procedure before referral to the full Judiciary Committee to read:

> "(d) If a proceeding is instituted by the Federal Trade Commission or an action is filed by the United States, alleging that an acquisition violates section 7 of this Act, or section 1 or 2 of the Sherman Act (15 U.S.C. 1-2), and either the Federal Trade Commission or the Assistant Attorney General certifies to the United States district court within which the respondent resides or carries on business, or in which the action is filed, that it or he believes that the public interest requires relief pendent lite pursuant to this subsection, the court shall enter an order that such acquisition shall not be consummated until the order of the Commission in respect thereof or the judgment entered in such action

> has become final, and that the proceeding or action shall be in every way expedited. The court may thereafter modify such order, or subject it to conditions, upon a showing that the action brought by the Commission or the Assistant Attorney General is without merit and frivolcus, or that the respondent or defendant will be irreparably injured unless the order is modified or conditioned. A showing of loss of anticipated benefits from the proposed transaction shall not be sufficient to modify or condition such order." (July amendment underscored)

The Subcommittee's amendment, it seems clear, does little to cure the central defect of this measure: the traditional judicial function of granting extraordinary relief pending the outcome of a litigated proceeding is still -- in practical effect -- handed over to the government enforcing agencies. Because few, if any, acquisitions can abide the typical two to five years required to litigate a Section 7 case, a stay pendente lite in effect aborts the acquisition. As noted recently by Judge Friendly in Missouri Portland Cement Co. v. Cargill, 498 F.2d 851, 870 (2d Cir. 1974):

> "Experience seems to demonstrate that just as the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger, the grant of a temporary injunction on antitrust grounds at the behest of a target company spells the almost certain doom of a tender offer."

Similarly, as stated in a comprehensive Note, Preliminary Relief for the Government under Section 7 of the Clayton Act, 79 Harv. L. Rev. 391, 393 (1965):

> "It appears that no proposed merger has survived a wholly prohibitory preliminary injunction for any substantial period of time. Many mergers are delicate transactions involving compromises and predictions about the future. Obviously, changes in the capital market, the economy, and the industry may make the merger more or less attractive to the parties. The financing of a merger may be dependent on loans from financial institutions that cannot remain committed indefinitely without regard to changes in the money market."

Specified grounds for modification of stay orders are useless in practice. The first, requiring proof of the Government's bad faith in bringing a frivolous and meritless action, imposes an impossible burden on merging companies and, in any event, focuses on the Government's motives rather than the real question of whether the extraordinary remedy of staying an acquisition -- where that stay will probably kill the acquisition -- is justified. The second, allowing a showing of irreparabl injury, is wholly swallowed up by its exception providing that loss of the anticipated benefits of the proposed transaction is not sufficient to constitute irreparable injury. What other injury would normally be sustained when an acquisition is thwarted is hard to imagine.

The question is not whether preliminary relief should be available in Section 7 cases -- under present law the Antitrust Division and the FTC can apply for temporary injunctive relief in actions challenging acquisitions under the antitrust laws. The question, rather, is whether to oust

the district court's jurisdiction to decide, on the basis of the evidence presented by both sides, whether the need for a stay has been established, or whether other temporary relief should be fashioned to suit the exigencies of the particular situation. On this point, expressing his preference for the present vesting of flexible discretion in the district court, the Chairman of the FTC, Lewis A. Engman, in his testimony before the Senate Subcommittee on Antitrust and Monopoly on May 7, 1975, stated unequivocally that:

> "Rather than mandating a court, upon application of the enforcement agency, to enter an order prohibiting consummation of a merger pending final judgment [as S.1284 would do], the law should permit a court to require a showing by the government of probable illegality [as it now does]. Also, the court should have the discretion to permit mergers to take place upon adequate showing that the acquiring company would remain a sufficiently distinct entity to permit ready divestiture if later ordered." Engman Testimony at 11.

The testimony before the Subcommittee falls short of demonstrating the need for an automatic stay provision. It was pointed out to the Subcommittee that in only one merger case in the past ten years, did the Government fail to get preliminary relief in a case which it eventually won. Moreover, without dealing here with the difficult and disputed question of whether the number of acquisitions and mergers is increasing or decreasing, suffice it to note that the statistics on this score presented to the Subcommittee were no more current than the late 1960's.

Buchen

THE WHITE HOUSE

WASHINGTON

May 3, 1976

MEETING WITH ATTORNEY GENERAL LEVI TO DISCUSS ADMINISTRATION'S POSITION ON ANTITRUST LEGISLATION

Tuesday, May 4, 1976
2:00p.m. (30 minutes)
The Cabinet Room

From: Edward C. Schmults

I. PURPOSE

To discuss Administration's position on pending antitrust legislation.

II. BACKGROUND, PARTICIPANTS & PRESS PLAN

A. Background: On April 6 the Senate Judiciary Committee completed mark-up on the Hart/Scott Antitrust Improvements Act (S. 1284). In the House, three of the major provisions of S.1284 are being considered in separate legislation. The so-called parens patriae bill has been passed and the Civil Process Act amendments have been approved by a House Judiciary Subcommittee. On April 2 Senators Hart and Scott met with Justice Department and White House Staff to urge Administration support for their legislation and to determine possible areas of compromise. We reemphasized the views expressed in your letters to John Rhodes on parens patriae and Peter Rodino on the Civil Process Act Amendments. We are being urged by Senators Hart and Scott to enter into negotiations aimed at producing an acceptable bill. (See summary of current status in memorandum at Tab A)

B. Participants: The Attorney General, Assistant Attorney General Thomas Kauper, Philip Buchen, Max Friedersdorf, James Lynn, Jack Marsh, Bill Seidman, Ed Schmults.

C. Press Plan: None. Meeting not to be announced. White House Photographer Only.

III. TALKING POINTS

1. The purpose of this meeting is to review the status of antitrust legislation currently before the Congress and decide what approach we should take in working with the Congress.

2. Perhaps Ed Schmults should begin by providing us an overview of the present congressional activity in this area. (Chart at Tab B will be distributed for discussion.)

THE WHITE HOUSE

WASHINGTON

April 14, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: EDWARD C. SCHMULTS

SUBJECT: Antitrust Legislation Now Before Congress

Issue

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

Background

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

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

Status of the Legislation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Declaration of Policy. Finally, the Senate omnibus bill contains a collection of assertions and conclusions about the commitment of this country to a free enterprise system, the decline of competition as a result of oligopoly and monopoly, and the positive impact of vigorous antitrust enforcement. It has been criticized as not being based on economic consensus nor logically connected to the procedural matters dealt with in the body of S.1284. The Administration has previously taken no position on this provision.

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

Options:

At this stage, we have the following options:

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

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

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

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

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

Decision:

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

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

Option 3: Schedule a meeting (Supported by _____)

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Telephone: 202-225-3951

March 17, 1976

The President
The White House

Dear Mr. President:

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

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

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

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

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

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

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

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

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

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

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

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

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

> Strangely enough, while the business community is taking a strong public stand for free enterprise as a concept, it is also mounting an enormous lobbying effort in an attempt to delay, to cut back or to prevent the passage of such legislation.
>
> And so again, the call for a return to free enterprise takes on a somewhat hollow ring.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

PETER W. RODINO, JR.
Chairman

PWR:edg

Office of the White House Press Secretary

THE WHITE HOUSE

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

March 17, 1976

Dear John:

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

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

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

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

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

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

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

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

Sincerely,

/s/ Gerald R. Ford

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

THE WHITE HOUSE

WASHINGTON

March 31, 1976

Dear Chairman Rodino:

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

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

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

Sincerely,

Gerald R. Ford

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

TAB C

Parens Patriae

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

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

1. A provision which would authorize a State to recover damages to the "general economy" of that State or its political subdivisions was deleted.

2. The bill was modified to apply in general to future violations, rather than retrospectively.

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

1. Scope. The House bill was, in practical effect, narrowed to willful price-fixing violations only, by permitting statistical aggregation of damages only in such cases. The Senate version applies to violations of the Sherman Act.

2. Statistical Aggregation in Private Class Actions. The House eliminated a provision to permit aggregation in consumer class action suit. The Senate retained this provision.

3. Damages. The House provided for a court determined reduction of damages from treble to single damages if a defendant could prove he was acting in good faith or without reason to believe he violated the antitrust laws. The Senate bill provides for mandatory award of treble damage.

4. Attorneys Fees. Both the House and Senate provide that a court may award reasonable attorney's fees to a prevailing defendant upon finding the state attorney general acted in bad faith.

5. Contingency Fees. The House provided for a flat ban against contingency fee arrangement. The Senate bill requires the approval of the court for any attorney fee arrangement according to standard criteria (e.g., number of hours of time multiplied by reasonable hourly rate, adjusted up or down for risk, complexity, or other factors).

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

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

TAB D

THE WHITE HOUSE

WASHINGTON

March 29, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: L. WILLIAM SEIDMAN

SUBJECT: Administration Antitrust Legislation

Issue

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Decision

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

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

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

Supported by: Marsh, Friedersdorf

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

Major Antitrust Legislation Before the Congress

	Senate [1]	House	Stated Administration Positions
1.	Civil Process Act Amendments (S. 1284)	Civil Process Act Amendments (H.R. 39) passed House Judiciary Subcommittee by voice vote on April 28.	
	Provides for use of Civil Process Act powers in regulatory proceedings.	No provision	Opposes
	Provides for mandatory reimbursement of third parties for expenses, without specific authorization for appropriations.	Reimbursement only of witnesses according to current standards.	No stated position
	No exemption of information from disclosure under Freedom of Information Act.	Provides an explicit exemption	Favors explicit exemption
	Provides grand jury information to FTC and private antitrust plaintiffs after completion of civil or criminal proceedings.	No provision	No stated position
2.	Premerger Notification and Automatic Stay (S. 1284)	Premerger Notification and Automatic Stay (H.R. 13131) Judiciary Subcommittee hearings are scheduled for May 6.	
	Provides for 30 day notification with 20 day extension, prior to consummation of very large mergers and acquisitions (involving transactions between $100 million and $10 million companies).	Similar provision	Supports
	Provides for automatic stay, not to exceed 60 days, with burden on defendant to show why stay should not be issued.	Similar provision	Opposed-retain existing decisional law

[1] An omnibus antitrust bill (S. 1284), containing five titles, was favorably reported to the full Senate on April 6. The Senate Judiciary Committee vote was 10-5. Opposed were Eastland, McClellan, Hruska, Thurmond, W. Scott.

	Senate	House	Stated Administration Positions
3.	Parens Patriae (S. 1284)	Parens Patriae (H.R. 8539) passed House by voice vote on March 18	2/
	Scope: Limited to Sherman Act violations	Practical effect is limitation to willful price-fixing	Limitation to price-fixing
	Damages: --Provides for mandatory award of treble damages	Court determined reduction from treble to single damages if defendant acted in good faith	Favors limitation to single damages
	--Provides for statistical aggregation of damages in private class actions	No provision	Opposes
	Attorney's Fees: --Court may award attorney's fees to a defendant if state attorney general acted in bad faith	Similar provision	Favor
	--Court may approve contingency fees according to standard criteria	Flat ban against contingency fees	No stated position
4.	Miscellaneous Provisions (S. 1284)	No comparable House provisions	
	Broadens Clayton Act (including Robinson-Patman Act) to include violations "affecting" rather than "in" interstate commerce.		Supports provision applying to Clayton 7 (mergers); opposes applying to other sections of Clayton Act, including Robinson-Patman Act
	Dismissal of claims of party relying upon foreign statutes to justify refusal to comply with discovery order.		Opposes
	Mandatory award of attorney's fees for injunctive relief under Clayton Act.		Favors discretionary awards
5.	Declaration of Policy (S. 1284)	None	No stated position
	Sets forth assertions and conclusions about Nation's commitment to a free enterprise system, the decline of competition because of monopoly and anti-competitive behavior and the need for vigorous antitrust enforcement.		

2/ The President's letter of March 17 to Congressman Rhodes expressed serious reservations about the principle of parens patriae. The President also expressed concern regarding specific provisions.

THE WHITE HOUSE
WASHINGTON

August 24, 1976

Mr. Marsh received a call from Vail.

The President made a decision to oppose the resolution on Anti-trust on procedural grounds only, not on substantive grounds.

THE WHITE HOUSE

WASHINGTON

August 24, 1976

MEMORANDUM FOR: JACK MARSH

FROM: MAX FRIEDERSDORF

SUBJECT: H.Res. 1462, Anti-Trust Resolution

The House will consider today H.Res. 1462, a parliamentary device reported by the Rules Committee which would permit three previously passed House bills to be taken to Conference with the Senate as a package.

The bills include H.R. 8532 (Parens Patriae passed previously by voice vote); H.R. 13489, Anti-Trust Civil Process Amendments and H.R. 14580, Pre-Merger Notification, both previously passed on suspension.

Chairman Rodino, supported by Representative Bob McClory, appeared before Rules prior to recess to seek the Resolution in order to facilitate a Conference.

I recommend we oppose the Resolution. It marries good legislation, pre-merger and civil process, to objectionable legislation, namely, parens patriae which has passed both the House and Senate in objectionable form.

To oppose the Resolution today would signal objections only to the unusual parliamentary procedure of merging three previously passed bills.

Defeat of H.Res. 1462 would insure the President of considering the three bills on their separate merits and not having to buy all or nothing.

Ed Schmults concurs that we oppose H.Res. 1462. Bill Seidman disagrees, maintaining that this puts the Administration on the politically objectionable side of big business.

cc: Bill Seidman
Ed Schmults

ADDENDUM

Minority Leader John Rhodes is putting out a whip advisory that he is personally opposed to the bill as a bad piece of legislation.

Michel defers to the Republican Members of the House Judiciary Committee; John Anderson believes the House will adopt the Resolution and that the White House should not get out front on a Custer's Last Stand.

Hutchinson favors the Resolution; opposes Parens Patriae. Wiggins is noncommital and Caldwell Butler's dislike of Parens Patriae is constrained because the Virginia attorney general is running for Governor.

INFORMATION

THE WHITE HOUSE

WASHINGTON

September 1, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP BUCHEN

SUBJECT: Senate Consideration of Omnibus Antitrust Legislation

The Senate is continuing to debate a compromise omnibus antitrust bill that essentially adopts the provisions in three separate antitrust bills that recently passed the House. A final vote is expected next Wednesday after the Senate returns from recess. If the sponsors of this compromise amendment are successful, it will be sent to the House for action without a conference. The current prognosis is that the House is likely to pass the compromise amendment.

The following is a brief summary of the key provisions of that amendment and the most important modifications that have been made in response to Administration concerns:

Title I - Antitrust Civil Process Act Amendments - authorizes the Department of Justice to issue civil investigative demands to all persons who may have information relevant to an antitrust investigation. The Justice Department views enactment of these amendments as a vital step designed to close a gap in their enforcement authority. Despite the inclusion of a variety of safeguards to protect against governmental overreaching, however, some business opposition to these amendments continues. All provisions which were objectionable to the Administration were deleted in the Senate amendment under consideration which is the same as the House passed bill.

Title II - Premerger Notification - requires that corporations with assets or sales in excess of $100 million that plan to acquire corporations with assets or sales in excess of $10 million give the federal enforcement authorities 30 days advance notice, subject to a 20 day extension.

In addition to a premerger notification provision, the Senate had earlier provided for an automatic injunction against the consummation of mergers and acquisitions that could be invoked by federal enforcement authorities. Due to strong opposition by the Administration and others, the Senate amendment would drop this provision and adopt the limited House premerger notice provision. There is little controversy surrounding this Title.

Title III- Parens Patriae - authorizes state attorneys general to seek damages in federal courts as a result of federal antitrust violations. In a March 17, 1976 letter to Minority Leader Rhodes, you expressed serious reservations regarding the concept of parens patriae as well as concern regarding specific provisions of the House legislation (see Attachment A). In response to these specific concerns, the House parens patriae provisions were narrowed. The Senate amendment generally adopts the House version by limiting the scope of parens patriae actions, in practical effect, to price fixing violations. The Senate amendment, however, is broader than the House passed bill in that it would provide for mandatory treble damage awards and some latitude for the courts to permit contingency fees on other than percentage fee bases.

In addition to these major changes in the three major titles, the Senate amendment deleted all other titles in the bill that had earlier passed the Senate (e.g., declaration of antitrust policy, Antitrust Review Commission, and a miscellaneous set of amendments to the antitrust laws).

The Senate has made arrangements to vote on Wednesday, September 8 whether to adopt the proposed compromise amendment or go to conference on the original Senate bill. The latter would likely kill antitrust legislation in this session of Congress.

THE WHITE HOUSE

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

March 17, 1976

Dear John:

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

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

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

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

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

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

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

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

Sincerely,

/s/ Gerald R. Ford

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