The original documents are located in Box 10, folder "Domestic Council - Memoranda (5)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 1, 1976 Time:

FOR ACTION: cc (for information):

Phil Buchen
Jim Lynn Arthur Fletcher
Dave Gergen

FROM THE STAFF SECRETARY

DUE: Date: Friday, September 3 Time: 10 A.M.

SUBJECT:

Jim Cannon memo re: Letter from Presidents of Historically Black Colleges

ACTION REQUESTED:

____ For Necessary Action ___X___ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

___X___ For Your Comments ____ Draft Remarks

REMARKS:

September 2, 1976

Although this memo does not present adequate information to allow Counsel's Office to concur in the view that most of these recommendations would raise "serious questions of constitutionality", we nonetheless concur in the recommendation that the President sign the attached letter. I think it is most important that HEW move promptly and visibly to implement those matters where immediate action is possible.

P.W.B.

Philip W. Buchen
Counsel to the President

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

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

Jim Connor
For the President

THE WHITE HOUSE

WASHINGTON

September 16, 1976

MEMORANDUM FOR: PHIL BUCHEN
ROBERT T. HARTMANN
JACK MARSH
MAX FRIEDERSDORF
JIM LYNN

FROM: JIM CANNON

Attached for your comments and recommendations is a draft Presidential statement on historic preservation.

This statement has been requested by the National Trust for Historic Preservation to be printed in their October newsletter.

The last paragraph refers to S. 327, the Land and Water Conservation Authorization which is expected to be enrolled this week. Favorable action on the bill is expected.

I would appreciate your sending your comments and recommendations to Sarah Massengale, Room 220, Ext. 6776 by 9:00 a.m., Friday, September 17.

Thank you.

9/17/76
Phoned comments in.
P 208

DRAFT PRESIDENTIAL STATEMENT ON HISTORIC PRESERVATION

It was my privilege this year to designate a week in May as "National Historic Preservation Week". The official proclamation states well the reason for my firm belief that the preservation of America's cultural resources must be a continuing objective of our society: "One of the most important sources of our sense of national direction is our cultural and architectural heritage -- the historic sites, structures and landmarks that link us physically with our past."

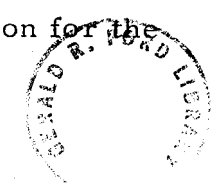
Your government has a proper role in this continuing effort to preserve our heritage. I am committed to the partnership between the private sector and the Federal and State governments that has proven to be so productive. And I am committed to continuing and enhancing Federal financial support for these programs.

Summing up the progress of historic preservation in the ten years since enactment of the National Historic Preservation Act, the Advisory Council on Historic Preservation observed that this landmark legislation "has produced a stronger, more dynamic program".

To those of you who have followed closely the emergence of America's concern for preservation of our cultural legacy, the signs of that progress are familiar indeed: a National Register of Historic Places which now boasts more than 12,000 individual entries, the burgeoning membership of the National Trust for Historic Preservation and affiliated organizations throughout the country, growing respect on the part of Federal agencies for the principles of identification and protection embodied by Executive Order 11593, and the greatly increased workload of the Advisory Council itself, among others. But these are not the only ~~the tangible~~ signs of commitment by millions of citizens to the preservation of those places and properties which constitute the historic fabric of America. As I travel to town and cities in every region of the United States this year, I can not help but observe that Americans have seized upon our Bicentennial celebration as the impetus for important new

preservation projects. Thus, as we look backward to capture anew the inspiration which fired the founding of this Republic, we have pledged that physical evidence of the American experiment will remain to inspire succeeding generations.

The preservation movement is a citizens' movement, and it should remain so, but it can and should be nurtured by the sympathetic actions of government at all levels. We are proud, for instance, of the partnership between the National Park Service and state historic preservation officers which has responsibility for administration of historic preservation grants in aid. Through June of this year, more than $57 million had been allocated to the states, territories and possessions in support of their preservation programs, and more than $11 million made available to the National Trust for its outstanding work. In fiscal year 1976 alone, the comparable figures were $15.3 million and $2.5 million. Distinguished citizen members of the Advisory Council on Historic Preservation help to shape Federal policy with respect to historic preservation, as do the members of the Secretary of the Interior's Advisory Board on National Parks, Historic Sites, Buildings and Monuments. And many of the Nation's most significant historic sites, now including Valley Forge and 23 others improved this year in preparation for the



Bicentennial, are managed by the National Park Service with assistance from Volunteers in the Parks and a wide variety of citizens' advisory groups.

As this Administration is committed to assisting citizen preservationists in identifying and protecting historic sites and properties, so too have we sought to protect historic properties which are entrusted to the stewardship of Federal agencies, and to assure that Federal agencies do not act without regard for the historic values of properties which qualify for National Register status. The mandates of Executive Order 11593 (May 13, 1971) and section 106 of the Historic Preservation Act have been enforced, with the result that, according to the Advisory Council, "(t)he potential of Federal protection has been extended to thousands of historic sites, and the number of properties saved and restored has increased dramatically".

Despite such progress on many fronts, this Administration recognizes that the Federal role in historic preservation is one which must be subject to change, if only to keep pace with the growth of public interest and the development of new preservation strategies. We first proposed the Environmental Protection Tax Act, important provisions of which have been adopted by the Congress in its 1976 tax reform legislation, changing depreciation rules to encourage restoration -- and

not demolition -- of historic properties. We have strongly recommended enactment of the Public Buildings Cooperative Use Act, making possible the preservation and adaptive use of historic buildings which are owned by the Federal Government. I have recently proposed a $1.5 billion, ten-year Bicentennial Land Heritage Program, enabling the National Park Service to accelerate its acquisition of additional historic and archeological sites, while assuring adequate maintenance of and facilities for those such sites which are already within the National Park System. The National Park Service has adopted a program to acquire and administer preservation easements in nationally significant historic properties. The Secretary of Housing and Urban Development has established a cabinet-level Committee on Urban Development and Neighborhood Revitalization.

No new law will have more immediate impact than those amendments to the Historic Preservation Act which I signed into law last month. Having determined that a healthy economy and improved budget outlook would now justify such action, I was particularly pleased to approve an increased authorization -- from $24.4 million at present to $100.0 million in fiscal years 1978 and 1979 and $150.0 million in fiscal years 1980 and 1981 -- for the historic preservation grants in aid program. This four and six-fold increase in the amount of Federal funds which

can be made available to support the state preservation programs, and the activities of the National Trust, will assure the continued momentum of our national preservation program.7

THE WHITE HOUSE

WASHINGTON

September 17, 1976

MEMORANDUM FOR: JIM CANNON

THROUGH: PHIL BUCHEN

FROM: BOBBIE GREENE KILBERG

SUBJECT: Financial Assistance for Alaskan Highways

This memorandum is in response to your request for comments on the draft memorandum to the President regarding Alaska's request for financial aid for the repair of Alaskan highways. Among the four options which you propose, the Counsel's Office would favor either the use for repairs of presently authorized highway upgrading funds, provided it is permitted by statute, or legislation to authorize a loan from the Highway Trust Fund. The option of waiting for the conclusion of the DOT study seems undesirable because of the January 1977 contractor bids deadline (which deadline Judy Hope believes is firm), and the option of legislation authorizing direct grant aid seems undesirable before the completion and evaluation of the DOT study.

In regard to the loan option, the following questions occur to us: (1) How would a loan of up to $70 million affect the other obligations of the Highway Trust Fund; and (2) given the late date, what chance does legislation, which has not yet been introduced, have of passage in this Congress? Judy Hope and I discussed these questions today, and she will pursue answers.

In regard to utilizing presently authorized funds, Judy has informed me that Alaska may have sufficient statutory authority to spend upgrading money for repairs without an amendment to the 1976 Highway Act. Since we also would raise the legislative timing question about an amendment to the Highway Act, it is our opinion that the utilization of presently authorized funds is the most practical solution to the problem.

THE WHITE HOUSE

WASHINGTON

September 10, 1976

MEMORANDUM FOR: PHIL BUCHEN
ROBERT T. HARTMANN
JACK MARSH
MAX FRIEDERSDORF
ALAN GREENSPAN
JIM LYNN OK
BILL SEIDMAN

FROM: JIM CANNON

SUBJECT: Financial Assistance for Alaskan Highways

This is to solicit your comments on the attached draft decision memorandum on the question of Federal financial assistance for Alaskan highways damaged by heavy traffic supporting the Pipeline construction.

I would appreciate having your comments by Wednesday, noon, September 15.

Attachment

THE WHITE HOUSE DRAFT

WASHINGTON
September 10, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Alaska's Request for Financial Aid for the Repair of Alaskan Highways

Governor Hammond (R-Alaska) and the Alaskan delegation are requesting administration support for S. 2071, a bill to authorize the appropriation of $70 million for the repair of Alaskan highways. Alaskan highways have suffered damage since construction of the pipeline began and the Governor maintains that this damage is due to increased traffic from pipeline construction.

BACKGROUND

The Governor states that without repair these highways could deteriorate to the point of closing. Governor Hammond has indicated that if financial aid for repairs is not forthcoming, the State will consider restrictions which might delay pipeline completion.

Alaska has estimated that it requires Federal aid of approximately $70 million initially and $300 million over a five-year period to finance needed repair and restoration work.

Section 151 of the Federal-Aid Highway Act of 1976 responds to the State's concerns by requiring the Secretary of Transportation to study the problem of highway impact and report his findings to the Congress. Under this section the Secretary is authorized to undertake a study to determine the costs of, and responsibility for, repairing the damage to Alaskan highways that has been caused by pipeline construction. The Secretary's initial findings are due on or before September 30, 1976, and his final conclusions are due no later than three months after completion of pipeline construction. Construction is now expected to be completed by the end of 1977.

Alaska, however, presently has a cash flow problem and is without front-end funds to accept contractor bids by January, 1977, the last month in which it can make arrangements for the repair of highways in the summer of 1977.

S. 2071 has passed the Senate and is currently pending in the House. Without a strong Administration push, it is unlikely that S. 2071 will pass the House this session, especially since the House Public Works Committee appears to want to wait for the Section 151 report. (Given the priority items confronting the Congress before the recess, it may well be that legislation on this subject couldn't be enacted under any circumstances.)

OPTIONS

1. Await the Study

Do nothing to support the legislation and indicate that any further definitive Administration recommendations on this issue will await completion and transmittal to the Congress of the comprehensive Alaskan roads study required by Section 151 of the 1976 Highway Act. As noted above, the initial report is due on September 30, 1976.

2. Loan

Support legislation to authorize the Secretary to loan up to $70 million from the Highway Trust Fund, repayment of the loan to begin when oil revenues accrue to the State.

3. Permit Use of other funds

Support an amendment to the 1976 Highway Act to allow Alsaka to spend up to $20 million from the funds already authorized for upgrading their highways for repair to the damaged roads by pipeline activity.

4. Direct Aid

Support the S. 2071 legislation for $70 million in a new grant authorization.

ASSESSMENT OF ALTERNATIVES

Option 1 -- Await the Study 9/3/76

Con

a. Alaska maintains that the roads need repair now. Without Federal financial assistance, the Governor believes that many of the roads will deteriorate to the point of closing.

b. Although the Section 151 study is due September 30, that date may be too late for Congress to act this Fall. Bids for next summer's construction must be contracted by January, 1977.

Pro

a. Awaiting the study would allow the Administration to be more certain of the condition of the roads and of the Federal responsibility for their repair.

b. No Federal funds would be advanced at the present time.

Option 2 --Loan

Con

a. Federal funds would be advanced before the study indicates the condition of the roads and the Federal responsibility for their repair.

b. Loan may set a bad precedent of Federal government assuming responsibility for damage before cause of damage is determined.

Pro

a. Option 2 has the support of Secretary Coleman and the State of Alaska. Alaska is amenable to this option, because its financing problem is partly one of cash flow. Front-end money is necessary now so that the State can accept contractor bids by the end of January 1977,

b. Alaska maintains that pipeline construction is having an extraordinary impact on Alaska's roads at the present time. While Alaska will benefit significantly when new oil revenues start to flow, the State asserts its need for cash now when State funds are unavailable for heavy road expenses.

c. The loan would require legislative authority, but would not necessarily require appropriations action if it was from the Highway Trust Fund.

Option 3 -- Permit Use of other Funds

Con

a. Option 3 would not give the State any additional funds over its current allocation of Federal-aid highway funds.

b. This option is opposed by the State because it does not believe that it can divert money from its other priorities to repair the impacted roads.

Pro

a. Diversion of funds would solve Alaska's present cash flow problem. If the study then concluded that Federal assistance should be forthcoming, the State's Federal Highway Fund could be reimbursed.

b. No Federal outlay would be made at this time.

Option 4 -- Direct Aid

Con

a. Option 4 requires both authorization and appropriation action. Assuming Congress sticks to its current adjournment schedule, there is very little time to pursue this course of action.

b. The Section 151 study should be received before recommending an outright grant containing no requirement of repayment.

Pro

a. Governor Hammond, Congressman Young, as well as Senators Gravel and Stevens, strongly believe Alaska needs and deserves extra highway resources during this pipeline construction period.

RECOMMENDATIONS

DOT:

Up to this point, the Administration's position has been that any action on S. 2071 or related bills should await transmittal of the Section 151 Report to the Congress on September 30, 1976. Secretary Coleman has indicated to the Governor that he would be willing to support legislation to provide

additional flexibility in the use of existing Federal-aid highway funds going to Alaska, if such flexibility was necessary to achieve needed restoration and rehabilitation.

DOT understands that this position is not acceptable to the State, primarily because it provides no extra funds at this time. If the Administration believes further assistance is justifiable, DOT believes such assistance should be limited to a loan with repayment due shortly after oil revenues start accruing to the Alaskan Treasury. This loan would require legislative authority, but would not necessarily require separate appropriations actions if it was from the Highway Trust Fund.

Domestic Council

THE WHITE HOUSE

WASHINGTON

September 24, 1976

MEMORANDUM FOR: JIM CANNON

FROM: PHILIP BUCHEN P.W.B.
DICK PARSONS RDP

SUBJECT: Hatch Act

This is to advise you that we have no legal problem with members of the staff of the Domestic Council continuing to perform their normal and customary duties on behalf of the President, including canvassing the various departments and agencies of the Federal Government to determine those issues of Federal concern which the President might encounter in traveling around the country.

We would not think it appropriate, however, for those members of the staff of the Domestic Council who are not paid from appropriations to the President to contact persons from outside the Federal Government (such as State or local officials or political party chairmen) for the purpose of identifying issues of local sensitivity or concern.

THE WHITE HOUSE

WASHINGTON

September 27, 1976

MEMORANDUM FOR: JIM CANNON

THROUGH: PHIL BUCHEN P.

FROM: BOBBIE GREENE KILBERG BGK

SUBJECT: Proposed Presidential Response to Letter from Mr. Finney, President of American National Cattlemen's Association

I have discussed the proposed Presidential response with Paul Leach and it is my understanding from that conversation that the State Department does not object to the Agricultural Policy Committee, chaired by Secretary Butz, conducting a "thorough committee review of our procedures for negotiation of the voluntary restraint agreements and for administration of the program." (State is a member of this Committee.) It is my further understanding that the Committee's mandate will be to conduct a review of procedures and administration rather than a substantive policy review.

On the above basis, the Counsel's Office has no objection to the proposed Presidential response to Mr. Finney's letter.

For Paul Leach's information, I have sent him a memorandum correcting the Cattlemen Association letter's inaccurate legal statement on the Agricultural Act of 1956. Paul has indicated that he will convey this information to the Association's attorneys. In its correspondence, the Association requested that the President transfer "back" to the Secretary of Agriculture the authority to negotiate and complete voluntary restraint agreements for meat imports. The Association went on to state that the 1956 Act gave this responsibility to the Secretary of Agriculture, but that President Nixon changed the negotiation authority by Executive Order.

7 U.S.C. § 1854 of the Agricultural Act of 1956 states that the President may negotiate with foreign governments agreements limiting "the export from such countries and the importation to the United States of any agricultural commodity or product manufactured therefrom or textiles or textile products." The President is further authorized to "issue regulations governing the entry or withdrawal from warehouse of any such commodity, product, textiles, or textile products ot carry out any such agreement." On June 30, 1970, President Nixon issued Executive Order 11539, delegating to the Secretary of State, with the concurrence of the Secretary of Agriculture and the Special Representative for Trade Negotiations, the authority to negotiate bilateral import agreements on cattle meat, goats and sheep. Under this Executive Order, the Secretary of Agriculture, with the concurrence of the Secretary of State and the Special Representative for Trade Negotiations, is authorized to issue regulations governing the entry or withdrawal from warehouse for consumption in the United States of any such meats to carry out any such agreement.

In summary, the President has the statutory authority to negotiate meat importation agreements and President Nixon delegated that negotation authority to the Secretary of State, to be exercised with the concurrence of the Secretary of Agriculture and the Special Representative for Trade Negotiations. The Secretary of Agriculture does not have the negotiation authority and that authority has never been delegated to the Secretary of Agriculture, other than in the E.O. 11539 provisions for concurrence with the Secretary of State's actions. However, the Secretary of Agriculture does have the authority to issue regulations to complete the import agreements, in the form of regulations governing the entry or withdrawal from warehouse for consumption in the United States. This is subject to the concurrence of the Secretary of State and the Special Representative for Trade Negotiations.

115

THE WHITE HOUSE

WASHINGTON

September 24, 1976

MEMORANDUM FOR: PHIL BUCHEN
BRENT SCOWCROFT
BILL SEIDMAN

FROM: JIM CANNON

SUBJECT: Proposed Presidential Response to Letter from President of American National Cattlemen's Association

In late August, the President of the American National Cattlemen's Association wrote to the President about the meat import program. See attached letter at Tab A.

A draft Presidential response has now been prepared along the lines suggested by Secretary Butz. This is at Tab B. Since this is a sensitive matter, I would appreciate your comments and recommendations on this letter and course of action.

Would you please provide this to me by noon, Saturday, September 25?

Thanks.

A

American National Cattlemen's Association

A Non Profit Corporation

1001 Lincoln Street • P. O. Box 569 • Denver, Colorado 80201 • Phone (303) 861-1904

OFFICE OF THE PRESIDENT

WRAY FINNEY
P. O. Box 280
Ft. Cobb, Oklahoma 73038
(405) 643-2625

August 27, 1976

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

The nation's cattle industry is willing to live within the provisions of the Meat Import Act of 1964. This legislation created the fairest form of trade access and is the envy of the world. No other country guarantees, as our law does, a share of a domestic market. Other countries, in fact, often arbitrarily close their borders to world trade in meat.

As you are aware, two of our trading partners, Australia and New Zealand, have violated the intent and the spirit of the Meat Import Act of 1964 by the use of the unique facility called a Foreign Trade Zone. The action of these two countries, in our opinion, is a blatant and willful violation of honesty and fair play. Australia in particular, has been willing to undercut the normal price of imported meat by as much as 25% just to make circumvention possible.

In our efforts to stop such violations we wish to highly commend Secretary of Agriculture, Earl L. Butz, Assistant Secretary of Agriculture, Richard E. Bell, and many members of their staffs. We have sought and received full cooperation from USDA. They have done and are doing everything within the law that is possible. We have also received excellent cooperation from Assistant Secretary of Treasury, David McDonald. I cannot say the same for the Secretary of State and his staff. We believe the Department of State has done everything they could to thwart the efforts of Secretary Butz. As we have dealt with this problem, we have often felt that the Department of State and the office of the Special Trade Representative were our adversaries. Through their activities it has been evident that they are more interested in representing the interests of other countries than they are toward the economic survival of a segment of U. S. citizenry. As the representative of this segment of the American society, we feel we must protest in the strongest

terms the actions of the Secretary of State and his staff. We believe in trade with other nations, but when such trade is outside the boundaries of fair play, then all levels of our government should resist such action and not be of assistance to the violators.

Further, the Department of State has been derelict in carrying out its responsibilities to negotiate and establish voluntary restraint levels associated with meat imports. This year the month of August was reached before all agreements were signed. It makes sense to us that all agreements should be negotiated prior to and signed as close to January 1 as possible. We are informed that the Department of State has never begun negotiations in time to reach this objective. Such procrastination has resulted in many disruptions within the cattle industry.

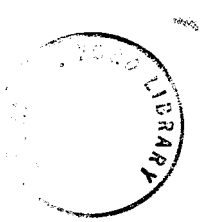
Mr. President, we respectfully request that the authority to negotiate and complete voluntary restraint agreements for meat imports be transferred back to the Secretary of Agriculture where it belongs. The law, as contained in the Agricultural Act of 1956, specifies that this is the responsibility of the Secretary of Agriculture, but President Nixon by Executive Order changed this statuatory authority. We further respectfully request that such authority be transferred without delay as the time for negotiation of the 1977 restraint levels is fast approaching.

Sincerely,

Wray Finney
President

WF:sf

B



THE WHITE HOUSE

WASHINGTON

Dear Mr. Finney:

Thank you for your letter of August 27 in which you discussed your concerns with the meat import program. Since receiving your letter, I have had my staff investigate the points you have raised.

I recognize that there have been some difficulties in administering the meat import program over the past two years. For this reason, I am directing Secretary Butz, as Chairman of my Agricultural Policy Committee, to initiate a thorough Committee review of our procedures for negotiation of the voluntary restraint agreements and for administration of the program. The Committee will submit a report and recommendations to me in time so that we will be able to avoid unnecessary problems in the administration of the program in the future.

Please be assured that I appreciate your efforts to bring important matters of interest to the American cattle industry to my attention and that my Administration will continue to be concerned with the problems of the cattle industry.

Sincerely,

Mr. Wray Finney
President
American National
Cattlemen's Association
1001 Lincoln Street
Denver, Colorado 80201

THE WHITE HOUSE
WASHINGTON

Ed:

Ken and I think you should be the one to clear off on this one.

Bobbie

THE WHITE HOUSE

WASHINGTON

September 27, 1976

MEMORANDUM FOR: JIM CANNON

FROM: PHILIP BUCHEN

SUBJECT: H.R. 8532 (Hart-Scott-Rodino Antitrust Improvements Act, 1976)

This memorandum is in response to your action memorandum of September 25, Tab I.

The draft Memorandum for the President, which was attached to the action memorandum, refers to the fact that the Attorney General planned to convey his views on the matter personally to the President. His views to the President are set forth in the memorandum signed by him which is attached at Tab II.

The draft memorandum on page 5 (last paragraph) is somewhat misleading. Although it is true that H.R. 8532 is not limited to price fixing but covers all violations of the Sherman Act, the Attorney General in his memorandum shows that the aggregation of damage section only applies where there has been a determination that a defendant agreed to fix prices. Thus, as a practical matter, the parens patriae provisions will probably be used only in cases of alleged price fixing.

Edward Schmults and I recommend a veto by the President solely because of the parens patriae provisions. But we agree with the Attorney General that the decision is a close one and that if the President does veto the bill, a statement should be issued substantially along the lines set forth in the memorandum from Edward Schmults dated September 25, a copy of which is attached at Tab III.

Attachments

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 25 Time: 1020am

FOR ACTION: Paul Leach
Max Friedersdorf
Dick Parsons
Bobbie Kilberg
Robert Hartmann

cc (for information): Jack Marsh
Jim Connor
Bill Seidman Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date: September 27 Time: 500pm

SUBJECT:

H.R. 8532-Hart-Scott-Rodino Antitrust Improvements Act,1976

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

x For Your Comments ____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

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

James M. Cannon
For the President

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

SEP 23 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 8532 - Hart-Scott-Rodino Antitrust Improvements Act of 1976
Sponsors - Rep. Rodino (D) New Jersey and 8 others

Last Day for Action

September 30, 1976 - Thursday

Purpose

Broadens powers of the Department of Justice in conducting antitrust investigations; requires advance notice to Justice and the Federal Trade Commission of certain corporate mergers or acquisitions; and authorizes State attorneys general to file suits to recover damages incurred by the State's residents as a result of certain antitrust violations.

Agency Recommendations

Office of Management and Budget	Approval (Signing statement attached)
Federal Trade Commission	Approval
Department of Commerce	Does not recommend veto
Small Business Administration	Cannot support enactment
Department of the Treasury	Disapproval
Department of Justice	No recommendation received

Discussion

H.R. 8532 is a controversial antitrust bill that has been the subject of extensive negotiations between the Administration and the Congress. The first of the three titles in the bill resulted from an Administration proposal. The second is a congressional initiative which is now acceptable to the Administration since

certain objectionable provisions were deleted by the Congress. The third title (regarding parens patriae) has been strongly opposed by the Administration. While labor and consumer groups have supported H.R. 8532, there has been a great deal of opposition to the entire bill from the American business community, and overwhelming opposition to the parens patriae title.

The enrolled bill passed the Senate by 69-18 and the House by 242-138. In another significant vote, the House rejected a motion to recommit to the Judiciary Committee a bill just containing a parens patriae provision by 223-150.

Major Provisions

Title I - Antitrust Civil Process Act Amendments

Current law (the Civil Process Act) authorizes the Department of Justice to serve a "civil investigative demand" (CID) -- a pre-complaint subpoena -- on suspected violators of the antitrust laws, the so-called "targets." The CID helps the Department determine, in advance of filing a suit, whether in fact a violation has occurred. It may only be used to obtain documents and only from "other than natural" persons (e.g., corporations) that Justice has reason to believe are violating or have violated the law.

The enrolled bill would amend the Civil Process Act to authorize Justice to

-- issue CID's not only to "targets" of the investigation but also to (1) third parties (e.g., customers, suppliers, competitors) who may have information relevant to an antitrust investigation and (2) individuals (e.g., witnesses to a meeting) as well as business firms.

-- obtain answers to oral and written questions, as well as documents, from the CID recipients.

-- issue CID's relating to the investigation of mergers and acquisitions prior to their consummation.

-- authorize access by the Federal Trade Commission (FTC) to materials received by Justice in response to CID's.

H.R. 8532 would also provide certain safeguards to protect persons against governmental overreaching in the use of CID's. Anyone asked to give a deposition could be accompanied and advised by an attorney, who may advise his client, in confidence, to refuse to answer questions on the grounds of self-incrimination or any other lawful grounds. If a disagreement arises about the propriety of any question, a witness could refuse to answer, and the Department would have to obtain a court order to compel a response. A witness could obtain a copy of the transcript of his testimony unless, for good cause, the Assistant Attorney General in charge of the Antitrust Division only permits the witness to inspect the transcript.

This title of the bill is substantially similar to legislation submitted to the Congress by the Department of Justice, and would provide the Department with powers now possessed by the Federal Trade Commission and other Federal agencies. In a March 31, 1976 letter to Rep. Rodino, Chairman of the House Judiciary Committee, you indicated your "... support of amendments to the Antitrust Civil Process Act which would provide important tools to the Justice Department in enforcing our antitrust laws..." and urged "... favorable consideration" of this legislation.

Title II - Premerger Notification

H.R. 8532 would require companies with total assets or net sales of $100 million or more that plan to acquire companies with total assets or net sales of $10 million or more to provide 30 days advance notice to the Department of Justice and the FTC, if the acquisition results in the acquiring company holding either (1) 15 percent of the stock or (2) assets and stock in excess of $15 million in the acquired company.

The companies would have to supply FTC and Justice with documentary material and information relevant to the proposed acquisition. Twelve classes of transactions would be exempt from this requirement, including regulated industry and bank mergers, real estate acquisitions for office space, formation of subsidiary companies, and acquisitions exempted under FTC rules with the concurrence of the Assistant Attorney General in charge of the Antitrust Division.

Other provisions in this title would

-- require a 15 day advance notice period for cash tender offers;

-- authorize FTC or Justice to extend the 30 day notice period for an additional 20 days (10 days for a cash tender offer) and allow Justice and the FTC to terminate the notice period in individual cases; and

-- make anyone who fails to comply with this title liable to a penalty of not more than $10,000 a day.

Title II of H.R. 8532 would be effective 150 days after enactment of the bill, except that a provision authorizing the FTC to prescribe rules relating to this title would be effective immediately upon enactment.

The business community contends that because the values of stock, used for consideration in mergers and acquisitions, would fluctuate during the period of advance notice to Justice and FTC, there is a real danger that this title could disrupt legitimate business combinations. On the other hand, the Justice Department does not believe that existing law gives the Department an adequate opportunity to learn about and take action against mergers or acquisitions that violate the antitrust laws. Due to strong opposition by the Administration and others, a provision in earlier versions of the legislation that would have provided for an automatic injunction against the consummation of mergers and acquisitions by Federal enforcement authorities was deleted. The Administration has not objected to this title of the bill since that provision was dropped.

Title III - Parens Patriae

H.R. 8532 would authorize State attorneys general to bring suits in Federal district court on behalf of State residents for violations of the antitrust provisions of the Sherman Act. Treble damages would be awarded in successful suits and would either be distributed to individuals in a manner approved by the court or be considered a civil penalty and deposited with the State as general revenues. In price-fixing cases, damages could be proved in the aggregate by using statistical sampling or other measures without the necessity of proving the individual claims of, or amount of damage to, each person on whose behalf the suit was brought.

The Attorney General would be required to provide State attorneys general with (a) written notification of instances in which Justice has brought antitrust actions and he believes the States could bring action under this title on the same grounds, and (b) investigative files or other materials, to the extent permitted by law, which may be relevant to a course of action under this title.

While the bill would prohibit State attorneys general from hiring outside lawyers to be paid with a contingency fee based on a percentage of the settlement or recovery, it would allow the court to award "reasonable" fees to such lawyers which could be determined on a non-percentage contingency basis.

The amendments made by this title would not apply to any injury sustained prior to the date of enactment of this bill.

The proponents of this title claim that it is necessary in order to assist large numbers of consumers who may be injured by antitrust violations on a continuing basis although in individually small amounts (e.g., a million consumers might be overcharged an average of a penny a week for a 2 year period on a product like a loaf of bread). In such cases, it is argued, relief is almost impossible to obtain under present law, since individual antitrust law suits are out of the question and class action suits are usually determined to be unmanageable by the courts because of their size and complexity. Hence, the proponents state that "Title III is the legislative response to the present inability of our judicial system to afford equal justice to consumers for violations of the antitrust laws."

In a March 17, 1976 letter to Representative Rhodes, you indicated your "serious reservations concerning the parens patriae concept..." and said:

> "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."

You also indicated your concern over specific provisions of the legislation then being considered in the House, as follows:

> -- "The present bill is too broad in its reach and should be narrowed to price fixing violations." (H.R. 8532 is not limited to price-fixing but covers all violations of the Sherman Act.)

-- "... the Administration is opposed to mandatory treble damages awards ..." (H.R. 8532 authorizes treble damages.)

-- "The Administration opposes extension of the statistical aggregation of damages... to private class action suits..." (H.R. 8532 does not extend such techniques to private class action suits.)

The Administration had also opposed a provision in earlier versions of this legislation which would have allowed State attorneys general to hire private lawyers to assist them in parens patriae cases and compensate those attorneys by a contingency fee based on a percentage of the settlement or recovery. As noted above, while contingency fees per se are not permitted under the enrolled bill, courts can award fees to such lawyers on a non-percentage contingency basis.

Congressional and business opponents of this title have asserted that it would (1) overburden the Federal courts with needless litigation, (2) enhance the power of politically ambitious State attorneys general to pillory corporations in highly publicized actions, and (3) impede business growth due to firms' impaired access to financing when exposed to huge contingent liabilities by massive antitrust litigation.

Agency Views

Secretary Simon, in a memorandum to you which is enclosed with the Treasury views letter, strongly recommends that you veto the enrolled bill because of title III. He objects to the provisions which extend its scope beyond price-fixing to the Sherman Act, allow mandatory treble damages, and permit certain contingent fee arrangements for private lawyers. The Secretary argues that:

> "These provisions would give State Attorneys General, nearly all of whom are elected officials (and many of whom are openly competing with other elected State officials), an open invitation to pursue antitrust claims with very little risk to them or the State governments and with a great likelihood of political gain for themselves. State governments would incur little cost in prosecuting antitrust claims against business firms since they would be able to retain private counsel under contingent fee arrangements. Since both elected

> officials and the private antitrust bar would stand to gain from prosecuting parens patriae actions, the potential for abusing this power by promoting unfounded antitrust litigation against business concerns seems manifest.
>
> Business firms [especially small businesses] confronted with such litigation may be forced to settle, irrespective of the merits of the State's case, because they cannot obtain a clean auditor's opinion so long as they are exposed to such a magnified contingent civil liability.
>
> Title III also represents an unwarranted intrusion of the Federal Government upon the States."

The Small Business Administration (SBA) also "cannot now support enactment of H.R. 8532." In its attached views letter, SBA argues that "... smaller firms may become leading victims of parens patriae claims under Title III. A smaller firm ... may be unable to stand the risk of a potentially astronomical exposure. This type of litigation is inherently conducive to 'blackmail settlements,'..." SBA also claims that small business firms, faced with parens patriae actions, may have their ability to obtain financing severely curtailed.

While the Commerce Department does not recommend a veto of H.R. 8532, it has a "deep concern as to the potentially adverse effects that certain provisions of Title III may have upon the business community and consequently upon the economy." The Department notes in its views letter that Titles I and II of the enrolled bill have been passed by the House in essentially identical form as separate bills which are now pending in the Senate and could be passed before the end of the current session.

FTC recommends approval of the enrolled bill and states that it "believes that Title III could provide an effective deterrent to Sherman Act violations in general and price-fixing in particular."

No recommendation has been received from the Justice Department on H.R. 8532 and we have been informally advised by Justice staff that the Attorney General will personally convey his views to you on this matter.

OMB Recommendation

The issue presented by the enrolled bill is whether the parens patriae title, even though somewhat narrowed in scope and effect to meet certain Administration objections, still represents such poor public policy that it justifies disapproving the bill despite the other desirable features of H.R. 8532.

This enrolled bill presents a very close call. On balance, we reluctantly recommend your approval. While it would be preferable if H.R. 8532 did not contain title III, Congress has narrowed the parens patriae provisions in response to Administration objections by (1) confining the statistical aggregation of damages to price-fixing cases, and (2) requiring Federal court approval of arrangements for paying attorneys fees on any contingent fee basis. The more focused and restricted title III, plus the desirable features of title I and the now unobjectionable provisions of title II, outweigh, in our view, the potentially harmful effects of the parens patriae provisions.

Attached for your consideration is a draft signing statement.

Paul H. O'Neill
Acting Director

Enclosures

SIGNING STATEMENT

I have today signed into law H.R. 8532, the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

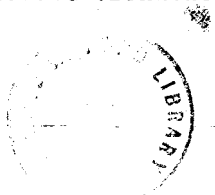
This bill contain three titles. The first title will significantly expand the civil investigatory powers of the Antitrust Division. These amendments to the Antitrust Civil Process Act originated with the Administration two years ago, and I am pleased to see that the Congress has passed them.

The second title of this bill will require parties to very large mergers to give the Antitrust Division and the Federal Trade Commission advance notice of the proposal. This title was not objected to by the Administration and I intend that it be carefully monitored in operation to assure that it does not hamper legitimate business combinations.

This antitrust bill also includes a third title, about which I have previously expressed serious reservations. It would permit State attorneys general to bring antitrust suits (parens patriae suits) on behalf of the citizens of their States to recover treble damages.

The States have ample authority to amend their own anti-trust laws to authorize such suits in State courts. I question whether the Congress should bypass the State legislatures and provide State attorneys general with access to Federal courts to enforce Federal laws.

Congress has, however, narrowed this title so as to reduce the possibility of significant abuses. I had urged that the scope of this legislation be narrowed to price-fixing activities where the impact is most directly felt by consumers. The Congress responded to this suggestion by confining the scope of the most controversial provision, which would authorize the statistical aggregation of damages, to price-fixing violations. Thus, this bill will be confined to hard-core antitrust violations.



I was also concerned about the provision that would allow States to retain attorneys on a contingent fee basis, thereby encouraging suits against business in which the principal motivation would be enrichment for attorneys rather than restitution for the consumer. The present bill, while not prohibiting all contingent fee arrangements, has proscribed those kinds that have been subject to most abuse. I remain concerned about this provision, but I think it has been improved.

With these and other changes that have been made in this title since its introduction, this legislation has been focused and limited. In this form, it may well prove the deterrent to price-fixing that it is supposed to be.

I am signing this major antitrust legislation with the belief that the parens patriae authority will be responsibly enforced and in the knowledge that the Antitrust Civil Process Act amendments and pre-merger notification provisions will strengthen Federal antitrust enforcement.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

SEP 23 1976

The Honorable James T. Lynn
Director, Office of Management
and Budget
Executive Office of the President
Washington, D.C. 20503

Dear Mr. Lynn:

This is in response to your request for the views of the Federal Trade Commission upon Enrolled Bill H.R. 8532, 94th Congress, 2d Session, an act "To improve and facilitate the expeditious and effective enforcement of the antitrust laws, and for other purposes."

H.R. 8532, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, is a comprehensive measure containing three separate titles designed to increase the effectiveness of antitrust enforcement. Title I would expand the investigative authority of the Department of Justice to obtain information that is necessary or appropriate to the enforcement of the antitrust laws. Title II would create a mechanism to provide advance notification to the antitrust authorities of large mergers prior to their consummation. Title III would authorize State attorneys general to bring private treble damage actions on behalf of natural persons residing in their State for violations of the Sherman Act.

Title I would amend the Antitrust Civil Process Act of September 19, 1962 (15 U.S.C. § 1311) which authorizes the Antitrust Division to issue compulsory process (called a "civil investigative demand") to investigate violations of the antitrust laws prior to the filing of an action. H.R. 8532 would broaden the scope of this Act by authorizing the Division, through the use of a civil investigative demand, to investigate mergers and acquisitions prior to consummation, to obtain relevant evidence from natural persons and third parties, and to take oral testimony and written interrogatories. As expressed in its statement of May 7, 1975 regarding S. 1284, 1/ the Commission supports the effort to strengthen the investigative authority of the Department of Justice but defers to the Department with respect to the specific provisions of Title I.

1/ Statement of Lewis A. Engman, Chairman of the Federal Trade Commission before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on S. 1284, May 7, 1975.

Of particular interest to the Commission is Section 103 of Title I which authorizes access by the Commission to materials produced in response to the Antitrust Division's civil processes. This section provides that the custodian of such materials may deliver copies to the Federal Trade Commission, pursuant to a written request, for use in connection with an investigation or proceeding under the Commission's jurisdiction. We believe that this provision will avoid duplication of effort by the antitrust enforcement agencies and is consistent with the current policy of the Commission and the Antitrust Division to share, where appropriate, information secured during investigation or trial of a civil matter.

Title II of H.R. 8532 would amend the Clayton Act (15 U.S.C. § 12 et seq.) to establish a premerger notification procedure which would require notification to the antitrust authorities and a 30-day extendible waiting period prior to the consummation of large acquisitions. The procedure would apply to stock or asset acquisitions between companies with net sales or assets of at least $100,000,000 and $10,000,000, which result in holdings of at least 15% or more than $15,000,000 in the stock or assets of the acquired company.

The Commission previously has expressed support for the concept of premerger notification, emphasizing the need for a reasonable and compulsory notice period prior to the consummation of large acquisitions. 2/ As it is doubtful whether the Commission now has the authority to require a waiting period through its current premerger notification program, 3/ it often has difficulty obtaining and analyzing information in time to challenge an unlawful acquisition prior to its consummation. After consummation, assets often become so commingled that divestiture may prove to be an inadequate remedy. Thus, the Commission believes there is a

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2/ Statement of Lewis A. Engman, Chairman of the Federal Trade Commission before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on S. 1284, May 7, 1975; Statement of Paul Rand Dixon, Acting Chairman of the Federal Trade Commission before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee, March 10, 1976; Letter of July 11, 1975, to the Honorable Philip A. Hart, Chairman, Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee.

3/ The Commission's present premerger notification program calls, generally, for 60 days advance notice of covered transactions;

need for a prenotification waiting period to enable the antitrust enforcement agencies to evaluate the information received with respect to a particular acquisition prior to its consummation.

Title III of the proposed legislation would amend the Clayton Act (15 U.S.C. § 12 et seq.) to authorize State attorneys general to bring civil actions, as parens patriae on behalf of natural persons residing in their State, to secure monetary relief for injury sustained by such persons to their property by reason of any violation of the Sherman Act. Although the Commission defers to the Department of Justice, which is charged with enforcement of the Sherman Act, for more detailed comments about this title, the Commission believes that Title III could provide an effective deterrent to Sherman Act violations in general and price-fixing in particular.

In view of the foregoing discussion, the Federal Trade Commission recommends Presidential approval of H.R. 8532.

By direction of the Commission.

Charles A. Tobin
Secretary

3/ (Cont'd)

but authority to enforce this requirement has been questioned. The almost universal compliance with this program, however, appears to indicate that it imposes no inordinate burden on affected companies.

SEP 2 2 1976

SEP 2 2 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D.C. 20503

Attention: Assistant Director for Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the views of this Department concerning H.R.8532, an enrolled enactment

> "To improve and facilitate the expeditious and effective enforcement of the antitrust laws, and for other purposes,"

to be cited as the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

H.R.8532 contains three separate titles which (i) amends the Antitrust Civil Process Act (15 U.S.C. 1311 et seq.), (ii) amends the Clayton Act (15 U.S.C. 12 et seq.) by adding pre-merger notification requirements, and (iii) adds to the Clayton Act authorization for parens patriae actions by State attorneys general. In addition, the enactment officially designates the Sherman, Clayton, Wilson Tariff, and Webb-Pomerene Acts by those names.

By amendments to the Antitrust Civil Process Act, Title I of H.R.8532 expands the Justice Department's pre-complaint antitrust civil investigative powers by authorizing the issuance of civil investigative demands (CIDs) to obtain evidence from natural persons and third parties and to take oral testimony and written interrogatories, in addition to documentary evidence. It also authorizes the use of CIDs to obtain evidence for use in pending regulatory agency proceedings and to investigate mergers and acquisitions prior to consummation.

Title II would require 30-day pre-merger notification to the Justice Department and the Federal Trade Commission for mergers and acquisitions between two companies with assets or sales exceeding $100 million and $10 million, respectively, when such transactions involve either 15 percent of the stock or $15 million of assets or stock of the acquired company. Companies would also be required to submit specific economic data. Certain transactions, including those involving regulated industries, banking, real estate, subsidiary formation and non-voting stock, are exempted from the notification requirement. Tender offers are subject to special notification requirements.

Title III amends the Clayton Act to permit State attorneys general to recover treble-damages for violations of the Sherman Act on behalf of natural persons residing in their State. In actions involving price fixing, Title III provides that damages may be proved in the aggregate without separately establishing the fact or amount of each person's individual injury or damage. In addition to treble-damages, a court would be authorized to award to the State the cost of suit, including reasonable attorney's fees. Percentage contingency fees are prohibited; however, non-percentage contingency fees are authorized if determined by the court to be reasonable.

Although we have previously expressed reservations to certain provisions of Title I, the Department does not pose any objections to the enactment of Titles I and II of H.R.8532. The Department continues, however, to harbor deep concern as to the potentially adverse effects that certain provisions of Title III may have upon the business community and consequently upon the economy.

Specifically, our concern is that the potential damage exposure posed by parens patriae suits under Title III may contribute substantial uncertainty to the business community and cause significant problems in such areas as capital formation. There is also the issue of survival for many firms that are subject to massive, unforeseen damage awards.

Much of the uncertainty is due to the requirement for mandatory treble damage awards rather than single or actual damages as the President strongly recommended in his letter of March 17, 1976 to Congressman Rhodes. The awarding of treble damages, based on aggregated estimates in the case of price fixing violations, raises the specter of damage recoveries of unlimited dimension that may be well beyond the ability of many businesses to pay.

Additional uncertainty stems from the availability of parens patriae suits to any violation of the Sherman Act, rather than just to price fixing violations as recommended by the President in his March 17 letter. The Sherman Act is often applied one day to conduct previously thought permissible at an earlier time. This is especially true in such contentious areas as the permissible scope of patent license restrictions, marketing arrangements and cooperative activities.

While the Department is not recommending a veto of H.R. 8532 because of the shortcomings of Title III, we nevertheless believe that the adverse effects that may result from these shortcomings should be seriously considered and weighed against the benefits to be derived. In this regard it should be noted that Titles I and II of the enactment have been passed by the House in essentially identical form as separate bills -- H.R. 13489 and H.R. 13131, respectively -- and are presently before the Senate. Thus, these titles of H.R. 8532 could be acted upon and passed by the Senate in the current session.

Enactment of this legislation would not involve any increase in the budgetary requirements of this Department.

Sincerely,

Edward O. Vetter

Edward O. Vetter

U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

SEP 2 2 1976

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Frey:

This is in response to your request for the views of the Small Business Administration regarding H.R. 8532, an Enrolled Bill "To improve and facilitate the expeditious and effective enforcement of the antitrust laws, and for other purposes."

As sent to the President on September 16, 1976, the "Hart-Scott-Rodino Antitrust Improvement Act of 1976" included three major provisions:

Title I: Antitrust Civil Process Act Amendments

Authorizes the Justice Department's Antitrust Division to issue civil investigate demands (CIDs), in the course of investigating potential antitrust violations, to natural persons and third parties (such as competitors or suppliers) and to compel production of oral testimony and answers to written interrogatories. CIDs also could be issued in connection with investigations of planned mergers and regulatory agency proceedings.

Title II: Premerger Notification

Requires 30-50 days advance notice to the Antitrust Division and the Federal Trade Commission to allow investigation of mergers involving companies worth $100 million or more and companies worth $10 million or more, if such transaction involves acquisition of more than $15 million in stock or assets, or 15 per cent of the voting securities of the acquired company. Material filed with the Government under this provision would be exempt from disclosure under the Freedom of Information Act.

Title III: Parens Patriae

Authorizes state attorneys general or their retained private counsel to bring treble damage suits in Federal court on behalf of state citizens injured by violations of the Sherman Act. In cases involving price-fixing, the state could prove the amount of damages to be awarded "in the aggregate by statistical or sampling methods, by the computation of illegal overcharges" or other reasonable system approved by the court -- instead of proving the exact amount of each individual claim. States could notify citizens of a parens suit by general publication, but courts could require other forms of notice. States could not pay private counsel conducting parens suits a contingency fee based on a percentage of the expected damage award or on any other basis, unless the court approves the amount as reasonable. Courts could award reasonable attorney's fees to a prevailing defendant if the state suit was brought in bad faith. Recovered damages must be distributed according to court order or treated as general state revenue. The U.S. Attorney General would be required to notify state attorneys general of Federal antitrust cases that could inspire state parens suits, and to provide state attorneys general with relevant materials upon request. A provision of of this title provides that a state could pass a law invalidating this authority to bring parens suits. Suits could not apply to violations committed before enactment.

The sponsors of this Act have stated that this legislation is not intended to create any new antitrust liability. It is merely to provide for an effective procedure for enforcing existing antitrust law. The legislation is intended to return power to the states by delegating antitrust enforcement power to the state attorneys general.

The Small Business Administration previously expressed support for these three titles when they were a part of S. 1284. However, SBA now has reservations about the impact of Title III on small business. It would appear that the potential exists for misuse of the authority granted by Title III.

SBA is not sure that Title III will achieve its professed purpose of compensating consumers victimized by large corporations' price fixing conspiracies for which no adequate redress is said to exist. In any event, overshadowing any conceivable Title III benefits is the potential for punitive

or political abuse of power inherent in authorizing 50 state attorneys general to file in the name of millions of state residents huge damage claims against business firms.

Title III also has the potential for abuse by private antitrust entrepreneurs working through willing state officials. This is recognized in several Title III "protective" amendments to the Clayton Act:

(1) Section 4C(d)(2) would require the court to determine the plaintiffs' attorneys' fees;

(2) Section 4C(d)(1) would authorize payment of defendants' attorneys' fees if the suit is brought "in bad faith, vexatiously, wantonly, or for oppressive reasons"; and

(3) Section 4C(c) would require notice and court approval before a suit could be settled.

However, the proposed Section 4C(d)(1)'s provision for determination of plaintiffs' attorneys' fees by the court adds nothing to existing law, and the criteria for fee awards remain highly uncertain. Section 4C(d)(1)'s discretionary authorization for attorneys' fees awards to a prevailing defendant, upon a "finding that the State attorney general acted in bad faith, vexatiously, wantonly, or for oppressive reasons" is no match for the mandatory attorneys' fees granted to prevailing plaintiffs by Section 4C(a)(2).

Although portrayed as recapturing corporate "ill-gotten gains" from price fixing conspiracies involving bread, milk, and other consumer products, Title III goes far beyond hard-core price fixing violations. Through ever-broadening court interpretations of the Sherman Act's elastic ban on "restraint of trade," it may penalize an open-ended catalogue of business activities. Therefore, huge antitrust liabilities under parens patriae actions may also create heavy antitrust exposures for smaller firms and professional and service organizations. Actually, under recent judicial interpretations of the Sherman Act and Justice Department actions against advertising and fee restrictions by professional and service organizations, smaller firms may become leading victims of parens patriae claims under Title III.

A smaller firm, charged as an antitrust co-conspirator with joint and individual liability for an alleged industry-wide conspiracy, may be unable to stand the risk of a potentially astronomical exposure. This type of litigation against smaller firms is inherently conducive to "blackmail settlements," since they often cannot carry the risk or the costs of an effective antitrust defense.

An inevitable negative impact of Title III upon the country's economic well-being, would be curtailment of financing opportunities on the part of small business firms faced with multimillion-dollar liabilities when named in massive parens patriae actions. Potentially huge contingent liabilities may affect their access to financing and capital markets. Banks and lending institutions will take such substantial contingent liabilities into account in their lending decisions.

Without further reassessment of this legislation's impact on small business the Small Business Administration cannot now support enactment of H.R. 8532.

Thank you for the opportunity to comment on this legislation.

Sincerely,

Mitchell P. Kobelinski
Administrator

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

SEP 22 1976

Director, Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Sir:

Reference is made to your request for the views of this Department on the enrolled enactment of H.R. 8532, "To improve and facilitate the expeditious and effective enforcement of the antitrust laws, and for other purposes."

The enrolled bill is designed to provide more stringent legal tools for the enforcement of antitrust legislation.

Title III of this bill, the parens patriae provision, would authorize State Attorneys General to bring civil action on behalf of private persons who have sustained damage to their property by reason of any violation of the Sherman Act.

The Secretary objects strongly to this provision and he has registered his opposition in a memorandum to the President (enclosed).

In his memorandum, the Secretary has raised the potential problems which could be created by the bill, the detrimental impact on industry, especially small businesses, and the unwarranted intrusion of the Federal Government upon the States.

Under the bill, State governments could pursue private antitrust claims with little cost to themselves and substantial potential political gain. In many cases, businesses would not be able to sustain the cost, in time and in money, of such litigation. In addition, the legislation would provide for mandatory treble damages, even in "good faith" situations. Further, such authority of the State Attorneys General would extend to State-regulated businesses exempted from State antitrust law.

In view of these serious concerns, the Department recommends that the enrolled enactment not be approved by the President.

Sincerely yours,

General Counsel
Richard R. Albrecht

Enclosure

THE SECRETARY OF THE TREASURY
WASHINGTON 20220

SEP 22 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Antitrust Legislation

I strongly recommend that you veto the recently passed Antitrust Improvements Act of 1976. The antitrust legislation before you does not satisfy the concerns raised in your letter to Congressman John Rhodes on March 17, 1976, in which you expressed serious reservations concerning the parens patriae concept set forth in the then pending House legislation.

First, the parens patriae provisions are not limited to price fixing violations, but extend to all violations of the Sherman Act. While State Attorneys General would be able to prove the measure of damages through statistical aggregation only in price fixing cases, they would still be free to bring parens patriae suits to redress violations of any provision of the Sherman Act.

Secondly, the legislation provides for the mandatory award by the courts of treble damages in any parens patriae suit. In this regard it deletes the House provision that would have permitted the court to award only actual damages in good faith situations.

Thirdly, it provides for the mandatory award of attorneys' fees and would permit the State Attorneys General to hire private attorneys under contingent fee arrangements, subject only to the requirement that such arrangements be approved by the courts--much in the manner in which attorneys' fees are routinely approved in derivative suit litigation.

These provisions would give State Attorneys General, nearly all of whom are elected officials (and many of whom are openly competing with other elected State officials), an open invitation to pursue antitrust claims with very little risk to them or the State governments and with a great likelihood of political gain for themselves. State governments would incur little cost in prosecuting antitrust claims

against business firms since they would be able to retain private counsel under contingent fee arrangements. Since both elected officials and the private antitrust bar would stand to gain from prosecuting parens patriae actions, the potential for abusing this power by promoting unfounded antitrust litigation against business concerns seems manifest.

Business firms confronted with such litigation may be forced to settle, irrespective of the merits of the State's case, because they cannot obtain a clean auditor's opinion so long as they are exposed to such a magnified contingent civil liability. This is especially so for small businesses, which lack the financial resources to finance a long and expensive litigation, even if they would ultimately prevail.

Title III also represents an unwarranted intrusion of the Federal Government upon the States. By giving the State Attorneys General authority to enforce Federal antitrust law against State-regulated businesses exempted from State antitrust law, the parens patriae provisions of Title III could upset the delicate political balances established in this regard by many States.

In conclusion, I firmly believe that the parens patriae provisions of Title III are fundamentally unsound in that they pose the threat of political lawsuits and private lawyer enrichment at the expense of the entire business community and the general public. Accordingly, I recommend that you veto the Antitrust Improvements Act of 1976.

(Signed) Bill Simon

William E. Simon

Office of the Attorney General
Washington, D. C. 20530

September 27, 1976

MEMORANDUM FOR THE PRESIDENT

My recommendation is that you veto the antitrust bill. But I believe the decision is a close one and there is a substantial argument the other way.

The argument for signing the bill is that the civil investigative demand and premerger sections have been revised to meet the Administration's wishes. If this is accepted, then the remaining problem is with the parens patriae section. This also has been modified to bring it somewhat closer to the views you have expressed, although your objections, with which I agree, were more sweeping.

I assume the Administration is committed to the civil investigative demand and premerger notification provisions. I personally question the importance of the premerger notification provision, although I suppose it has some symbolic value. The Antitrust Division believes it is necessary because of the difficulty otherwise of obtaining sufficient evidence to sustain a preliminary injunction. I dislike the civil investigative demand which can require oral testimony. The argument that this power has been given to other Federal agencies does not seem to me to be a reason for a further extension of Federal intrusive power. But my dislike for the extension of the civil investigative demand to oral questioning may be based more on a general view about government than the likelihood of abuse in this instance. And it is the civil investigative demand provision which the Antitrust Division particularly wants, arguing that it is frequently better to use this form of investigatory power than to use a grand jury. I agree this is true in some cases.

The changes in the parens patriae section in the bill which may make it more palatable are as follows: While it is not limited to price fixing agreements or section one of the Sherman Act violations, but applies to any violation of the Sherman Act, the aggregation of damage section only applies where there has been a determination that a defendant agreed to fix prices. The likelihood of nuisance

actions brought by State Attorneys General is slightly diminished by the provision that the court may award a reasonable attorney's fee to a prevailing defendant upon a finding that the State Attorney General has acted in bad faith, vexatiously, wantonly, or for appressive reasons. The contingent fee section, also, has been substantially altered, and the court must approve the fee.

The harassment of separate suits in district courts in many States is somewhat mitigated by the provision that the judicial panel on multi-district litigation may consolidate and transfer without the consent of the parties, for both pretrial purposes and for trial, any action brought.

I understand one objection which has been advanced to the parens patriae section is that it may be too easy to prove price fixing where there is conscious parallelism or very little evidence of intentional price fixing. I find this a difficult argument to make since it is tantamount to urging that the Federal jurisprudence against price fixing is too strict, which I do not believe to be the case. My guess is that the provision will make the courts more careful in determining in governmental cases that there has been an adequate proof of price fixing. But the courts have been going in the direction of greater care in any event.

I believe there is a more legitimate argument that the parens patriae provision may catch defendants in the aftermath of change-of-law cases; that is, for example, where professional fees have been arranged according to customary practices which for one reason or another were thought to have been lawful. The effect is conjectural; it may make courts more cautious in the interpretation of the law in government cases.

Presumably parens patriae will be used most frequently where the Federal government has won a final judgment or decree which may be used as prima facie evidence in the parens patriae case. This point is sometimes made as a way of suggesting that parens patriae will not have a deleterious effect. I do not think this follows, although the existence of parens patriae may give added emphasis to consent decrees. The argument does suggest that new initiatives in the interpretation of the antitrust laws through parens patriae may be minimized.

The main argument against parens patriae remains that it adds another element of substantial uncertainty to the cost of doing business. It is not clear that there may not be multiple damage recoveries, with both possible State and Federal court proceedings, and with other actions brought, in addition to the representation of natural persons by the State Attorney General in the parens patriae proceeding, by business entities in the chain of distribution. Aggregation of damage formulas can be unfair; this has added force when the damages are trebled. The law against price fixing, with the increased criminal penalties which the Congress has recently provided, has not been shown to need this reinforcement. The risk of new large damage awards based upon a formula can compel settlements when the enterprise cannot take the larger risk. One can seriously damage the antitrust laws and their continuation with this kind of overkill. The courts have been concerned with the excesses of class actions in other areas. The parens patriae provision seems to ignore this experience.

In my view the provision remains a bad one, and if the bill is viewed in terms of this provision it ought to be vetoed. I do not know whether this can be done in such a way as to show support for the antitrust laws. Since the bill was a compromise it is possible that without the parens patriae provision, a new bill would have the kind of premerger notification measure which the Administration might think went much too far.

Overall I think it is important that the Administration show its support of the antitrust laws, since this is an essential part of a dedication to a competitive free enterprise system of individual effort. I believe it has been generally assumed that the Administration (particularly in view of apparent earlier Administration approval) has been on a road toward a compromise. A basic question is whether the Administration can convincingly show support for the antitrust laws if there is a veto of a bill which contains two provisions (and for some persons a third provision) which so many dedicated believers in the antitrust laws regard as important.

Edward H. Levi
Attorney General

THE WHITE HOUSE

WASHINGTON

September 25, 1976

MEMORANDUM FOR: PHILIP BUCHEN
JIM LYNN
JACK MARSH
BILL SEIDMAN

FROM: ED SCHMULTS

SUBJECT: Consideration of the Hart/Scott/ Rodino Antitrust Improvements Act of 1976

In connection with consideration of the antitrust legislation, attached for your review is a proposed statement for use by the President in acting on the legislation.

Attachment A is a suggested outline of the antitrust and competition policy of the Ford Administration.

Attachment B would be the last part of the statement if the President decides to sign the antitrust bill.

Attachment C would be used if the President decides to veto the bill.

While I can't find any precedent for a statement in the form I am suggesting, I think there is real benefit, from the President's standpoint, in putting whatever action he takes on the bill in the context of the Administration's overall antitrust policy. The President's antitrust record is a good one and action on the antitrust bill is an event which we can use to call attention to his record. Hopefully, it will be a useful political document in rebutting the attacks Carter and Mondale have made on "weak" Republican antitrust efforts. If the President decides to veto the bill, we could mitigate the down side risk by "forcing" a review of his overall record.

STATEMENT OF THE PRESIDENT

THE ANTITRUST AND COMPETITION POLICY OF THE FORD ADMINISTRATION

This country has become the economic ideal of the free world because of its dedication to the free enterprise system. Full and vigorous competition has been the watchword of America's economic progress.

My Administration has always considered competition to be the driving force of our economy. Our competitive markets promote efficiency and innovation by rewarding businesses that produce desirable products at low cost. In a competitive industry, inefficient companies are forced to become efficient or be driven out of business. Competition is also a powerful stimulus to the development of new products and manufacturing processes. The free market system rewards the successful innovator.

In the United States, promotion of competition is consistent with our political and social goals. Any excessive concentration of either economic or political power has traditionally been seen as a threat to individual freedom. Under competitive conditions, economic power is fragmented; no one firm can control prices or supply. Political power is also decentralized by our public policy which stresses reliance on competition because there is then no need for massive governmental bureaucracies to oversee business operations.

In today's international economy, members of a vigorously competitive economic system enjoy unlimited worldwide opportunities and contribute significantly to the stability of their domestic economies.

But perhaps the most compelling justification for a free market economy is that it best serves the interests of our citizens. In a freely competitive market, consumers enjoy the freedom to choose from a wide range of products of all sizes, kinds, and varieties. Consumers, through their decisions in the marketplace, show their preferences and desires to businessmen who then translate those preferences into the best products at the lowest prices.

I firmly believe that the Federal Government must play an important role in protecting and advancing the cause of competition.

Through enforcement of our antitrust laws, the Antitrust Division of the Department of Justice and the Federal Trade Commission must assure that competitors do not engage in anticompetitive practices.

A vigorous antitrust enforcement policy is most important in deterring price-fixing agreements between competitors that result in higher costs to consumers -- and less production. As we come out of an inflationary period and into a period of economic growth and expansion,

my Administration will work to assure that the price mechanism is not artificially manipulated for private gain.

It is important to realize that this Administration has been the first one in forty years to recognize a second way the Federal Government vitally affects the competitive environment in which businesses operate. Not only must the Federal Government seek to restrain private anticompetitive conduct, but the Federal Government must also see to it that the governmental process does not impede free and open competition.

All too often in the past, the Federal Government has itself been a major source of unnecessary restraints on competition. Many of our most vital industries have over the years been subjected to pervasive regulation. Although regulation has been imposed in the name of the public interest, there is a growing awareness that the consumer is often the real loser. My Administration has taken the lead in sharpening this awareness over the past two years and will vigorously continue this most worthwhile effort.

I believe that far too many important managerial decisions are made today not by the marketplace responding to the forces of supply and demand but by the bureaucrat.

In many instances a businessman cannot raise or lower prices, enter or leave markets, provide or terminate services without the prior approval of a Federal regulatory body. As a consequence, the innovative and creative forces of major industries are suffocated by governmental regulation.

This is not the economic system that made this country great. Government regulation is not an effective substitute for vigorous competition in the American marketplace.

To be sure, in some instances governmental regulation may well protect and advance the public interest. But the time has come to recognize that many existing regulatory controls were imposed during uniquely transitory economic periods which differed greatly from today's economic conditions. We must repeal or modify those controls that suppress rather than support fair and healthy competition.

My Administration's pro-competitive policy has attempted to make those necessary modifications. We have set in motion a far-reaching regulatory reform program. And this program has been accompanied by a policy of vigorous antitrust enforcement to reinforce our commitment to competition.

In the last two years, the antitrust laws have been vigorously enforced by strengthened antitrust enforcement agencies. The resources for the Antitrust Division and the Federal Trade Commission's Bureau of Competition have been increased by over 50 percent since Fiscal Year 1975.

For the Antitrust Division, this represented the first real manpower increases since 1950. I am committed to continuing to provide these agencies with the necessary resources to do their important job. This intensified effort is producing results. The Antitrust Division's crackdown on price fixing resulted in indictment of 183 individuals during this period, a figure equalled only once in the 86 years since enactment of the Sherman Act. The fact that the Division presently has pending more grand jury investigations than at any other time in history shows these efforts are being maintained.

To preserve a competitive market structure by preventing anti-competitive mergers and acquisitions, the Antitrust Division is devoting substantial resources to merger investigations. At the same time, the Division is litigating large and complex anti-monopoly cases in two of our most important industries -- computers and telecommunications. Cases have also been filed involving such anticompetitive business actions as restrictive allocation of customers and markets.

I advanced the cause of vigorous antitrust enforcement with the signing of the Antitrust Procedures and Penalties Act of 1974, which made violation of the Sherman Act a felony punishable by imprisonment of up to three years for individuals, and by a corporate fine of up to $1 million.

Also, in December 1975, I signed legislation repealing Fair Trade enabling legislation. This action alone, according to various estimates, will save consumers $2 billion annually.

Two regulatory reform proposals I have signed -- the Securities Act Amendments of 1975 and the Railroad Revitalization and Regulatory Reform Act, inject strong dosages of competition into industries that long rested comfortably in the shade of Federal economic regulation. Contrary to industry predictions, more competition has not led to chaos in the securities industry, and I am confident it will prove to be beneficial in our railroad industry and elsewhere.

My Administration has also sponsored important legislative initiatives to reduce regulation of other modes of transportation and the regulation of financial institutions. An important element of my regulatory reform proposals has been the narrowing antitrust immunities which Federal legislation currently grants to industry rate bureaus thereby permitting these groups to restrain competition under official government sanction. Although Congress has not yet acted on these proposals, I am hopeful that the elected representatives of our people will take action on these proposals soon, since every day which passes

means millions of dollars of excessive costs and inefficiencies in our economic system.

The Administration also has underway a comprehensive review of many other legislative immunities to the antitrust laws and I intend to eliminate those immunities that are not truly justified -- if the Congress will concur. All industries and groups, however regulated and by whom, should be subject to the interplay of competitive forces to the maximum extent feasible.

A full measure of my commitment to competition is the proposed Agenda for Government Reform Act. This would require a comprehensive, disciplined look at ways of restoring competition in the economy. This would involve in-depth consideration of the full range of Federal regulatory activities in a reasonable -- but rapid -- manner that would allow for an orderly transition to a more competitive environment.

This competition policy, which includes regulatory reform and invigorated antitrust enforcement, will protect those businessmen who desire to be competitive from anti-competitive actions both by government regulators and by other business competitors. In turn, the American consumers will enjoy the substantial benefits provided by full and open competition within the business community.

HART/SCOTT/RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

I believe the record of this Administration stands as a measure of its commitment to competition and the action I am taking today should further strengthen competition and antitrust enforcement.

This bill contains three titles. The first title will significantly expand the civil investigatory powers of the Antitrust Division. This will enable the Department of Justice not only to bring additional antitrust cases that would otherwise have escaped prosecution, but it will also better assure that unmeritorious suits will not be filed. These amendments to the Antitrust Civil Process Act were proposed by the Administration two years ago, and I am pleased to see that the Congress has finally passed them.

The second title of this bill will require parties to large mergers to give the Antitrust Division and the Federal Trade Commission advance notice of the proposal. This will allow these agencies to conduct careful investigations prior to consummation of mergers and if necessary, bring suit before often irreversible steps have been taken toward consolidation of operations. Again, this proposal was supported by the Administration, and I am pleased to see it enacted into law.

I believe these two titles will contribute substantially to the competitive health of our free enterprise system.

However, this legislation also includes a third title which would permit state attorneys general to bring antitrust suits on behalf of the citizens of their states to recover treble damages. I have previously expressed serious reservations regarding this parens patriae approach to antitrust enforcement.

As I have said before, the states have authority to amend their own antitrust laws to authorize such suits in state courts. If a state legislature, representing the citizens of the state believes that such a concept is sound policy, it ought to allow it. I questioned whether the Congress should bypass the state legislatures.

However, Congress has narrowed this title in order to remove the possibility of significant abuses. Earlier, I had urged that the scope of this legislation be narrowed to price-fixing activities where the law is clear and where the impact is most directly felt by consumers. Given the broad scope of the bill, I also recommended that damages be limited to those actually

resulting from the violations. The Congress addressed these concerns by confining the scope of the controversial provision of measuring damages to price-fixing violations. Thus, as a practical matter, enforcement efforts under this bill will be focused on hard core antitrust violations.

I have also been concerned about the provision that would allow states to retain attorneys on a contingent fee basis, thereby encouraging suits against businesses in which the motivation would be attorney enrichment. The present bill has been revised to narrow these arrangements and has required Federal court approval of all attorneys fees.

These and other changes that have been made in this title have improved this legislation. In this form, it can contribute to deterring price fixing violations. Price fixers must be denied the fruits of their acts, and remedies must be available to those injured by price fixing. The approach in this title, if responsibly enforced, can aid in protecting consumers. However, I will carefully review the implementation of these powers to assure that they are not abused.

Individual initiative and market competition must remain the keystones to our American economy. I am today signing this major antitrust legislation with the expectation

that it will contribute significantly to our competitive economy.

ATTACHMENT C

HART/SCOTT/RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

I believe the record of this Administration stands as a measure of its commitment to competition and I had hoped that the Congress would submit to me additional legislation to further strengthen competition and antitrust enforcement. However, Congress passed an omnibus antitrust bill containing three titles, two of which my Administration has supported and one which has caused me serious concern.

The first title would significantly expand the civil investigatory powers of the Antitrust Division. It would enable the Department of Justice not only to bring additional antitrust cases that would otherwise have escaped prosecution, but it would also better assure that unmeritorious suits will not be filed. These amendments to the Antitrust Civil Process Act were proposed by the Administration two years ago.

The second title of this bill would require parties to large mergers to give the Antitrust Division and the Federal Trade Commission advance notice of the proposal. This would allow these agencies to conduct careful investigations prior to consummation of mergers and, if necessary, bring suit before often irreversible steps have been taken toward consolidation of operations. Again, this proposal was supported by the Administration.

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As I have said before, the states have authority to amend their own antitrust laws to authorize such suits in state courts. If a state legislature, representing the citizens of the state believes that such a concept is sound policy, it ought to allow it. I questioned whether the Congress should bypass the state legislatures.

I also urged Congress to provide adequate safeguards that would prevent abuses of parens patriae. Although Congress narrowed this title in some respects, important safeguards were ignored.

The present bill requires the award of mandatory treble damages in successful parens patriae suits. The view that Federal penalties were inadequate, which has been used to justify mandatory treble damages in the past, I believe is no longer valid given the substantial increase in these penalties which I have signed into law.

For example, a business can be fined $1 million and its officers imprisoned for three years. While no one condones price fixing, the present bill would require the courts, without any discretion, to award treble damages which could bankrupt some companies, thereby adversely affecting innocent employees and shareholders and the local economy.

Also, the present bill continues to allow private attorneys to be hired by state attorneys general on a contingency fee basis, although it does eliminate percentage fee arrangements. The Administration has urged a flat ban against any such arrangements. By allowing private attorneys to seek out cases, the bill avoids the state government's role in setting priorities for its citizens and appropriating the funds necessary to protect them.

I believe that the elimination of these safeguards could open the door to multi-million dollar "nuisance" suits by private attorneys who often are the major beneficiaries in such suits. Although proponents of this legislation have alleged that it will benefit consumers, in my view, consumers will eventually pay the bill in the form of higher prices, while the lawyers instituting such litigation reap large legal fees. Ironically, it is also small businesses which will be hurt since they frequently

cannot afford the costly litigation and are forced to settle suits which larger companies can successfully defend.

Congress was aware that I would veto the parens patriae provisions had they reached my desk standing alone. I was faced with a more difficult decision in weighing the benefits provided by the Antitrust Civil Process Act amendments and the pre-merger notice provisions against my belief that the parens patriae provisions are not a responsible way to enforce the antitrust laws and the risks they would be misused. I have decided that I cannot sign any legislation including these parens patriae provisions.

I am vetoing the Hart/Scott/Rodino Antitrust Improvements Act of 1976 with the expectation that Congress will promptly enact the first two titles of this legislation and send them to me for signature. The Senate can do this quickly and simply before adjournment by passing the two titles sent to it by the House earlier this year. This action will better assure the American people of responsible and effective enforcement of the antitrust laws.