

# CONSENT DECREE BILLS

---

---

HEARINGS  
BEFORE THE  
SUBCOMMITTEE ON MONOPOLIES AND  
COMMERCIAL LAW  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
NINETY-THIRD CONGRESS  
FIRST SESSION  
ON  
**H.R. 9203, H.R. 9947, and S. 782**  
CONSENT DECREE BILLS

---

SEPTEMBER 20, 26, 27, AND OCTOBER 3, 1973

---

**Serial No. 20**



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1973

## COMMITTEE ON THE JUDICIARY

PETER W. RODINO, JR., New Jersey, *Chairman*

HAROLD D. DONOHUE, Massachusetts	EDWARD HUTCHINSON, Michigan
JACK BROOKS, Texas	ROBERT McCLORY, Illinois
ROBERT W. KASTENMEIER, Wisconsin	HENRY P. SMITH III, New York
DON EDWARDS, California	CHARLES W. SANDMAN, JR., New Jersey
WILLIAM L. HUNGATE, Missouri	TOM RAILSBACK, Illinois
JOHN CONYERS, JR., Michigan	CHARLES E. WIGGINS, California
JOSHUA EILBERG, Pennsylvania	DAVID W. DENNIS, Indiana
JEROME R. WALDIE, California	HAMILTON FISH, JR., New York
WALTER FLOWERS, Alabama	WILEY MAYNE, Iowa
JAMES R. MANN, South Carolina	LAWRENCE J. HOGAN, Maryland
PAUL S. SARBANES, Maryland	WILLIAM J. KEATING, Ohio
JOHN F. SEIBERLING, Ohio	M. CALDWELL BUTLER, Virginia
GEORGE E. DANIELSON, California	WILLIAM S. COHEN, Maine
ROBERT F. DRINAN, Massachusetts	TRENT LOTT, Mississippi
CHARLES B. RANGEL, New York	HAROLD V. FROELICH, Wisconsin
BARBARA JORDAN, Texas	CARLOS J. MOORHEAD, California
RAY THORNTON, Arkansas	JOSEPH J. MARAZITI, New Jersey
ELIZABETH HOLTZMAN, New York	
WAYNE OWENS, Utah	
EDWARD MEZVINSKY, Iowa	

JEROME M. ZEIFMAN, *General Counsel*

GARNER J. CLINE, *Associate General Counsel*

JOSEPH FISCHER, *Counsel*

HERBERT FUCHS, *Counsel*

HERBERT E. HOFFMAN, *Counsel*

WILLIAM P. SHATTUCK, *Counsel*

H. CHRISTOPHER NOLDE, *Counsel*

ALAN A. PARKER, *Counsel*

JAMES F. FALCO, *Counsel*

MAURICE A. BARBOZA, *Counsel*

DONALD G. BENN, *Counsel*

FRANKLIN G. POLK, *Counsel*

ROGER A. PAULEY, *Counsel*

THOMAS E. MOONEY, *Counsel*

PETER T. STRAUB, *Counsel*

MICHAEL W. BLOMMER, *Counsel*

ALEXANDER B. COOK, *Counsel*

---

## SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

PETER W. RODINO, JR., New Jersey, *Chairman*

JACK BROOKS, Texas	EDWARD HUTCHINSON, Michigan
WALTER FLOWERS, Alabama	ROBERT McCLORY, Illinois
JOHN F. SEIBERLING, Ohio	CHARLES W. SANDMAN, JR., New Jersey
BARBARA JORDAN, Texas	DAVID W. DENNIS, Indiana
EDWARD MEZVINSKY, Iowa	

JEROME M. ZEIFMAN, *Counsel*

JAMES F. FALCO, *Counsel*

JARED B. STAMELL, *Assistant Counsel*

FRANKLIN G. POLK, *Associate Counsel*

# CONTENTS

	Page
Hearings held on—	
Sept. 20, 1973.....	1
Sept. 26, 1973.....	95
Sept. 27, 1973.....	139
Oct. 3, 1973.....	179
Text of Bills—	
H.R. 9203.....	6
H.R. 9947.....	16
S. 782.....	27
Opening statement—	
Rodino, Hon. Peter W., Jr., chairman, Subcommittee on Monopolies and Commercial Law.....	35
Testimony of—	
Kirkpatrick, Miles W., Morgan, Lewis & Bockius, Washington, D.C., accompanied by Victor H. Kramer, Institute for Public Interest Representation, Georgetown University Law Center, Washington, D.C., and George D. Reycraft, Cadwalader, Wickersham & Taft, New York, N. Y.....	139
Prepared statements:	
Miles W. Kirkpatrick.....	143
George D. Reycraft.....	153
Handler, Prof. Milton, Kaye, Scholer, Fierman, Hays & Handler, New York, N. Y.....	199
Prepared statement.....	213
Jones, John Paul, Public Notice Committee, National Newspaper Association, accompanied by William G. Mullen, general counsel and secretary, National Newspaper Association.....	95
Prepared statement.....	101
Lurie, Prof. Howard R., Villanova University Law School.....	125
Prepared statement.....	134
McGurk, Dan, president, Computer Industry Association, accom- panied by C. Jack Pearce, Counsel for the Association.....	103
Prepared statement.....	103
Mezines, Basil J., Stein, Mitchell & Mezines, Washington, D.C.....	179
Prepared statement.....	193
Nader, Ralph and Green, Mark J., Before The Senate Subcommittee on Antitrust and Monopoly, Hearings on S. 782, Apr. 5, 1973.....	227
Tunney, Hon. John V., a U.S. Senator from the State of California..	37
Prepared statement.....	37
Wilson, Hon. Bruce B., Deputy Assistant Attorney General, Anti- trust Division, Department of Justice, accompanied by Keith I. Clearwaters, special assistant to the Assistant Attorney General...	61
Prepared statement.....	84
Additional statements and correspondence—	
Calvert, Gordon L., letter, Oct. 3, 1973.....	235
Comegys, Walter B., Deputy Assistant Attorney General, Antitrust Division, Department of Justice.....	90
Hutchinson, Hon. Edward, a Representative in Congress from the State of Michigan.....	41
Mark J. Green, Corporate Accountability Research Group; Mark H. Lynch, Congress Watch, letter, Oct. 16, 1973.....	225
Mezines, Basil J., letter, Oct. 9, 1973.....	196
Stanton, Hon. James V., a Representative in Congress from the State of Ohio.....	46

## CONSENT DECREE BILLS

---

THURSDAY, SEPTEMBER 20, 1973

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 9:30 a.m., pursuant to call, in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. [chairman] presiding.

Present: Representatives Rodino, Flowers, Seiberling, Jordan, Mezvinsky, Hutchinson, McClory, and Dennis.

Also present: James F. Falco, counsel; Jared B. Stamell, assistant counsel; and Franklin G. Polk, associate counsel.

Chairman RODINO. The committee will come to order and this morning I will commence hearings on the subject of consent decrees and we are considering my bill, H.R. 9203, H.R. 9947 by Representative James V. Stanton, and S. 782 produced by Senator Tunney.

[Copies of H.R. 9203, H.R. 9947, and S. 782 follow:]



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

3       “(b) Any consent judgment proposed by the United  
4 States, for entry in any civil proceeding brought by or on  
5 behalf of the United States under the antitrust laws shall be  
6 filed with the district court before which that proceeding is  
7 pending and published in the Federal Register at least sixty  
8 days prior to the effective date of such decree. Any written  
9 comments relating to the proposed consent judgment and any  
10 responses thereto shall also be filed with the same district  
11 court and published in the Federal Register within the afore-  
12 mentioned sixty-day period. Copies of the proposed consent  
13 judgment and such other materials and documents which the  
14 United States considered determinative in formulating the  
15 proposed consent judgment shall also be made available to  
16 members of the public at the district court before which the  
17 proceeding is pending and in such other districts as the court  
18 may subsequently direct. Simultaneously with the filing of  
19 the proposed consent judgment, unless otherwise instructed  
20 by the court, the United States shall file with the district  
21 court, cause to be published in the Federal Register, and  
22 thereafter furnish to any person upon request a public impact  
23 statement which shall recite—

24               “(1) the nature and purpose of the proceeding;

25               “(2) a description of the practices or events giving

1 rise to the alleged violation of the antitrust laws;

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

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

10 “(5) a description of the procedures available for  
11 modification of the proposed judgment;

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

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

1 places where such material is available for public inspection.

2 “(d) During the sixty-day period provided above, and  
3 such additional time as the United States may request and  
4 the court may grant, the United States shall receive and  
5 consider any written comments relating to the proposed con-  
6 sent judgment. The Attorney General or his designate shall  
7 establish procedures to carry out the provisions of this subsec-  
8 tion, but the sixty-day time period set forth herein shall not  
9 be shortened except by order of the district court upon a  
10 showing that extraordinary circumstances require such  
11 shortening and that such shortening of the time period is not  
12 adverse to the public interest. At the close of the period  
13 during which such comments may be received, the United  
14 States shall file with the district court and cause to be pub-  
15 lished in the *Federal Register* a response to such comments.

16 “(e) Before entering any consent judgment proposed  
17 by the United States under this section, the court shall  
18 determine that entry of that judgment is in the public  
19 interest as defined by law. For the purpose of this determina-  
20 tion, the court may consider—

21 “(1) the public impact of the judgment, including  
22 termination of alleged violation, provisions for enforce-  
23 ment and modification, duration of relief sought, antici-  
24 pated effects of alternative remedies actually considered,  
25 and any other considerations bearing upon the adequacy  
26 of the judgment;

1           “(2) the public impact of entry of the judgment  
2           upon the public generally and individuals alleging spe-  
3           cific injury from the violations set forth in the complaint,  
4           including consideration of the public benefit to be de-  
5           rived from a determination of the issues at trial.

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

8           “(1) take testimony of Government officials or ex-  
9           perts or such other expert witnesses, upon motion of  
10          any party or participant or upon its own motion, as  
11          the court may deem appropriate;

12          “(2) appoint a special master, pursuant to rule  
13          53 of the Federal Rules of Civil Procedure, and such  
14          outside consultants or expert witnesses as the court  
15          may deem appropriate; and request and obtain the  
16          views, evaluations, or advice of any individual group  
17          or agency of government with respect to any aspect  
18          of the proposed judgment of the effect thereof in such  
19          manner as the court deems appropriate;

20          “(3) authorize full or limited participation in pro-  
21          ceedings before the court by interested persons or agen-  
22          cies, including appearance *amicus curiae*, intervention  
23          as a party pursuant to rule 24 of the Federal Rules  
24          of Civil Procedure, examination of witnesses or docu-  
25          mentary materials, or participation in any other manner

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

3 “(4) review any comments or objections concern-  
4 ing the proposed judgment filed with the United States  
5 under subsection (d) and the response of the United  
6 States to such comments or objections;

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

9 “(g) Not later than ten days following the filing of any  
10 proposed consent judgment under subsection (b), each de-  
11 fendant shall file with the district court a description of  
12 any and all written or oral communications by or on behalf  
13 of such defendant, including any officer, director, employee,  
14 or agent thereof, or other person except counsel of record,  
15 with any officer or employee of the United States concern-  
16 ing or relevant to the proposed consent judgment. Prior  
17 to the entry of any consent judgment pursuant to the anti-  
18 trust laws, each defendant shall certify to the district court  
19 that the requirements of this section have been complied  
20 with and that such filing is a true and complete description  
21 of such communications known to the defendant or which the  
22 defendant reasonably should have known.

23 “(h) Proceedings before the district court under subsec-  
24 tions (e) and (f), and public impact statements filed under  
25 subsection (b) hereof, shall not be admissible against any

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

7 **PENALTIES**

8 **SEC. 3.** Sections 1, 2, and 3 of the Act entitled “An Act  
9 to protect trade and commerce against unlawful restraints  
10 and monopolies”, approved July 2, 1890 (26 Stat. 209; 15  
11 U.S.C. 1, 2, and 3) are each amended by striking out “fifty  
12 thousand dollars” and inserting “five hundred thousand dol-  
13 lars if a corporation, or, if any other person, one hundred  
14 thousand dollars”.

15 **EXPEDITING ACT REVISIONS**

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

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

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

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

11       “(a) Except as otherwise expressly provided by this  
12 section, in every civil action brought in any district court  
13 of the United States under the Act entitled ‘An Act to pro-  
14 tect trade and commerce against unlawful restraints and  
15 monopolies’, approved July 2, 1890, or any other Acts hav-  
16 ing like purpose that have been or hereafter may be enacted,  
17 in which the United States is the complainant and equitable  
18 relief is sought, any appeal from a final judgment entered  
19 in any such action shall be taken to the court of appeals  
20 pursuant to sections 1291 and 2107 of title 28 of the United  
21 States Code. Any appeal from an interlocutory order entered  
22 in any such action shall be taken to the court of appeals pur-  
23 suant to section 1292 (a) (1) and 2107 of title 28 of the  
24 United States Code but not otherwise. Any judgment entered  
25 by the court of appeals in any such action shall be subject

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

4 “(b) An appeal from a final judgment pursuant to  
5 subsection (a) shall lie directly to the Supreme Court if—  
6 “(1) upon application of a party filed within five  
7 days of the filing of a notice of appeal, the district judge  
8 who adjudicated the case enters an order stating that  
9 immediate consideration of the appeal by the Supreme  
10 Court is of general public importance in the adminis-  
11 tration of justice.

12 A court order pursuant to (1) must be filed within  
13 fifteen days after the filing of a notice of appeal. When such  
14 an order or certificate is filed, the appeal and any cross appeal  
15 shall be docketed in the time and manner prescribed by the  
16 rules of the Supreme Court. That Court shall thereupon  
17 either (1) dispose of the appeal and any cross appeal in  
18 the same manner as any other direct appeal authorized by  
19 law, or (2) in its discretion, deny the direct appeal and  
20 remand the case to the court of appeals, which shall then  
21 have jurisdiction to hear and determine the same as if the  
22 appeal and any cross appeal therein had been docketed in  
23 the court of appeals in the first instance pursuant to sub-  
24 section (a).”

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

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

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

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



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

3 “(b) (1) Any consent judgment proposed by the  
4 United States for entry in any civil proceeding brought by or  
5 on behalf of the United States under the antitrust laws shall  
6 be filed with the district court before which that proceeding  
7 is pending and published in the Federal Register at least  
8 sixty days prior to the effective date of such decree. Any  
9 written comments relating to the proposed consent judgment  
10 and any responses thereto, other than those which are ex-  
11 empt from disclosure under section 552 (b) of title 5, United  
12 States Code, shall also be filed with the same district court  
13 and published in the Federal Register within the aforemen-  
14 tioned sixty-day period.

15 “(2) Copies of the proposed consent judgment and such  
16 other materials and documents which the United States con-  
17 sidered *determinative in formulating the proposed consent*  
18 *judgment*, other than those which are exempt from dis-  
19 closure under sections 552 (a) (4) and (5) of title 5,  
20 United States Code, shall also be made available to mem-  
21 bers of the public at the district court before which the  
22 proceeding is pending and in such other districts as the court  
23 may subsequently direct. Simultaneously with the filing of  
24 the proposed consent judgment, unless otherwise instructed  
25 by the court, the United States shall file with the district

1 court, cause to be published in the Federal Register, and  
2 thereafter furnish to any person upon request a public im-  
3 pact statement which shall recite—

4 “(A) the nature and purpose of the proceeding;

5 “(B) a description of the practices or events giving  
6 rise to the alleged violation of the antitrust laws;

7 “(C) an explanation of the proposed judgment, re-  
8 lief to be obtained thereby, and the anticipated effects on  
9 competition of that relief, including an explanation of  
10 any unusual circumstances giving rise to the proposed  
11 judgment or any provision contained therein;

12 “(D) the remedies available to potential private  
13 plaintiffs damaged by the alleged violation in the event  
14 that the proposed judgment is entered;

15 “(E) a description of the procedures available for  
16 modification of the proposed judgment;

17 “(F) a description and evaluation of alternatives  
18 actually considered to the proposed judgment.

19 “(3) In the case of a consent decree entered after  
20 December 31, 1972, and before the date of enactment of this  
21 subsection, copies of any consent judgment proposed by the  
22 United States, and any other materials and documents and  
23 the public impact statement with respect to such consent  
24 decree, which would have been required under paragraph  
25 (2) of this subsection had such consent decree been entered

1 after the date of enactment of this subsection, shall be filed  
2 and made available to the public in the same manner as  
3 specified under paragraph (2), to the maximum extent  
4 practicable.

5 “(c) The United States shall also cause to be published,  
6 commencing at least sixty days prior to the effective date of  
7 such decree, for seven days over a period of two weeks in  
8 newspapers of general circulation of the district in which the  
9 case has been filed, in Washington, District of Columbia, and  
10 in such other districts as the court may direct (i) a summary  
11 of the terms of the proposed consent judgment, (ii) a sum-  
12 mary of the public impact statement to be filed under sub-  
13 section (b), (iii) and a list of the materials and documents  
14 under subsection (b) which the United States shall make  
15 available for purposes of meaningful public comment, and  
16 the places where such material is available for public  
17 inspection.

18 “(d) During the sixty-day period provided above, and  
19 such additional time as the United States may request and  
20 the court may grant, the United States shall receive and  
21 consider any written comments relating to the proposed  
22 consent judgment. The Attorney General or his designate  
23 shall establish procedures to carry out the provisions of this  
24 subsection, but the sixty-day time period set forth herein  
25 shall not be shortened except by order of the district court

1 upon a showing that extraordinary circumstances require  
2 such shortening and that such shortening of the time period  
3 is not adverse to the public interest. At the close of the  
4 period during which such comments may be received, the  
5 United States shall file with the district court and cause to  
6 be published in the Federal Register a response to such  
7 comments.

8 “(e) Before entering any consent judgment proposed  
9 by the United States under this section, the court shall  
10 determine that entry of that judgment is in the public  
11 interest as defined by law. For the purpose of this deter-  
12 mination, the court may consider—

13 “(1) the public impact of the judgment, including  
14 termination of alleged violation, provisions for enforce-  
15 ment and modification, duration of relief sought, antici-  
16 pated effects of alternative remedies actually considered,  
17 and any other considerations bearing upon the adequacy  
18 of the judgment;

19 “(2) the public impact of entry of the judgment  
20 upon the public generally and individuals alleging spe-  
21 cific injury from the violations set forth in the complaint.

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

24 “(1) take testimony of Government officials or ex-  
25 perts or such other expert witnesses, upon motion of

1 any party or participant or upon its own motion, as  
2 the court may deem appropriate;

3 “(2) appoint a special master, pursuant to rule  
4 53 of the Federal Rules of Civil Procedure, and such  
5 outside consultants or expert witnesses as the court  
6 may deem appropriate; and request and obtain the  
7 views, evaluations, or advice of any individual group  
8 or agency of government with respect to any aspect  
9 of the proposed judgment of the effect thereof in such  
10 manner as the court deems appropriate;

11 “(3) authorize full or limited participation in pro-  
12 ceedings before the court by interested persons or agen-  
13 cies, including appearance amicus curiae, intervention  
14 as a party pursuant to rule 24 of the Federal Rules  
15 of Civil Procedure, examination of witnesses or docu-  
16 mentary materials, or participation in any other manner  
17 and extent which serves the public interest as the court  
18 may deem appropriate;

19 “(4) review any comments or objections concern-  
20 ing the proposed judgment filed with the United States  
21 under subsection (d) and the response of the United  
22 States to such comments or objections;

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

1       “(g) Not later than ten days following the filing of  
2 any proposed consent judgment under subsection (b), each  
3 defendant shall file with the district court a description of  
4 any and all written or oral communications by or on behalf  
5 of such defendant, including any officer, director, employee,  
6 or agent thereof, or other person with any officer or employee  
7 of the United States concerning or relevant to the proposed  
8 consent judgment: *Provided*, That communications made  
9 by or in the presence of counsel of record with the Attorney  
10 General or the employees of the Department of Justice shall  
11 be excluded from the requirements of this subsection. Prior  
12 to the entry of any consent judgment pursuant to the anti-  
13 trust laws, each defendant shall certify to the district court  
14 that the requirements of this section have been complied  
15 with and that such filing is a true and complete description  
16 of such communications known to the defendant or which the  
17 defendant reasonably should have known.

18       “(h) Proceedings before the district court under subsec-  
19 tions (e) and (f), and public impact statements filed under  
20 subsection (b) hereof, shall not be admissible against any de-  
21 fendant in any action or proceeding brought by any other  
22 party against such defendant under the antitrust laws or by  
23 the United States under section 4A of this Act nor constitute  
24 a basis for the introduction of the consent judgment as prima

1 facie evidence against such defendant in any such action or  
2 proceeding.”.

3 **PENALTIES**

4 **SEC. 3.** Sections 1, 2, and 3 of the Act entitled “An Act  
5 to protect trade and commerce against unlawful restraints  
6 and monopolies”, approved July 2, 1890 (26 Stat. 209;  
7 15 U.S.C. 1, 2, and 3) are each amended by striking out  
8 “fifty thousand dollars” and inserting “five hundred thousand  
9 dollars if a corporation, or, if any other person, one hundred  
10 thousand dollars”.

11 **EXPEDITING ACT REVISIONS**

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

16 “SECTION 1. In any civil action brought in any district  
17 court of the United States under the Act entitled ‘An Act  
18 to protect trade and commerce against unlawful restraints  
19 and monopolies’, approved July 2, 1890, or any other Acts  
20 having like purpose that have been or hereafter may be  
21 enacted, wherein the United States is plaintiff and equitable  
22 relief is sought, the Attorney General may file with the  
23 court, prior to the entry of final judgment, a certificate that,  
24 in his opinion, the case is of a general public importance.  
25 Upon filing of such certificate, it shall be the duty of the

1 judge designated to hear and determine the case, or the chief  
2 judge of the district court if no judge has as yet been desig-  
3 nated, to assign the case for hearing at the earliest practicable  
4 date and to cause the case to be in every way expedited.”.

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

7 “(a) Except as otherwise expressly provided by this  
8 section, in every civil action brought in any district court  
9 of the United States under the Act entitled ‘An Act to pro-  
10 tect trade and commerce against unlawful restraints and  
11 monopolies’, approved July 2, 1890, or any other Acts hav-  
12 ing like purpose that have been or hereafter may be enacted,  
13 in which the United States is the complainant and equitable  
14 relief is sought, any appeal from a final judgment entered in  
15 any such action shall be taken to the court of appeals pur-  
16 suant to sections 1291 and 2107 of title 28 of the United  
17 States Code. Any appeal from an interlocutory order entered  
18 in any such action shall be taken to the court of appeals pur-  
19 suant to sections 1292 (a) (1) and 2107 of title 28 of the  
20 United States Code but not otherwise. Any judgment entered  
21 by the court of appeals in any such action shall be subject  
22 to review by the Supreme Court upon a writ of certiorari  
23 as provided in section 1254 (1) of title 28 of the United  
24 States Code.

1       “(b) An appeal from a final judgment pursuant to  
2 subsection (a) shall lie directly to the Supreme Court if,  
3 upon application of a party filed within fifteen days of the  
4 filing of a notice of appeal, the district judge who adjudi-  
5 cated the case enters an order stating that immediate con-  
6 sideration of the appeal by the Supreme Court is of general  
7 public importance in the administration of justice. Such  
8 order shall be filed within thirty days after the filing of a  
9 notice of appeal. When such an order is filed, the appeal  
10 and any cross appeal shall be docketed in the time and  
11 manner prescribed by the rules of the Supreme Court. The  
12 Supreme Court shall thereupon either (1) dispose of the  
13 appeal and any cross appeal in the same manner as any  
14 other direct appeal authorized by law, or (2) in its discre-  
15 tion, deny the direct appeal and remand the case to the  
16 court of appeals, which shall then have jurisdiction to hear  
17 and determine the same as if the appeal and any cross appeal  
18 therein had been docketed in the court of appeals in the  
19 first instance pursuant to subsection (a).”.

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

22       (b) The proviso in section 3 of the Act of February 19,  
23 1903, as amended (32 Stat. 848, 849; 49 U.S.C. 43), is  
24 repealed and the colon preceding it is changed to a period.

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



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

3       “(b) Any consent judgment proposed by the United  
4 States for entry in any civil proceeding brought by or on  
5 behalf of the United States under the antitrust laws shall be  
6 filed with the district court before which that proceeding is  
7 pending and published in the Federal Register at least sixty  
8 days prior to the effective date of such decree. Any written  
9 comments relating to the proposed consent judgment and any  
10 responses thereto, other than those which are exempt from  
11 disclosure under section 552 (b) of title 5, United States  
12 Code, shall also be filed with the same district court and  
13 published in the Federal Register within the aforementioned  
14 sixty-day period. Copies of the proposed consent judgment  
15 and such other materials and documents which the United  
16 States considered determinative in formulating the proposed  
17 consent judgment, other than those which are exempt from  
18 disclosure under sections 552 (b) (4) and (5) of title 5,  
19 United States Code, shall also be made available to members  
20 of the public at the district court before which the preceding  
21 is pending and in such other districts as the court may sub-  
22 sequently direct. Simultaneously with the filing of the pro-  
23 posed consent judgment, unless otherwise instructed by the  
24 court, the United States shall file with the district court,  
25 cause to be published in the Federal Register and thereafter

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

3 “ (1) the nature and purpose of the proceeding;

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

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

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

14 “ (5) a description of the procedures available for  
15 modification of the proposed judgment;

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

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

1 mary of the public impact statement to be filed under sub-  
2 section (b), (iii) and a list of the materials and documents  
3 under subsection (b) which the United States shall make  
4 available for purposes of meaningful public comment, and  
5 the places where such material is available for public inspec-  
6 tion.

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

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

1 interest as defined by law. For the purpose of this deter-  
2 mination, the court may consider—

3 “(1) the public impact of the judgment, including  
4 termination of alleged violation, provisions for enforce-  
5 ment and modification, duration of relief sought, antici-  
6 pated effects of alternative remedies actually considered,  
7 and any other considerations bearing upon the adequacy  
8 of the judgment;

9 “(2) the public impact of entry of the judgment  
10 upon the public generally and individuals alleging spe-  
11 cific injury from the violations set forth in the complaint.

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

14 “(1) take testimony of Government officials or ex-  
15 perts or such other expert witnesses, upon motion of  
16 any party or participant or upon its own motion, as  
17 the court may deem appropriate;

18 “(2) appoint a special master, pursuant to rule  
19 53 of the Federal Rules of Civil Procedure, and such  
20 outside consultants or expert witnesses as the court  
21 may deem appropriate; and request and obtain the  
22 views, evaluations, or advice of any individual group  
23 or agency of government with respect to any aspect

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

3 “(3) authorize full or limited participation in pro-  
4 ceedings before the court by interested persons or agen-  
5 cies, including appearance amicus curiae, intervention  
6 as a party pursuant to rule 24 of the Federal Rules  
7 of Civil Procedure, examination of witnesses or docu-  
8 mentary materials, or participation in any other manner  
9 and extent which serves the public interest as the court  
10 may deem appropriate;

11 “(4) review any comments or objections concern-  
12 ing the proposed judgment filed with the United States  
13 under subsection (d) and the response of the United  
14 States to such comments or objections;

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

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

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

9 “(h) Proceedings before the district court under subsec-  
10 tions (e) and (f), and public impact statements filed under  
11 subsection (b) hereof, shall not be admissible against any de-  
12 fendant in any action or proceeding brought by any other  
13 party against such defendant under the antitrust laws or by  
14 the United States under section 4A of this Act nor constitute  
15 a basis for the introduction of the consent judgment as prima  
16 facie evidence against such defendant in any such action or  
17 proceeding.”

18 **PENALTIES**

19 **SEC. 3.** Sections 1, 2, and 3 of the Act entitled “An Act  
20 to protect trade and commerce against unlawful restraints  
21 and monopolies”, approved July 2, 1890 (26 Stat. 209;  
22 15 U.S.C. 1, 2, and 3) are each amended by striking out  
23 “fifty thousand dollars” and inserting “five hundred thousand  
24 dollars if a corporation, or, if any other person, one hundred  
25 thousand dollars”.

## EXPEDITING ACT REVISIONS

1

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

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

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

22       “(a) Except as otherwise expressly provided by this  
23 section, in every civil action brought in any district court  
24 of the United States under the Act entitled ‘An Act to pro-  
25 tect trade and commerce against unlawful restraints and

1 monopolies', approved July 2, 1890, or any other Acts hav-  
2 ing like purpose that have been or hereafter may be enacted,  
3 in which the United States is the complainant and equitable  
4 relief is sought, any appeal from a final judgment entered in  
5 any such action shall be taken to the court of appeals pur-  
6 suant to sections 1291 and 2107 of title 28 of the United  
7 States Code. Any appeal from an interlocutory order entered  
8 in any such action shall be taken to the court of appeals pur-  
9 suant to sections 1292 (a) (1) and 2107 of title 28 of the  
10 United States Code but not otherwise. Any judgment entered  
11 by the court of appeals in any such action shall be subject  
12 to review by the Supreme Court upon a writ of certiorari  
13 as provided in section 1254 (1) of title 28 of the United  
14 States Code.

15       “(b) An appeal from a final judgment pursuant to  
16 subsection (a) shall lie directly to the Supreme Court if,  
17 upon application of a party filed within fifteen days of the  
18 filing of a notice of appeal, the district judge who adjudi-  
19 cated the case enters an order stating that immediate con-  
20 sideration of the appeal by the Supreme Court is of general  
21 public importance in the administration of justice. Such  
22 order shall be filed within thirty days after the filing of a  
23 notice of appeal. When such an order is filed, the appeal  
24 and any cross appeal shall be docketed in the time and  
25 manner prescribed by the rules of the Supreme Court. The

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

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

11       (b) The proviso in section 3 of the Act of February  
12 19, 1903, as amended (32 Stat. 848, 849; 49 U.S.C. 43),  
13 is repealed and the colon preceding it is changed to a  
14 period.

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

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

Passed the Senate July 18, 1973.

Attest: FRANCIS R. VALEO,  
*Secretary.*

Chairman RODINO. When Congress enacted the Nation's first anti-trust law in 1890 in a criminal statute popularly known as the Sherman Act, Congress expressed national economic, social, and legal policies and purposely chose to rely on the Justice Department and the Federal courts rather than on an administrative commission for primary antitrust enforcement. In 1959, after a comprehensive review of the antitrust enforcement technique contained in the consent decree usage and practice that began in 1906 and are used in both Sherman and Clayton Act cases this subcommittee concluded,

The consent decree practice has established an orbit in the twilight zone between established rules of administrative law and judicial procedures.

The proposed consent decree reforms that the Subcommittee on Monopolies and Commercial Law will examine during the hearings on the Antitrust Procedures and Penalties Act that commence today, reflect the congressional purpose to enact procedural guidelines that will justify continued legislative reliance for antitrust enforcement in accordance with Congress' statutory scheme and to restore the public's confidence in the integrity of enforcement procedures, the prosecutors and, even, the Federal district courts themselves that have repeatedly been labeled as mere rubber stamps in antitrust consent decree practice.

The causes of needed reform were well stated by this subcommittee years ago. The need for consent decree reforms is well documented, on the public record, and beyond dispute. Our primary purpose during these hearings, in this regard, is to insure that meaningful and effective reforms are enacted because at stake also is the public's confidence in its representative form of government. "The impartial execution of the laws," as the Supreme Court recently restated, is a "great end of Government." In view of these great and widely acclaimed legislative goals, one area that these hearings must explore is the possibility that the settlement of all Government antitrust actions, including settlements of criminal actions, is necessary if effective reforms are to be enacted.

I note that the ranking minority member of the committee, Mr. Hutchinson, is on his way and has an opening statement to make. I am sure that upon arrival he will make it and I know at that time, we will be hearing the first witness, the distinguished Senator from California, Mr. Tunney, and that he will not mind if we interrupt him for Mr. Hutchinson's statement. I do have present here, a member of the minority, and not so much a minority, my distinguished colleague, Mr. McClory.

Mr. McCLORY. Thank you very much.

We will try to hold up our side, Mr. Chairman. I would like to say that I did have the privilege of sitting in another committee which is investigating a number of mergers that this committee investigated during the last Congress. It did come to light that there were many areas in the law, particularly in regard to consent decree settlements of mergers and acquisitions, which needed some improvement. I think it's an appropriate area for us to consider at this time, and I welcome the testimony of our former colleague and our colleague in the other body, Senator Tunney.

Thank you, Mr. Chairman.

Chairman RODINO. I understand that Senator Tunney will be conducting hearings very shortly, and at this time, I will say that I will be brief, and Senator, for that reason I did not prolong my opening statement. I will insert the rest of it in the record to give you an opportunity to present your views.

We're very, very delighted and pleased to welcome our old colleague, a good friend, and one who has certainly done some great work in this area, who initiated the legislation on the Senate side, which moved through the Senate because of his leadership and is presently before us. At this time, Senator Tunney, you may proceed.

[The opening statement of Hon. Peter W. Rodino, Jr., follows:]

OPENING STATEMENT OF HON. PETER W. RODINO, JR., CHAIREMAN,  
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

When Congress enacted the nation's first antitrust law in 1890 in a criminal statute popularly known as the Sherman Act, Congress expressed national economic, social and legal policies and purposely chose to rely on the Justice Department and the federal courts rather than on an administrative commission for primary antitrust enforcement. In 1959, after a comprehensive review of the antitrust enforcement technique contained in the consent decree usage and practice that began in 1906 and are used in both Sherman and Clayton Act cases, this Subcommittee concluded,

"The consent decree practice has established an orbit in the twilight zone between established rules of administrative law and judicial procedures."

The proposed consent decree reforms that the Subcommittee on Monopolies and Commercial Law will examine during the hearings on the Antitrust Procedures and Penalties Act that commence today, reflect the Congressional purposes to enact procedural guidelines that will justify continued legislative reliance for antitrust enforcement in accordance with Congress' statutory scheme and to restore the public's confidence in the integrity of enforcement procedures, the prosecutors and, even, the federal district courts themselves that have repeatedly been labeled as mere "rubber stamps" in antitrust consent decree practice.

The causes of needed reform were well stated by this Subcommittee years ago. The need for consent decree reforms is well documented, on the public record, and beyond dispute. Our primary purpose during these hearings, in this regard, is to insure that meaningful and effective reforms are enacted because at stake also is the public's confidence in its representative form of government. "The impartial execution of the laws," as the Supreme Court recently re-stated, is a "great end of Government." In view of these great and widely acclaimed legislative goals, one area that these hearings must explore is the possibility that the settlement of *all* government antitrust actions, including settlements of criminal actions, is necessary if effective reforms are to be enacted.

The only readily discernible area of controversy about the propriety of consent decree reforms centers on proposed procedures for defendants in government antitrust cases and for, particularly, their attorneys. In a recent case, the Supreme Court may have provided the proper resolution for this controversy when it observed:

"Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy."

In re Griffiths 51 U.S.L.W. 5147 (U.S. June 26, 1973).

This observation by the Supreme Court, I hasten to add, is applicable equally to government attorneys when replacing backrooms with courtrooms in the public interest.

The proposed legislation seeks, additionally, to achieve a greater deterrence to Sherman Act violations by increasing ceilings on fines allowable. The unquestioned need to deter antitrust violations has consistently been recognized by Congress. From initial enactment of the antitrust laws, legislation has mandated

the availability of litigated judgments in government actions as prima facie evidence of liability in private antitrust actions in which, moreover, Congress has especially authorized recovery by private litigants of three times the amount of damages proved as caused by antitrust violations. This need for effective antitrust deterrents first expressed in a two-step statutory scheme by Congress has been repeatedly voiced and expanded by others.

The late Robert F. Kennedy, when he was Attorney General, stated, "I view the businessmen who engage in antitrust conspiracies in the same light as I regard the racketeer who siphons money off the public in crooked gambling or the union official who betrays his union members." Public interest and consumer advocates in more recent times have increasingly resorted to referring to antitrust violations as "crime in the suites" as a measure to drive home to the enforcers, the courts the public, and, even, to the Congress that, like "crime in the streets", major public problems requiring overdue resolution are involved. Effective deterrents to antitrust violations and not the undisputed need to deter such violations is the real focus of the proposed legislation before us. It is eminently appropriate that the issue of effective deterrents to antitrust violations is raised in legislation that seeks also to reform consent decree procedures.

As this Committee concluded in 1959 when approximately 75% of Government antitrust cases were being settled,

"Large scale use of the consent decree to conclude antitrust suits instituted by the United States, therefore, amounts to an invitation to corporate officers to undertake programs that may violate the law."

Shockingly, it is presently estimated that over 80% of Government antitrust cases are settled without trial. Clearly, the Congress has a duty to act in this regard and, perhaps, in a manner that is broader than presently contemplated by the proposed legislation. The increase in a ceiling on fines may need to be brigaded with provisions for increased ceilings on jail sentences; by the addition of true "penalties"; and, by facilitating the private litigants' use of *all* decrees in government cases. Moreover, it appears ironic that, given the catalyst for proposed legislation found in the ITT merger settlements, no penalties for violations of the Clayton Act are presented. Moreover, the Supreme Court has repeatedly and, I add, correctly observed that Congressional strengthening of antimerger laws was designed to facilitate the arresting of Sherman Act offenses in their "incipiency".

Unlike consent decree reforms and effective deterrents to antitrust violations, the provisions of the proposed legislation directed toward re-defining appeals in Government antitrust cases raise innovative issues and major public policy decisions for our consideration. The Expediting Act presently expedites review by the Supreme Court of antitrust cases brought by the United States by routing appeals directly to the Supreme Court from district courts. The proposed legislation would add a new layer of intermediate appellate review for all government cases with one exception; and, would re-define "expediting" to mean expediting the case to district court trial after filing a complaint. Obviously, important questions of public policy permeate these provisions.

Nevertheless, the most serious public policy question raised in this part of the proposed Act involves the stripping of the right of direct appeal from the United States and placing its appeals of antitrust cases within the Supreme Court's discretionary jurisdiction that includes the discretion not to review at all. The main foundation of this feature is found in the acceptance of the thesis that the Supreme Court is overworked already. To accept this thesis without further, meticulous scrutiny is not our purpose.

In addition, in view of the expressed intention the legislation's sponsors have of not conferring additional power on the federal courts in antitrust cases, the provisions, whereby federal district courts would be empowered to block the proposed legislative exception to the new proposed method of appeals that would preserve the *possibility* of direct Supreme Court review of government cases under certain circumstances, appear to warrant close scrutiny.

The most remarkable feature of this aspect of the proposed Act resides in the reversal of the Supreme Court's historic and unique role in the development of antitrust law that has long been heralded as an example of how the doctrine of the separation of powers ought to function. In the area of the antitrust laws, the Supreme Court has not been confined to the pure judicial function called

by the Supreme Court, "interstitial federal lawmaking",<sup>1</sup> because of dynamic features of the American free enterprise system that are in conflict with rigid legislative codes.

**TESTIMONY OF HON. JOHN V. TUNNEY, U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Mr. TUNNEY. Thank you, Mr. Chairman.

I can't tell you how much I appreciate your courtesies, first, giving me the opportunity to testify at this time, so that I could conduct hearings over on our side, and most particularly for your consideration of legislation which I think is extremely important. Without your interest, this legislation would die aborning in the House, and with your interest, I feel that there is no question that we can see the bill pass the House and become law.

For those reasons, and others, I am deeply appreciative to you for the opportunity to be here this morning. Besides, I never dreamed when I was over in the House of Representatives that I would have the opportunity to come and testify before your committee, and it is a great experience for me to be here with you as chairman.

Chairman RODINO. Thank you.

Mr. TUNNEY. I am pleased to be able to make a brief statement in support of H.R. 9203 and S. 782, the Antitrust Procedures and Penalties Act, which I introduced along with Senator Gurney.

The daily headlines and a proliferation of public opinion polls make passage of this bill more imperative than ever.

Public confidence in our Government institutions has been severely eroded by scandal and perhaps most of all by Government secrecy, by closed-door decisionmaking, by shutting people out of the people's business.

These are precisely the abuses my bill is designed to remedy in the antitrust field.

Now, Mr. Chairman, I have a fairly long statement which I would like to have included in the record as if I had read it.

Chairman RODINO. Without objection, it will be included.

[The prepared statement of Hon. John V. Tunney follows:]

**STATEMENT OF HON. JOHN V. TUNNEY, A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Mr. Chairman, I am very pleased to be here today in order to make a brief statement in support of S. 782 and H.R. 9203 the Antitrust Procedures and Penalties Act, which I introduced along with Senator Gurney.

The daily headlines and a proliferation of public opinion polls make passage of this bill more imperative than ever.

Public confidence in our government institutions has been severely eroded by scandal and perhaps most of all by government secrecy, by closed-door decision-making, by shutting the people out of the people's business.

These are precisely the abuses my bill is designed to remedy in the antitrust field.

<sup>1</sup>"The inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. 'At the very least, effective Constitutionalism requires recognition of the power in the federal courts to declare, as a matter of common law or 'judicial legislation', rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.'" *United States v. Little Lake Misere Land Co.*, 41 U.S.L.W. 4839, 4843 (U.S. June 19, 1973) (Chief Justice Burger).

One of the most publicized antitrust settlements in recent years was the ITT case. I believe it is at least possible that, were the antitrust procedures I am proposing in effect at the time that case was settled, the terms of the settlement might well have been different; and public suspicion about both the economic and legal equity of that settlement would be less widespread than it is today.

Now let me proceed to a short restatement of the principal objectives of this bill, which was passed unanimously by the Senate in July.

In a series of extensive hearings conducted by the Senate, those testifying were in basic agreement that greater ventilation of the consent decree process—the process by which over 80% of all antitrust cases are disposed—is vitally needed, that the opportunity for informed public comment needs to be expanded, and that the courts must be able to make an independent determination in approving consent judgments. There was also general accord for the need to stiffen the criminal penalties levied against antitrust violators and to modify the process of judicial review in civil antitrust cases.

J. Skelly Wright, the distinguished Judge of the United States Court of Appeals for the District of Columbia, perceived the basic thrust of this bill and the urgency for its enactment when he told the Senate Subcommittee, “By definition, antitrust violators wield great influence and economic power. They often bring significant pressure to bear on government, and even on the courts, in connection with the handling of consent decrees. The public is properly concerned whether such pressure results in settlements which might shortchange the public interest.”

The pressures to which the eminent jurist refers are secret pressures, and it is the excessive secrecy with which many consent decrees have been fashioned that goes to the heart of the problem.

All too often, settlements have been hammered out behind closed doors, without benefit of public knowledge and in ignorance of all the facts which the government needs to formulate the appropriate consent decree and which the court needs to approve the decree.

The clandestine nature of these negotiations and the unsatisfactory results in many antitrust cases, both from the standpoints of economics and law, has contributed to a severe erosion of public confidence in the governmental process, has produced undesirable economic consequences, and ultimately has hurt the public pocketbook.

The increasing concentration of economic power among an everdecreasing handful of giant super-corporations is now an undeniable reality.

Spurred by the mergers and consolidations among the largest companies that have been occurring in regular cycles since 1898—with an average of 3,605 mergers annually in the period between 1967 and 1969—the trend toward “giantism” has put tremendous strain upon the courts and the government, who are both custodians of the antitrust laws. Tools invented essentially in the 1890s are being used to correct the abuses in the economic marketplace of the 1970s.

S. 782 is an effort to address this anachronistic situation. It is divided basically into three distinct sections:

Section 1 would require that the Justice Department file and publish, along with the consent decree, a “public impact” statement which explains the nature and purpose of the relief to be obtained by the proposed decree, the alternatives actually considered in deciding on such relief, and the procedures available for modification of the proposed judgment.

The period for public consideration of the decree is extended from thirty to sixty days, during which time written public comment is invited and the Justice Department must respond to any such comment.

The decree, the public impact statement and the comments and replies to them must be published in the *Federal Register*. Summaries of the consent decree and the public impact statement must also be published in newspapers of general circulation for seven days over a period of two weeks.

Within ten days of the filing of the decree, the defendant must list with the court its lobbying contacts with any officer or employee of the United States concerning or relevant to the proposed consent judgment, other than those communications made by or in the presence of counsel of record with the Attorney General or the employees of the Department of Justice.

I might add here, parenthetically, that I was happy to note that shortly after the Senate passage of my bill, Attorney General Elliot Richardson issued a set of comprehensive guidelines that requires the keeping of an appropriate internal record of all third-party contacts with the Justice Department, including

those from Congress or the White House, with respect to all pending cases. I urge the Attorney General to take the next step and make such communications, with the exception of those by outside informers, a matter of public record and open to public inspection.

Before entering the decree, the court must find that it is in the public interest as defined by law. In reaching its decision the court may, in its discretion, review both procedural and substantive factors which the bill enumerates.

I want to stress that the court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and least costly settlement through the consent decree process.

These provisions would do nothing to stymie or frustrate the efforts of the Justice Department in discharging its duties in the antitrust area.

The extension of the public comment period, the strengthened publication requirements, the necessity of listing lobbying contacts, and the need for a public interest determination all had the explicit support of the head of the Antitrust Division, Assistant Attorney General Thomas E. Kauper.

The second section of the bill would increase the maximum criminal fines for violations of the antitrust laws from \$50,000 to \$100,000 for individuals and to \$500,000 for corporations. The rationale here is quite simple. Unless the courts are prepared to make these penalties financially prohibitive, the rewards for breaking the law will continue to outbalance the deterrent value of the fines.

The third and last section of my bill would amend the Expediting Act, which was made law in 1903, to require appellate review of final judgments and interlocutory orders in certain civil antitrust cases. Cases of "general public importance" would be appealable directly to the Supreme Court after certification by a single district judge in lieu of a three-judge court upon application by either party.

These are the nuts and bolts of this bill.

Since it is the Antitrust Division of the Justice Department which is charged with the enforcement of the antitrust statutes, they obviously must have the resources to do the job. With that in mind, I joined with four of my Senate colleagues in urging additional appropriations for the Antitrust Division. I am happy to report that in the appropriations bill as passed by the Senate just a few days ago, an additional \$1 million was voted for the Antitrust Division budget.

While this amount of money is not an automatic guarantee that the government will effectively execute its mandate to apply the antitrust laws; and while a total antitrust budget of only \$13 million is but the barest investment in the integrity of a \$1.3 trillion economy, it will strengthen our defenses against anti-competitive and inflationary conduct. In the long run, this will result in savings to the consumer.

Mr. Chairman, it is past the time when certain basic changes in the nation's antitrust laws should have been implemented. No doubt, longer study will indicate that additional change is needed to adapt to the rapidly evolving national and international economic structure. But we can begin by doing what this measure proposes—and help to cleanse an atmosphere already too polluted by closed-door dealings and dangerous power-wielding at the highest corporate and governmental levels.

Thank you for this opportunity to address the Committee.

Mr. TUNNEY. I would just like now to extemporaneously explain what I consider to be the major provisions of the bill. As you know, over 80 percent of all antitrust cases disposed of are consent decrees. This means that the parties, Government as well as corporate defendants, get together and work out a solution and an agreement to the problem that has been identified by the Antitrust Division of the Justice Department as a violation of the antitrust laws.

When you have that type of agreement, I feel that it's subject to the possibility of abuse unless you have a complete ventilation of what is going on behind closed doors, and unless the public is made aware of what the nature of the decree is—what the agreement is. Now, I have no question that the vast majority of consent decree agreements are in the public interest. I have no question but that the men and the

women in the Antitrust Division of the Justice Department are capable, they are honest, and they want to serve the public interest. But, I am also well aware as a Senator and a former Congressman, of the kinds of pressures that can be brought to bear when issues are before the Congress of a highly charged political nature.

I think the same thing is true with the Justice Department. I am now not talking about men and women who are working in the lower echelons of the Department, but I am thinking of those who are in the upper reaches, the policymaking decisions of the Department. So what this legislation is designed to do essentially is to protect those with policymaking responsibilities and the Justice Department from the kind of pressures that they could be subjected to and to protect the public interest. The way we do that is by ventilating the system. We require in the first instance, the Justice Department file a public impact statement at the time that the consent decree is filed. Then there is a period of 60 days in which the public can comment on the consent decree, and the Justice Department is required to respond to that commentary. Thus we create a public record of why it was in the public interest to settle the case rather than pursue the litigation, and we give the public an opportunity to criticize or commend this outcome. Then we require the Justice Department to come back and comment on the public criticism.

I think that that is a very important provision and I think that it is going to help the Justice Department considerably, and it is going to help protect them from the kind of pressures that we sometimes see. It is not a partisan political issue, it happens in all administrations, Democrats and Republicans alike.

The other aspect of the bill which is very important is the requirement that within 10 days of the filing, the corporate defendant must file with the court the lobbying activities that took place between corporate officials or agents and governmental officials, except if counsel of record for the corporation meets with officials of the Justice Department, or is accompanied during those visitations by an official of the corporation. This exemption to the filing requirement is necessary, it is felt, so that the two sides can get together and discuss in detail the various ramifications of the settlement. These meetings would be protected and privileged, in the same way that we have executive sessions, markups in the Congress.

I am one person who believes if you do have a publication of everything that goes on in executive sessions, that you are not going to have the free flow of opinion, that you would otherwise have—and I think the same thing is true in the case of a corporation counsel and the official of the corporation meeting with the Justice Department to work out an agreement. These are the two main provisions of the legislation insofar as the ventilation of the system is concerned.

We also have an increase in the maximum criminal fines for violations, \$50,000 to \$100,000 for individuals and up to \$500,000 for corporations. I think that the rationale here is quite simple. Unless the court is prepared to make these penalties financially prohibitive, the rewards for breaking the law will continue to outbalance the deterrent value of the fines.

The third and last section of the bill would amend the Expediting Act, which was made into law in 1903, to require appellate review of

final judgments and interlocutory orders in certain civil antitrust cases. A case of general public importance would be appealable directly to the Supreme Court after certification by a single District Judge in lieu of a three-judge court upon application by either party. That is the nuts and bolts of this bill, and I might say that insofar as the amending of the Expediting Act is concerned, the judiciary, the Justice Department and the antitrust bar are in substantial agreement that three-judge courts are something of an anomaly today. So I would conclude with those brief remarks, Mr. Chairman, as to the nature of the bill.

Chairman RODINO. Thank you, Senator.

Senator, Mr. Hutchinson is here, and at this time he is free to make his opening statement.

Mr. HUTCHINSON. Senator, I want to apologize for being late. I was necessarily detained. You understand how those things are.

I do have an opening statement, but Mr. Chairman, in order to conserve the time of the Committee and since I was late, I will ask that I have unanimous consent to insert the statement in the record.

Chairman RODINO. Without objection, it is so ordered.

[The prepared statement of Hon. Edward Hutchinson follows:]

STATEMENT OF HON. EDWARD HUTCHINSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

The Antitrust Procedures and Penalties Act would change our antitrust laws in three areas—consent decrees, criminal penalties, and the Expediting Act. With regard to consent decrees, the legislation would subject such decrees to greater public and judicial scrutiny to insure that they are in the public interest. Under current practice, the determination of whether a consent decree is in the public interest rests with the Department of Justice—a determination which the public has found difficult to assess because of its secrecy and which the courts have declined to review because, in my opinion, of its resemblance to the exercise of prosecutorial discretion. As a general proposition it appears that the courts will accept such a determination unless there is a showing of bad faith or malfeasance.

I view the remedy proposed with mixed emotions. I agree that it is desirable that the settlement of antitrust cases be somehow opened to the public so that the people can decide whether their government is serving them properly. But I am troubled by the suggestion that a federal judge act as guardian of the "public interest." I wonder whether in our system of government a federal judge can, or should, make such decisions.

It must not pass notice that the large percentage of consent decrees negotiated by the government, approximately 75 to 80 per cent of all cases, allows a relatively small Division, allegedly smaller than the legal departments of some corporations, to reguete well beyond its means. However, in such a modus operandi it is often necessary to accept a half of a loaf here and there rather than holding out exclusively for full loaves. Who is to say which approach garners the most bread? How is a federal judge to treat such an argument?

Or suppose that a case is filed by one Attorney General to test a new theory of antitrust law which the succeeding Attorney General believes will result in a loss on the merits. What is the "public interest" in a subsequent consent decree? How does the court weigh the value of pressing new theories before it?

Or suppose that during the prosecution of a case against an oil company the government decided to settle for less relief than it could win on the merits because of the adverse impact full relief might have on a recently intervening energy crisis. Is such a question appropriate for judicial review?

The second area affected by the legislation is that of penalties. Although penalties would be increased to make them more nearly realistic, it should be noted that, except for smaller businesses, a maximum fine of \$500,000 may still be disproportionately small to damages inflicted by antitrust violations. In such case treble damage suits will still remain as the major deterrent for wrongdoers.

The third area affected is the Expediting Act. The first major change would be to permit interlocutory appeals to the court of appeals, a change long overdue.

The second major change would channel direct appeals to the courts of appeals rather than the Supreme Court, as the law does now, unless (1) either party makes a request, (2) the district judge determines that the case is of "general public importance in the administration of justice," and (3) the Supreme Court decides to hear it. In my opinion, if the Attorney General believes that the case is important and if the Supreme Court thinks it is important enough to hear out of turn, the case should be expedited regardless of how the trial judge would characterize its appealability.

The Antitrust Procedures and Penalties Act is probably the most important antitrust legislation of this Congress. It is my hope that it is in every way expedited.

Mr. HUTCHINSON. Thank you very much.

Senator, I know that you have another hearing and I do not wish to delay you, but I would like to ask a couple of questions.

Mr. TUNNEY. Sure. I am delighted. I will be late to my other hearing. I would prefer to be here.

Chairman RODINO. Senator, I just have two questions.

One, do you believe that the requirements that are now set up in bills that are before us would delay inordinately the effectiveness of getting consent decrees which sometimes serve the useful purpose of not delaying justice?

Mr. TUNNEY. I do not believe so. We extend from 30 to 60 days the time for public consideration of the decree. I do not consider that to be an inordinate delay, particularly when you consider the fact that many antitrust cases often remain unsettled for months, and even years. The extra 30 days is a very limited time, to extend public consideration of the decree.

We have made changes in the legislation on the Senate side from the form in which it was first introduced so that we would not now require the judge to evaluate certain criteria in his independent review of the consent decree proposal. As initially introduced by Senator Gurney and myself, the bill required the judge to evaluate certain criteria in his independent evaluations of the decree. We have amended the bill so that such evaluation is rendered discretionary, thereby removing a potential delay factor.

Chairman RODINO. Of course, Senator, you know that the 30 days you speak of is not a statutory requirement. It's merely a policy instituted by the Justice Department. So you are writing into the bill now a 60-day provision, and there was no provision at all previously.

Mr. TUNNEY. That's right.

Chairman RODINO. Now, you mention that 80 percent of the antitrust cases are finally resolved with consent decrees. Are you suggesting that the consent decree vehicle is a bad instrument to employ?

Mr. TUNNEY. No. Definitely not.

Chairman RODINO. Would you want to cut down the number of consent decrees?

Mr. TUNNEY. No. I think that we ought to have as many consent decrees as possible because I think that this cuts down on litigation. I think the public interest can be well served by consent decrees. I think it is necessary, however, that there be ventilation of the entire situation that led to the consent decree rather than a pursuit of the litigation. I feel that the Justice Department is protected by this kind of legislation because, if you know, for instance, that lobbying activities are going to have to be filed with the court, there are, in all probability, going to be less lobbying activities. Or if there are lobbying ac-

tivities, the conversations will be more restrained. I think that is a protection to the Justice Department, to the officials who are charged with the responsibility to administer the antitrust laws.

Chairman RODINO. I will not ask any further questions. I will turn it over to Mr. Hutchinson, but at some later time, Senator, I want to explore at some length the provision regarding the elimination of some of the requirements of the expediting sections of the bill. I would like to talk to you about that.

Mr. TUNNEY. Fine.

Chairman RODINO. Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Senator, beginning on page 4 of your bill, which the Senate passed, is the following language:

Before entering any consent judgment proposed by the United States under this section, the court shall determine that entry of the judgment is in the public interest as defined by law.

Is the public interest defined somewhere in the law?

Mr. TUNNEY. Well, as defined by law naturally assumes a judicial definition as well as any statutory definition, and when this matter was brought up in committee and this language was added to the legislation, as defined by law, it was assumed by the members of the committee that we were talking about statutory as well as judicial interpretations of the law.

Mr. HUTCHINSON. Well, all right.

I asked the question in order to get on the hearing record some clarification of that phrase, although I understand your concept. I think that it would be hard to find a definition of the "public interest" in the precedents of the court; the "public interest" varies from case to case.

I have only one other question, Senator, that I want to put to you.

Suppose that a court should determine that the consent judgment proposed by the United States isn't in the public interest, and they refuse to enter that decree. Then what alternative is left to the parties in the case? Is it necessary to try the case?

Mr. TUNNEY. Well, I would say there are two alternatives. They could try to work out a new agreement which would meet with the judge's approval or proceed with the litigation.

Mr. HUTCHINSON. Well, in other words, they could start anew and try to work out something else?

Mr. TUNNEY. Yes, absolutely.

Mr. HUTCHINSON. Would any kind of a consent decree need to have the court's approval?

Mr. TUNNEY. Right.

Mr. HUTCHINSON. Would any kind of agreement made outside the court privately stand?

Mr. TUNNEY. Well, I certainly do not think so. I suppose the Justice Department could drop the suit. That would be a third alternative. Otherwise the Justice Department could proceed with the litigation or come in with a new consent decree and attempt to get the judge's approval of that decree. There could not be, as I understand the law, and as I understand this legislation, a private agreement that would not involve a ratification by the court.

Mr. HUTCHINSON. Thank you, Senator.

Chairman RODINO. Mr. Seiberling.

Mr. SEIBERLING. Thank you, Mr. Chairman.

Senator, I understand you have a very pressing schedule and I am not going to take up too much of your time. I want to commend you for your initial job of getting this legislation through the Senate and for appearing before us today.

As a former antitrust lawyer in private practice, I have some feeling about the sufficiency of this kind of legislation. I would like to ask one question. I take it it is not the intent of your bill to apply it to private antitrust actions, but only to actions brought by the Attorney General?

Mr. TUNNEY. That is correct.

Mr. SEIBERLING. Well, I have no further questions in view of the time situation, but I thank you very much.

Chairman RODINO. Thank you, Mr. Seiberling.

Mr. McClory?

Mr. McCLORY. Senator, I am wholeheartedly in favor of that part of the bill which increases the fine, and I don't think we're going to have any problem on that part of the legislation. However, with regard to the mechanics involved and the other procedures, it seems there are a number of questions that we are going to have to consider carefully in this committee before taking action for a variety of reasons.

First of all, would it not be possible to create a procedure that we have involved here with legislation by rule of court, by amendment of the Federal rules, or perhaps even by internal practices within the Department of Justice?

Mr. TUNNEY. Well, I suppose that it could be done by a combination of court rules and modifications of practices in the Justice Department. However, it hasn't been done, and there is a desperate need to have it done, and that is why this legislation has been passed unanimously by the Senate. I might say that we have had in the Judiciary Committee of the Senate, some initial opposition to the legislation. But after it was explained and after the hearings were held, we had a unanimous vote in our committee, and then when it went to the floor, it passed 92 to 0. Senators on both sides of the aisle felt, I believe, that what was desperately needed today in antitrust litigation was a ventilation of the system.

Mr. McCLORY. I don't think you are going to find any opposition in this committee to the objectives to be obtained. One of the reasons for my question is that perhaps we need more flexibility than would be available, if we tie this subject down into an amendment of the statute. Let me ask you this, is there any requirement for any of the representatives of the public to be represented by counsel before the court?

Mr. TUNNEY. No.

Mr. McCLORY. For instance, I am thinking of the ITT case regarding the Hartford Insurance Co. acquisition to which you made reference in your testimony, and which is one that I think suggests the need for additional legislation because that acquisition, in my opinion, should not have been permitted or was certainly a questionable tactic. Since you could have literally thousands of individuals involved with individual statements in the court, I am wondering how you could handle this kind of massive interest on the part of the public.

Mr. TUNNEY. There is no provision in the legislation for public representation. The public can comment for a period of 60 days. The public can, you know, today have 30 days as a result of internal rules established by the Justice Department. The added 30-day period is not going to, in my mind, appreciably delay the consent decree judgment, and I certainly doubt there is record to demonstrate that you would have thousands of comments made by the public during that 60-day period. I think that it's far more likely that in the typical case, you will have none, but perhaps you will have 10 to 15 in a highly controversial case.

Mr. McCLORY. Is this apt to present a situation which will open the door completely, whether there is any interest or not?

Mr. TUNNEY. I don't think that it is going to delay the decrees from being entered by the judge, because you have only 60 days for the commentary. There is no period beyond the 60 days. There is no way that an individual attorney working for a public client can extend the 30-day period through legal challenge. We're talking about 60 days during which the public has an opportunity to evaluate the consent decree and then file its comments with the court.

So I do not see how it will delay matters, but what it does do is to give a sense of public participation within very clear demarcations.

Mr. McCLORY. I have one more question. What, in your opinion, is the scope of this judicial review? I ask that question because there are so many tactical administrative subjects that go into resolving an antitrust case in which the parties agree on the consent decree. When is the court authorized to consider the essentially nonjudicial, practical, or administrative subjects, clearly assigned from the more technical jurisdictional questions that have been discussed under the antitrust laws?

Mr. TUNNEY. The court is not required to do anything other than to give an independent evaluation that the consent decree is in the public interest. That is all.

The court today can do as much or as little as it wants. The court can order a trial if it wants.

Mr. McCLORY. The court can leave some questions unresolved.

Mr. TUNNEY. The court has complete discretion in this matter and we have preserved in the legislation—the court's discretion.

Initially in this legislation we did not insure complete court discretion. We mandated that the court had to evaluate certain criteria in determining that the consent decree was in the public interest. But we took that out, mainly because the Justice Department was opposed to it and they said they did not think that this was wise and the judges who testified indicated that they did not think it was wise.

Mr. McCLORY. The court could ignore some of the comments that are made by the public.

Mr. TUNNEY. Of course, the court could. It could ignore all of them if it wanted to.

Chairman RODINO. Thank you.

Mr. McCLORY. Thank you very much.

Chairman RODINO. Thank you. Mr. Flowers?

Mr. FLOWERS. I have no questions, Mr. Chairman. I would just like to say thank you, Senator.

Chairman RODINO. Ms. Jordan?

Ms. JORDAN. I want to commend the Senator for his bill and simply state than I would assume that this is an effort on your part to restore integrity to the antitrust proceedings, if that is possible.

Mr. TUNNEY. That is correct.

Ms. JORDAN. No further questions, Mr. Chairman.

Chairman RODINO. Thank you.

Mr. Mezvinsky?

Mr. MEZVINSKY. I think the Senator should be commended because he has worked hard; he led the fight in the Senate. I would hope at the same time, Senator, that we can maybe provide some funds to beef up the antitrust division to carry out these pieces of legislation as well as other legislation.

Mr. TUNNEY. You might be interested to know, Congressman, that just within the last 3 days we got an additional \$1 million for the Justice Department, to go to the antitrust division of the Justice Department.

Mr. MEZVINSKY. I gather that you think \$13 million that they now have is woefully inadequate?

Mr. TUNNEY. I would like to have seen it doubled. I started off with \$3 million and Senator Pastore agreed to \$1 million, and it passed the Senate and I hope that the House will approve that decision.

Mr. MEZVINSKY. Thank you.

Chairman RODINO. Thank you very much, Senator.

I hope that we have not unduly delayed you.

Mr. TUNNEY. It is my honor to be here and I appreciate your interest in the questions asked.

Chairman RODINO. Thank you very much. Our next scheduled witness the Hon. James V. Stanton is unable to appear this morning. His statement will be included at this point.

[The prepared statement and enclosures of Hon. James V. Stanton follow:]

STATEMENT OF HON. JAMES V. STANTON, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF OHIO

Chairman Rodino and Members of the Subcommittee: I want to thank you for the opportunity to appear here before you in support of S. 82, the Antitrust Procedures and Penalties Act. As a lawyer I have no doubt that this legislation is sound, and as a citizen I must say it is greatly needed. I want to commend the distinguished Senator from California, the Hon. John V. Tunney, for conceiving this important piece of legislation and for winning approval of it in the other body. I hope that we in the House of Representatives follow suit without delay.

My own version of Senator Tunney's bill, H.R. 9947, is virtually identical to that which passed the Senate, except that I have added a paragraph which makes certain provisions of the legislation retroactive to December 31, 1972. You will find the additional language on Page 3 of my bill, in the paragraph beginning on line 19. That paragraph reads:

"(3) In the case of a consent decree entered after December 31, 1972, and before the date of enactment of this subsection, copies of any consent judgment proposed by the United States, and any other materials and documents and the public impact statement with respect to such consent decree, which would have been required under paragraph (2) of this subsection had such consent decree been entered after the date of enactment of this subsection, shall be filed and made available to the public in the same manner as specified under paragraph (2), to the maximum extent practicable.

Before addressing myself this particular provision, Mr. Chairman, I want to state briefly that I concur wholeheartedly with the rationale for the legislation which was so ably expressed to you only a few moments ago by Senator Tunney. There is no need for me to reiterate the points made by him with respect to the people's right to know how the government arrives at settlements in anti-trust cases.

As a matter of fact, it is the public's inadequate knowledge of a matter involving the Standard Oil Company of Ohio (Sohio), in the U.S. District Court in Cleveland, that prompted me to introduce H.R. 9947, with its language aimed at ferreting out the facts in this specific case, as well as in others that might fall within the same time frame.

The Sohio case constitutes a rather apt illustration of why the Tunney legislation is needed. With your permission, Mr. Chairman, I would like to review some of the salient facts for you and then file for the record supporting documents that will give you more details.

The litigation began with an antitrust complaint filed by the Justice Department against Sohio on September 18, 1970 (Civil Action No. C 70-895). According to the complaint, Sohio accounts for about 30% of the motor fuel sold in the State of Ohio, which gives it a commanding position in the market. The Department accused Sohio of price fixing, among other things, as a consequence of the company's relationship with certain retail gasoline stations. I became interested in this matter because it was evident that the charges, if true, revealed a situation where gasoline was being sold to consumers at unnecessarily high prices. And, of course, because of Sohio's predominance and influence over the market, inflated prices would be paid by motorists no matter what brand of gasoline they purchased.

For reasons that I still find difficult to understand, the Justice Department seemed in no hurry to press its own case. Therefore, my early efforts were directed at trying to prod the Department into action. In a chain of correspondence, I urged the government lawyers to get on with it—to go to trial if no fair settlement could be reached.

Finally, with the case nearly three years old, I got word that a settlement was at hand. I was able to obtain a copy of the proposed consent decree. On reviewing it and after discussing it with members of the Northern Ohio Petroleum Retailers Association, whose grievances had inspired the government's complaint, I concluded that the proposed settlement was, in reality, a sweetheart agreement between the Justice Department and the oil company.

The documents I submit to you give the rationale for this assessment. At this point, I will merely state briefly that, at least as far as I was concerned, the government was proposing to permit Sohio to continue to engage in the same allegedly illegal practices. The only significant change, as I saw it, was semantical in nature. What had been called "Commission Manager Stations" were now to be called "Incentive Manager Stations," and under this new label these latter stations would be places where business was to be conducted, with Sohio and with the public, in the same old way—in the manner, that is, that the Government had complained about.

I criticized the proposed settlement and asked the Justice Department, which was just then coming under new leadership, to abrogate the agreement. The court ordered a hearing and took under advisement the question whether the proposed settlement should be approved. Finally, on September 10, 1973, it was approved.

Now, Mr. Chairman, I have no quarrel with the Hon. Thomas D. Lambros, the distinguished jurist who handled this case and entered the final order. Judge Lambros is a credit to the federal bench and has a well-earned reputation as one of the most astute of the federal judges in Cleveland. His integrity has never been questioned.

It might very well be that the court was correct in its ruling—which, I hasten to add, was rendered, as it had to be, under existing law. It is purely speculative, of course, whether we would have had the same result if S. 782 were already on the statute books, and its requirements had to be met.

Nonetheless, it seems to me that the court's ruling may be read as an argument in favor of the proposed legislation. Judge Lambros points out in his decision that he felt impelled to accept the settlement because there had been no allegation, and no showing, of bad faith on the part of the government. He calls attention to the fact that the government, after all, "has the primary duty to represent the public interest." This is true and, I submit, it is a heavy responsibility.

After observing that any settlement "results in some concessions by both parties," the court went on to say that it could not "assess with precision exactly which terms were concessions by the parties." And it added: "At the same time, the Court has reviewed the case and determines that it does not appear that the Government has made unreasonable concessions which conflict with the public interest." It seems to me, then, Mr. Chairman, that a fuller disclosure of pertinent facts, as called for in S. 782, would have a salutary effect on public understanding of antitrust cases.

If my version of the bill is adopted, the government would be obligated to disclose, in the "public impact statement," not only how the settlement was arrived at in the Sohio case and other cases, but also what the alternatives were, what effect the settlement is likely to have on competition, and a listing of the remedies that might be available to injured parties.

Therefore, I again urge you to approve this legislation, with the amendment that I propose. Thank you, Mr. Chairman.

I now ask leave to submit the following items for the record:

1. A copy of the government's complaint against Sohio.
2. A letter from the Justice Department to the company, dated May 2, 1973, a copy of which was sent to me as part of the justification of the proposed settlement. You will note that the letter refers to an "oral representation" made by Sohio, which the government evidently relied on but which is not further elaborated on.
3. A copy of the consent decree.
4. A Justice Department news release dated May 2, 1973.
5. An amicus curiae brief filed with the court by the gasoline retailers association.
6. A news release issued by the association following the court's ruling.
7. The final order of the court.

#### I

U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

United States of America, plaintiff, *v.* The Standard Oil Co. (an Ohio corporation), defendant. Civil action No. C 70-895. Filed: September 18, 1970.

#### COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action and complains as follows:

#### I

##### JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendant under Section 4 of the Act of Congress of July 2, 1890 (15 U.S.C. § 4), as amended, commonly known as the Sherman Act, in order to prevent and restrain a continuing violation by the defendant as hereinafter alleged, of Section 1 of the Sherman Act (15 U.S.C. § 1).

2. The defendant named herein maintains its principal place of business, transacts business and is found within the Northern District of Ohio, Eastern Division.

#### II

##### THE DEFENDANT

3. The Standard Oil Company, an Ohio corporation (hereinafter referred to as "Sohio"), is made the defendant herein. Sohio is a corporation organized and existing under the laws of the State of Ohio and has its principal place of business at Cleveland, Ohio.

#### III

##### DEFINITIONS

4. "TBA" means tires, batteries and automotive accessories.
5. "Service stations" means those business establishments that sell motor fuels, motor oils, lubricants, and TBA to consumers, and usually perform maintenance and minor repair services on motor vehicles for consumers.

6. "Commission stations" means those Sohio service stations that are supplied motor fuels, motor oils, and TBA under terms of defendant's standard form "Commission Manager Agreement" and are operated by "commission managers" under the terms of that agreement.

## IV

## CO-CONSPIRATORS

7. Various corporations and individuals not made defendants herein participated as co-conspirators in the offense alleged herein and have performed acts and made statements in furtherance thereof.

## V

## TRADE AND COMMERCE

8. Sohio, including its subsidiaries, is a major integrated company in the petroleum industry. It is engaged in exploration for the production of crude oil in the States of Texas, Louisiana, Kansas, Arkansas, Mississippi, Oklahoma, Wyoming, Kentucky, Michigan, Illinois, and Indiana. It transports such crude oil from those states into the State of Ohio through pipelines in which it has a substantial proprietary interest. Sohio operates refineries located at Lima and Toledo, Ohio. The petroleum products it produces at these refineries include motor fuels, motor oils, heating fuel oils, heavy fuel oils, lubricants, and asphalt. Sohio purchases TBA products from various manufacturers located throughout the United States. Sohio markets these petroleum products and TBA products primarily in the State of Ohio. Subsidiaries of Sohio market these products under various trade names in Ohio and 20 other adjacent and Eastern Seaboard States. The sales and revenues of Sohio and its subsidiaries in 1969 were in excess of \$1.4 billion.

9. There are approximately 14,102 service stations in Ohio. Approximately 2,946 of these service stations obtain motor fuel, motor oil, and TBA products from Sohio and market these products to consumers under the trade name "Sohio".

10. Sohio owns or leases 2,116 of the service stations that sell products under the Sohio trade name. Of these, 328 are company stations and, as of April, 1969, 1,04 of these stations were commission stations, operated pursuant to the Commission Manager Agreement. The company stations are dispersed throughout the State of Ohio and are in competition with the commission stations. All service stations owned or leased by defendant are equipped with pumps, tanks, and other dispensing equipment belonging to Sohio.

11. In operating commission stations, commission managers assume expenses and risks of independent businessmen. These expenses and risks are not borne by the managers of Sohio's company stations, who are employees of Sohio. For example, under the terms of the Commission Manager Agreements, the commission manager pays the wages of all station employees, and is solely responsible for their acts and omissions. The commission manager is also responsible for income tax withholding with respect to station employees, and for the employer portion of social security, workmen's compensation and unemployment insurance payments with respect to such employees. The commission manager is required, by the terms of the Commission Manager Agreement, to carry and pay for his own liability insurance policy, under which Sohio is also protected.

12. The commission manager receives commissions on the sales of Sohio products. With respect to motor fuels, the commission is a stated number of cents per gallon sold. With respect to TBA, motor oils and antifreeze, the commission is a percentage of the retail price. The commission manager is entitled, for his own account, to perform customer services and to purchase from others for resale such other products as Sohio may approve. The commission manager's income is determined solely on profits (or losses) from operating the station, which profits (or losses) consist of his revenues from sales and services less his business expenses.

13. The defendant is the principal supplier of motor oil and TBA products to service stations operated under terms of any of its standard form contracts, including the Commission Manager Agreement. The defendant circularizes quarterly a "Price Guide" to all its company stations and to all service stations supplied under terms of one of its standard form contracts, including the Commission Manager Agreement. The "Price Guide" sets forth so-called "Suggested

Retail Prices" for motor oils, lubricants, services, and TBA products. The Commission Manager Agreement authorizes the commission manager to perform for his own account only those customer services listed in Sohio's "Price Guide" and only at prices therein specified.

14. The motor fuel and motor oil business in Ohio is a highly concentrated industry, with relatively few large integrated oil companies supplying the bulk of the motor fuel sold in the State. Sohio accounts for approximately 30 per cent of the motor fuel sold in Ohio. The bulk of the motor fuel sold by defendant in Ohio is sold under the trade name "Sohio"; the balance of the motor fuel sold by defendant in Ohio is sold under the trade name "Fleetwing".

## VI

### OFFENSE CHARGED

15. Beginning in or about September 1968, and continuing thereafter up to and including the date of the filing of this complaint, the defendant has engaged in a combination and conspiracy with the commission managers in unreasonable restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). Such offense will continue unless the relief hereinafter prayed for is granted.

16. The aforesaid combination and conspiracy consists of a series of written contracts and concert of action among the defendant and its commission managers, who are parties to defendant's standard form Commission Manager Agreement, the substantial terms of which are that:

(a) The commission managers will sell motor fuels, motor oils, and TBA products obtained from defendant, and will perform customer services authorized by defendant, at prices fixed by the defendant;

(b) The defendant will sell motor fuel, motor oil, TBA products and perform services at company stations at the same prices which it fixes for the commission stations; and

(c) The commission managers will purchase from others for resale only such products as are approved by defendant.

17. In furtherance of the aforesaid combination and conspiracy the defendant and its commission managers have done those things which, as hereinabove alleged, they combined and conspired to do.

## VII

### EFFECTS

18. The aforesaid offense has had the following effects, among others:

(a) Prices of defendant's petroleum products and of TBA products and services purchased at defendant's service stations have been fixed at arbitrary and non-competitive levels;

(b) commission managers have been deprived of their rights to determine their own sales prices and the products and services they will offer;

(c) competition among commission managers and between them and defendant has been eliminated; and

(d) consumers have been deprived of the opportunity of purchasing petroleum products, TBA products and service work in a free and competitive market.

### PRAYER

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the combination and conspiracy between defendant and the commission managers is in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act.

2. That the defendant and its successors, officers, directors, managers, agents, representatives, employees and all other persons or corporations acting or claiming to act, under, through or on behalf of them or any of them, be perpetually enjoined and restrained from continuing, in any manner, to carry out, directly or indirectly, the agreements hereinabove alleged and from engaging in any other agreements having a like or similar purpose or effect.

3. That the defendant be required to revise its Commission Manager Agreements so as to conform to the provisions of the judgment entered herein.

4. That the defendant be perpetually enjoined, directly or indirectly, from:
  - (a) Fixing the prices at which any service station other than a company station can sell motor fuel, motor oil and TBA and perform services; and
  - (b) restricting the products or services which any service station other than a company station can offer for sale.
5. That the plaintiff have such other, further and different relief as the Court may deem appropriate or necessary.
6. That the plaintiff recover its taxable costs.

JOHN N. MITCHELL,  
*Attorney General.*

RICHARD W. MCLAREN,  
*Assistant Attorney General.*

BADDIA J. RASHID,  
CARL L. STEINHOUSE,

*Attorneys, Department of Justice.*

ROBERT M. DIXON,  
*Investigator.*

JOHN A. WEEDON,  
ROBERT S. ZUCKERMAN,

*Attorneys, Department of Justice Antitrust Division,  
Cleveland, Ohio.*

2

DEPARTMENT OF JUSTICE,  
*Washington, D.C., May 2, 1973.*

GEORGE J. DUNN, Esq.  
*Legal Department,  
The Standard Oil Co.,  
Cleveland, Ohio.*

Re: *United States v. The Standard Oil Co.*  
*(Ohio), civil action No. C 70-895*

DEAR MR. DUNN: This is in response to your letter of February 20, 1973, requesting our opinion as to whether the "I" management program will be consistent with the recently filed judgments in the above-entitled case.

The statements in this letter are based on a review of the Sohio Company Service Station Manual dated October 1972, and the Compensation and Operation Schedule (Company Station—I) referred to in your letter. Specifically, the review is not based on other documents which Sohio has submitted from time to time nor on Mr. Donaldson's letter of February 19, 1971.

In addition to the representations made in your letter, we note your oral representation that the "I" managers will make no capital investment in the service station.

Based upon our review we find no inconsistency between the proposed final judgment and the terms of the aforementioned document. However, as you are aware, it is impossible to anticipate how a given program will operate in actual practice, and pursuant to our usual policy, we reserve the right to reopen the whole question should operations under the "I" management program raise any questions under the final judgment or the antitrust laws generally.

Sincerely yours,

THOMAS E. KAUPER,  
*Assistant Attorney General,  
Antitrust Division.*

3

U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

United States of America, plaintiff, *v.* The Standard Oil Co. (an Ohio corporation), defendant. Civil Action No. C 70-895.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on September 18, 1970, the defendant, The Standard Oil Company, an Ohio corporation, having filed its answer on November 23, 1970, and plaintiff and defendant, by their respective attorneys having each consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission by either of the parties with respect to any such issue:

Now, therefore, before any testimony has been taken and without trial or adjudication of or finding of any issue of fact or law herein, and upon consent of the parties as aforesaid, it is hereby

Ordered, adjudged and decreed as follows :

## I

This Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states claims upon which relief may be granted against the defendant under Section I of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act, as amended.

## II

As used in this Final Judgment :

(A) "Defendant" shall mean The Standard Oil Company, a corporation organized and existing under the laws of the State of Ohio with its principal place of business in Cleveland, Ohio.

(B) "Person" shall mean an individual, corporation, partnership, firm, association or any other legal or business entity.

(C) "Service station" shall mean a business establishment that sells motor fuels, motor oils, lubricants, tires, batteries and automotive accessories to consumers, and usually performs maintenance and minor repair services on motor vehicles for consumers.

(D) "Company station" shall mean a service station for which defendant bears substantially all the financial risk of operation of the service station business. Defendant shall be deemed to bear such financial risk (1) if the service station, including its equipment and inventories, is either owned, leased, possessed or otherwise controlled by defendant, (2) if the service station is managed and staffed by employees of the defendant, and (3) if the manager of the service station is compensated by defendant for the performance of all of his duties in a total amount each calendar year which on an annual rate basis is not less than the minimum amount hereinafter defined. The term "minimum amount" as used herein shall mean \$5000 per year, escalated upwards or downwards, as the case may be, each calendar year beginning with 1974 in direct proportion to any percentage of change in the U.S. Consumer Price Index of the Bureau of Labor Statistics of the U.S. Department of Labor between January of such calendar year and January of the preceding calendar year. The defendant may compensate such manager by salary, commission, bonus, or otherwise, or any combination thereof.

(E) "Products" shall mean motor oil, tires, batteries and automotive accessories and each of them.

## III

The provisions of this Final Judgment shall be binding upon defendant and upon each of its officers, directors, personnel, agents, subsidiaries, successors and assigns, and to all those persons in active concert or participation with any of the above who shall have received actual notice of this Final Judgment by personal service or otherwise. None of the provisions of this Final Judgment shall apply outside of the United States of America, its territories and possessions, to activities which do not affect the foreign or domestic commerce of the United States.

## IV

(A) Defendant is ordered to terminate and cancel within ten (10) months from the date of entry of this Final Judgment all of its Commission Manager Agreements under its present standard form, whether now existing or entered into prior to the expiration of such ten (10) months, with persons engaged in managing service stations.

(B) Defendant is enjoined from entering into any agreement, combination or understanding with any person to fix or stabilize the prices of motor fuels, motor oils, lubricants, tires, batteries, automotive accessories or maintenance or repair services offered at service stations other than company stations.

(C) Defendant is enjoined from entering into any contract, agreement or understanding with any person operating a service station other than a company station that such person shall not deal in the products of a competitor or competitors of defendant.

## V

(A) For a period of five (5) years, defendant shall file with the Department of Justice copies of all forms of agreement used by defendant with employees at company stations.

(B) For a period of five (5) years, defendant shall file with the Department of Justice on each anniversary date of the entry of this Final Judgment a report setting forth the steps which it has taken during the prior year to advise defendant's appropriate officers, directors and management personnel of its and their obligations under this Final Judgment.

## VI

For the purpose of determining or securing compliance with this Final Judgment, and for no other purpose:

(A) Any duly authorized representative or representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant, made to its principal office, be permitted, subject to any legally recognized privilege:

(1) access during the office hours of defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession, custody or under the control of defendant relating to any matters contained in this Final Judgment; and

(2) subject to the reasonable convenience of defendant and without restraint or interference from it, to interview officers or personnel of defendant who may have counsel present, regarding any such matters.

(B) Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit such additional reports in writing with respect to the matters contained in this Final Judgment as from time to time may be requested.

No information obtained by the means provided for in this Section VI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States except in the course of legal proceedings to which plaintiff is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

## VII

Jurisdiction is retained for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions contained herein, for the enforcement of compliance therewith, and the punishment of the violation of any of the provisions contained herein.

## 4

DEPARTMENT OF JUSTICE,  
May 2, 1973.

The Department of Justice filed a proposed consent judgment today prohibiting The Standard Oil Company of Ohio (Sohio) from fixing prices of gasoline and other products and services at any of its independent service stations.

Attorney General Richard G. Kleindienst said the complaint, which terminated a civil antitrust suit brought against the company on September 18, 1970, was filed in U.S. District Court in Cleveland, Ohio.

The suit charged that Sohio had violated Section 1 of the Sherman Act through a series of agreements with its commission managers who operated service stations in the State of Ohio.

The original suit had charged that, in operating their service stations, Sohio's commission managers assumed the risks of independent businessmen. These risks and the expenses of operation, including the ownership or control of the station's equipment and inventories, are not assumed by managers of Sohio's company stations who, under the terms of the judgment, are required to be employees of Sohio.

The complaint charged that the commission manager agreements required the managers to sell gasoline and other service station products obtained from Sohio at prices fixed by Sohio, and restricted the commission managers to purchasing for resale only those products approved by Sohio.

Assistant Attorney General Thomas E. Kauper, in charge of the Antitrust Division, said that the proposed judgment prohibits Sohio from fixing prices of gasoline, motor oil and other service station products and services at any service station other than a company station.

A company station is defined in the proposed judgment as one for which Sohio bears substantially all the financial risks of operation.

The judgment also forbids Sohio from entering into agreements with non-company stations which will require those stations not to deal in the products of a Sohio competitor.

Company stations are also required by the judgment to be staffed by employees of the defendant. The judgment leaves the method of compensating the manager of a company station, beyond a specified minimum amount, up to the option of Sohio.

As of April 1969, 104 of Sohio's 2,000 service stations in the State of Ohio were operated under a commission manager arrangement. The proposed judgment requires Sohio to cancel any such agreement which is still in effect under its previous standard form.

Sohio is the largest marketer of gasoline in the State of Ohio and had total 1971 revenues of about \$1.4 billion.

The Department has also advised Sohio by letter that the Department does not view Sohio's "I" management program as inconsistent with the proposed judgment. Under this incentive management program, station managers, although compensated by commissions on sales, have no capital investment or risk in the operation of the service station they manage.

Comments to the Department of Justice and the Court regarding the proposed judgment are invited from members of the public during the 30-day waiting period prior to the judgment becoming final.

U.S. DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

United States of America, Plaintiff v. The Standard Oil Co., Defendant. Civil action No. C 70-895, Judge Thomas D. Lambros.

BRIEF, AMICUS CURIAE, BY NORTHERN OHIO PETROLEUM RETAILER'S ASSOCIATION OPPOSING PROPOSED CONSENT ENTRY BETWEEN PLAINTIFF, UNITED STATES OF AMERICA AND DEFENDANT, THE STANDARD OIL CO.

The within action was originally filed by the Department of Justice on or about September 18, 1970, and is the outgrowth of a complaint initially filed, on or about January 28, 1969, by the Northern Ohio Petroleum Retailer's Association, a trade organization of independent service station operators, with the Federal Trade Commission in Washington, D.C. Within a matter of several weeks after the complaint was filed with the F.T.C., the Department of Justice "assumed jurisdiction" of the complaint and—much later—as indicated, on September 18, 1970, filed the within anti-trust case.

Presently, this Honorable Court is being asked to approve the termination of the within anti-trust proceeding by consent judgment and order, thereby presumably resolving the issues presented in this case on a voluntary non-litigated agreement basis.

The Northern Ohio Petroleum Retailer's Association (concisely known and hereafter referred to as NOPRA), respectfully submits to this Court that the proposed "Final Judgment", in the nature of a consent decree, should either be totally rejected and the case litigated or, ordered "amended" to include the elimination of what is categorized as the defendant Standard Oil Company's Company Station-I, system of marketing, also known as the "Incentive Manager or I Manager System". NOPRA submits to this Court that the proposed consent judgment or decree, while presumably and on its face accomplishing the objective sought in the within Complaint, *does not* in fact so do, inasmuch as the defendant, SOHIO, and apparently with the direct if not tacit approval of the Department of Justice, has done nothing more than substitute a "new name" given a revised look to, and in effect cosmetically changed the face of the "Commission Manager" marketing device, claimed in the lawsuit to be a price-fixing device and anti-competitive scheme. Consequently, for the Court to approve the proposed decree to resolve the price-fixing suit would do nothing more than permit the same objectionable marketing system to be used by SOHIO . . . "Incentive Manager in lieu of Commission Manager".

For purposes of background information the plaintiff, United States of America, states certain information in its Complaint, that should be noted: In Ohio, there were, as of September 18 of 1970, when the Complaint was filed, approximately 14,012 service stations of all brands. Of the total, approximately 2,946 of such total number of stations market petroleum products, etc., under the "SOHIO" brand name. SOHIO itself, owned or leased 2,116 of the service stations, and directly operated 328 of them as company stations and, as of April, 1969, 104 as "Commission Manager Stations", pursuant to a Commission Manager Agreement. (SEE: Exhibit A for sample copy of agreement) Further, as stated by the government, the company stations are dispersed throughout the State of Ohio, and were/are in competition with the commission stations. So too, all service stations owned or leased by SOHIO are equipped with pumps, tanks, and other dispensing equipment belonging to SOHIO.

The Plaintiff, United States of America, in paragraphs 11 and 12 of the Complaint, defines the methods of operation as a "Commission Manager Station", and further states in paragraph 16 (a) to (c) the primary objectionable points of the use of the "Commission Manager" system of marketing . . . all of which relate directly or indirectly to sales of SOHIO products of all types, at prices fixed and determined by defendant SOHIO. Paragraph 18, Sub-sections (a) to (d) further amplify the ultimate effect of the use of such "Commission Manager" system:

(a) Prices of defendant's petroleum products and of TBA products and services purchased at defendant's service stations have been fixed at arbitrary and non-competitive levels;

(b) Commission managers have been deprived of their rights to determine their own sales prices and the products and services they will offer;

(c) Competition among commission managers and between them and defendant has been eliminated; and

(d) Consumers have been deprived of the opportunity of purchasing petroleum products, TBA products and service work in a free and competitive market.

At the time of the initial government complaint, the prevailing rate of commission paid to and earned by the "Commission Manager" was approximately 4.50¢ per gallon on regular gasoline and 5.00¢ per gallon on premium gasoline. From such monies or gross income, the "Commission Manager" was expected to pay his expenses including payroll, insurance, utilities, etc. Various other and diverse provisions regulating SOHIO—"Commission Manager" relations were/are included in the agreement, which will not be commented upon in detail but the end effect of which strictly regulated the "Commission Manager" in the manner in which he conducted his so-called independent business, but which in effect gave him little discretion, if any, in conducting his business.

Since the filing of the governmental action, the defendant Standard Oil Company (SOHIO) has followed a course of conduct designed to eliminate the import of business operations defined as "Commission Manager Stations" but has in lieu thereof substituted a hybrid similar to that of "Commission Managers", which we submit is still essentially the same objectional system which is the subject matter of this lawsuit. The introduction and modification of the *old* system (Commission Manager) into the so-called *new* system (Incentive Manager), and justification for the so-called *new system*, all hinges on the Court accepting and approving the proposed Final Judgment (Consent Decree) in general, and specifically paragraph II (D), in particular, defining "COMPANY STATION". The definition and paragraph are as follows:

"Company Station shall mean a service station for which defendant bears substantially all the financial risk of operation of the service station business. Defendant shall be deemed to bear such financial risk (1) if the service station, including its equipment and inventories, is either owned, leased, possessed or otherwise controlled by defendant, (2) if the service station is managed and staffed by employees of the defendant, and, (3) if the manager of the service station is compensated by defendant for the performance of all of his duties in a total amount each calendar year which on an annual rate basis is not less than the minimum amount hereinafter defined. The term "minimum amount" as used herein shall mean \$5,000.00 per year, escalated upwards or downwards as the case may be, each calendar year beginning with 1974 in direct proportion to any percentage of change in the U.S. Consumer Price Index of the Bureau of Labor Statistics of the U.S. Department of Labor between January of such calendar year and January of the pre-

ceding calendar year. The defendant may compensate such manager by salary, commission, bonus, or otherwise, or any combination thereof."

As applied to the proposed Final Judgment, here objected to, and as related to the definition of "Company Station", an "Incentive Manager or I-Manager" would be considered an *employee* of SOHIO, compensated from a commission earned on the sale of petroleum products (average 3.3¢ on regular gasoline and 3.8¢ on premium gasoline), plus further varying commission based on sales of TBA items and services. From such commissions earned, the "Incentive Manager" (and similar to Commission Manager), would have deducted from his commissions earned, the Gross Payroll Expenses of his employees, and any shortages and/or overages . . . with shortages and overages including both reported amounts and amounts determined by an audit. Further, SOHIO reserves to itself the right to charge against the compensation otherwise payable, an amount up to, but not in excess of, the first \$50.00 associated with damage claims due to loss, allegedly caused by faulty service work or other negligence. Of further and special interest to note, is that SOHIO would issue its own checks to station employees, as well as the "I-Manager" himself, as contrasted, with the method used under the "Commission Manager System" . . . *but* in all events, the *payroll expenses of operation* of the service station all come from commissions earned by the "Incentive Manager". Explicitly, the deduction of payroll expenses of operation from the "I-Manager's" commission is similar to the deductions for payroll expenses incurred by a "Commission Manager". Conversely, SOHIO's reservation of the right to charge against the "I-Manager's" compensation, the first \$50.00 associated with damage claims due to loss allegedly caused by faulty service work or other negligence, is totally inconsistent with SOHIO's company policy as associated with its *true* employees, who *are* not so charged. If the "I-Manager" is an employee, why should he be charged anything?

A brief comparison of certain main points between the "Commission Manager System" and the "Incentive Manager System" is in order :

#### *Under the Commission Manager System*

Essentially, all investments at a service station under this system purportedly were/are made by SOHIO. The commission earned by the dealer on petroleum sales was approximately 4.5¢ on regular gasoline and 5¢ on premium gasoline; the commission on TBA sales was the same as in company operated stations. SOHIO pays for all janitor supplies, all utilities, pays 50/50 on hospitalization insurance costs for the manager and his employees and pays all workman's compensation premiums. The Commission Manager still pays for and is obligated for costs of rubbish hauling, windshield wipes and liability insurance, not including loss of company merchandise and equipment.

#### *Under the Incentive Manager System*

All investments within the station are purportedly made by SOHIO, including equipment, merchandise, and all expenses, excluding payroll costs and losses due to faulty service work or other negligence. The commissions earned by the "Incentive Manager" (as contrasted to the commission earned by the Commission Manager), have been reduced to 3.3¢ on regular gasoline sales and 3.8¢ on premium gasoline sales. The *difference of 1.2¢* between the commissions under by the "Commission Manager" . . . 4.5¢ on regular gasoline and 5¢ on premium gasoline . . . *are more than sufficient* to pay for all the expenses incident to the operation of a service station. Consequently, SOHIO has more than sufficient monies to pay *overhead costs*, excluding payroll costs, for it to want to have its "Incentive Manager" stations considered as company-operated stations, with the associated right to determine pricing policies, of its products and services.

Referring once again to the definition of a "Company Station" as defined in Section II (D) of the proposed "Final Judgment" (Consent Decree), such definition as applied to SOHIO's operation permits a variety of changes in operation of a service station, so as to give the "Incentive Manager" system a new look of respectability . . . BUT, the most major and crucial factor in the operation of a station under this system has not and could not as a practical matter been changed by SOHIO. That is, the employees of the "Incentive Manager" station *are still paid* out of such manager's earned commission.

*Under the Commission Manager System (As to Payment of Wages)*

Under this system the service station employees were/are paid out of the Commission Manager's station commissions. He, the Commission Manager, made out the payroll and paid the employees out of the station income on his personal check or in cash; and, all this from a higher base commission on the sale of petroleum products and other TBA products and services.

*Under the Incentive Manager System (As to Payment of Wages)*

Under this most-similar system, SOHIO now pays the employees as well as the Incentive Manager, with company checks, creating the impression that they are company employees; but, the full wages and commissions earned by the employees are deducted from the Incentive Manager's commission at pay period. Consequently, this in effect makes the Incentive Manager an *employer* with the responsibility and burden of operating the station still being his, and not SOHIO by and through its company supervisors. Likewise, all shortages in stock and cash are the responsibility of the Incentive Managers, as is the responsibility of hiring and firing, as well as setting the rate of employee pay. Conversely, the "I-Manager," acting as an employer for all practical reasons, has no lease and/or other agreement with SOHIO (As in typical company-dealer lease and/or consignment relations), and can summarily be fired at the whim and caprice of SOHIO. As a further item of interest, employees working for an "Incentive Manager" cannot transfer on a temporary basis, if desired, between such "I-Manager" station and a true company operated "salary station," where employees, including a manager, are paid salary or hourly rates. If the employees working for an "I-Manager" are true employees, why can't they transfer? Obviously, because they are not true employees of SOHIO, but in fact of the "I-Manager" dealer-employee who himself is *not* a true employee but in fact an employer-dealer, being manipulated by SOHIO just as such employer-dealer was and is manipulated as a "Commission-Manager."

WHY THE NECESSITY FOR EITHER SOHIO "COMMISSION MANAGERS" OR "INCENTIVE MANAGERS"?

We submit that it is more than obvious that SOHIO wishes to use the "Commission/Incentive Manager" method of marketing operation for two important reasons:

(1) Use of either of the two named methods, of similar import, permits SOHIO to establish the prices at which its petroleum products, services, and TBA items are to be resold to the consuming public and restricts the sale of items to those that SOHIO wishes to be stocked and made available for retail sale. Such marketing system(s) effectively enables SOHIO to set the prices of all products handled at arbitrary and noncompetitive levels; the managers (whatever we call them) have been deprived of their right to determine their own sales prices and the products and services they will offer; competition among the managers (either name) and between them and SOHIO; has been eliminated; and, the consuming public has been deprived of the opportunity of purchasing petroleum products, TBA products and service work in a free and competitive market and economy.

(2) Use of either of the two named methods, of similar import, enable SOHIO to operate a multitude of service stations at carefully selected and strategic locations, as so-called "company stations", with virtual absolute control over marketing policies, without leasing them to *independent* service station operators, in competition with each other, and in such manner and device that SOHIO does not have any financial or legal obligations associated with unionization of its *true* company-operated stations. Thus, if a station were truly operated as a company station, *true employees of SOHIO* would be entitled to the following benefits:

- (a) Membership in a labor union.
- (b) Straight time for 40 hours of work.
- (c) Time and one-half over 40 hours of work.
- (d) Double time on Sundays.
- (e) Double time and one-half on holidays.
- (f) Seniority rights.
- (g) Paid vacations.

- (h) All employees shall participate in all SOHIO benefit plans and no employees shall be discriminated against.
- (i) Aggrieved employees, have a formal grievance procedure.
- (j) Nine (9) paid holidays.
- (k) Hospitalization insurance (Blue Cross) ; one-half of which is paid by SOHIO.)
- (l) Employees are paid 5¢ an hour to buy uniforms.
- (m) Participation in a retirement fund.
- (n) Eligibility to participate in a stock-purchase plan.
- (o) Opportunity for promotions.
- (p) Paid sick leave.

Under the two relatively similar methods of marketing operation referred to in this brief . . . "the Commission Manager" and "Incentive Manager" system, the assertion is made by both plaintiff, United States of America and defendant, The Standard Oil Company, that the manager is an "Employee," as is the managers' employees, and that therefore the marketing systems are legal and SOHIO has the right to set and determine pricing policies and the like. Logically, this is absurd and the proposal itself incomprehensible!

If the managers are truly employees, they correspondingly are entitled to be members of the union . . . with all the consequent benefits derived from the SOHIO-Union collective bargaining agreement. If they are not employees . . . then logically the "Incentive Managers"—as compared to the "Commission Managers"—are independent service station operators and not subject to the absolute and restrictive control of SOHIO. If the managers are neither employees nor employers, than WHAT are they and why are the marketing systems of similar nature, allowed to exist in the SOHIO operations and in the competitive American economic system? *If the systems are nothing more than a subterfuge for price-fixing and restricting competition, then they are illegal and should forthwith be declared so since federal anti-trust policy is preeminent even where a relationship under private contract law may be technically legal, but where prices are controlled by a supplier as related to the consuming public.* (SEE: Simpson vs. Union Oil Company, 377 U.S. 13 (1964))

In the instant case, the proposed "Judgment Entry" (Consent Decree) should be rejected and/or significantly modified as requested herein to eliminate the objectionable marketing methods; that, SOHIO in the event it wishes to resolve this controversy by agreement, be directed to use in its marketing system one of three (3) non-objectional systems: First, either a Dealer-Rental Method . . . that is leases with independent operators; Secondly, the use of "true" salary operated company stations (with benefits of unionization), so long as such company-operated stations are not used as price-fixing and competition restricting marketing methods; or, thirdly, a "Fuel Consignment Method", where a dealer invests in everything but gasoline (gasoline being the stocking item requiring the greatest dollar investment) . . . this operation is similar to "Dealer-Rental" with essentially the same lease terms and freedom, on the part of the station operator, to price gasoline and merchandise at whatever price competition would allow.

As "Amicus Curiae", a friend of the Court, the Northern Ohio Petroleum Retailer's Association (NOPRA) submits to the Court, for its consideration that the tremendous obligations owed to the American consuming motoring as well as general public, requires the highest degree of responsibility on the part of the United States government, the petroleum and marketing industry in general and, the Standard Oil Company in particular, together with the retailing industry as an entirety, to avoid even a "semblance" of suspicion that distribution supplies are being controlled and prices for petroleum products manipulated . . . all at the expense of the public.

In this present day and age of "fear, threat, publicized shortage, and industry suspicion", the need for strict scrutiny of any proposed "Consent Decree" such as in this case, is that much greater.

Respectfully submitted.

RAYMOND J. GRABOW,

Attorney for the Northern Ohio Petroleum Retailer's Association, Amicus Curiae.

NORTHERN OHIO PETROLEUM RETAILERS ASS'N., INC.,  
Cleveland, Ohio, September 11, 1973.

To: Cleveland Plain Dealer.

NOPRA RESPONDS TO JUDGE LAMBROS DECISION, "BLASTS JUSTICE  
DEPARTMENT POLICIES"

The Northern Ohio Petroleum Retailer's Association (NOPRA), and its individual members, recognize the obligation incumbent upon each of us as responsible citizens, to accept and follow decisions rendered by our courts, until such time as those decisions are reversed on appeal or changed by legislative action. However, none of us have any obligation to, without question or comment, regard all decisions as being correct in law or in conscience.

NOPRA is extremely disappointed in the decision rendered by Judge Thomas D. Lambros, of the United States District Court, permitting the anti-trust and price fixing case involving the Standard Oil Company of Ohio (SOHIO), to be terminated without a full court trial . . . and simply by agreement between the Justice Department and SOHIO. We continue to assert that the "Consent Decree" agreement between the Justice Department and SOHIO is not in the general public interest . . . but adverse to such public interest and the interests of the many small independent service station operators throughout the country. The "Consent Agreement" between the Justice Department and SOHIO continues to permit essentially the same objectional activities which the Justice Department had previously stated and agreed—restricted trade, set prices, controlled dealer activities, and affected the public interest through higher gasoline and petroleum product prices.

Further, the actions of the Justice Department in choosing to terminate the anti-trust and price-fixing litigation involving SOHIO, without a full court trial and simply by a weak and watered-down "Consent Agreement", continues in effect an objectionable practice which the Justice Department has followed for too many years—that of *not litigating* to full court decision and completion, lawsuits involving "Big Oil" and "Big Business" and, that of delay in bringing lawsuits involving "Big Business" to conclusion.

The Northern Ohio Petroleum Retailer's Association now, more than ever, recognizes that to protect and improve the status of the independent retail gasoline dealer, and that of the general consuming public, will require *independent* legal action to fight "inequities" and objectional and illegal practices within the gasoline and petroleum industry. NOPRA further acknowledges that it no longer has faith and confidence in the Justice Department . . . and recognizes, although sadly, that little if any help will be forthcoming from the Justice Department or other administrative departments during the present national administration, where the interests of "Big Business" seem to be paramount to the interests of the small businessman and general public.

JAMES V. CRESENTE,  
Executive Director, Northern Ohio Petroleum Retailer's Ass'n.,  
Cleveland, Ohio.

7

U.S. DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

United States of America, plaintiff *v.* The Standard Oil Co., defendant, No. C70-895.

MEMORANDUM OPINION AND ORDER

Lambros, district judge: In this suit brought by the United States of America under Section 1 of the Sherman Act, 15 U.S.C. § 1, the question presented is whether the Court should enter a proposed consent order stipulated by the parties in this case. The Court delayed the entry of the judgment in order to consider the brief and arguments submitted by the Northern Ohio Petroleum Retailer's Association as *amicus curiae*.

The general policy of the courts toward consent orders in antitrust cases was indicated by the Supreme Court in *Fox Publishing Co. v. United States*, 366 U.S. 683 (1961). Justice Harlan, speaking for the unanimous Court, stated:

Apart from anything else, sound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment

in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting. *Id.* 689.

See also *United States v. CIBA Corp.*, 50 F.R.D. 507, 514 (1970).

In this case, there is no allegation that the proposed consent order has been the result of any bad faith on the part of the Government or that the counsel for the Government are not attempting to represent loyally the best interests of the public. Therefore, if the Court refuses to enter the proposed consent decree it must do so because counsel for the Government has improperly assessed whether the terms thereof were in the public interest.

#### I. BACKGROUND OF THIS DISPUTE

According to the complaint, defendant accounts for approximately 30 per cent of the motor fuel sold in Ohio. In September, 1970, defendant owned or leased 2,116 service stations which sold products under the Sohio trade name. As of April, 1969, 328 of these stations were known as "company stations" and 104 of these stations were known as "commission stations."

The Government claimed in the complaint that managers in the "commission stations" were not employees of defendant and that the following restrictions on "commission stations" were therefore violative of the antitrust laws:

- (1) price fixing for products and services at rates which are the same as those charged in "company stations."
- (2) restricting those items sold by "commission stations."

The Government apparently conceded that managers of the "company stations" were agents of defendant and sought only to obtain an injunction against price fixing and product restriction in any service station other than a "company station."

According to the complaint, the reasons that managers of "commission stations" were not employees was that defendant did not bear the risk of loss, that defendant did not pay the managers or employees, and that defendant did not carry liability insurance.

#### II. PROPOSED CONSENT ORDER

The proposed consent order would abolish the "commission stations," would enjoin price fixing and product restriction in any service station other than a "company station," and would define "company station" as follows:

Company station shall mean a service station for which defendant bears substantially all the financial risk of operation of the service stations business. Defendant shall be deemed to bear such financial risk (1) if the service station, including its equipment and inventories, is either owned, leased, possessed or otherwise controlled by defendant, (2) if the service station is managed and staffed by employees of the defendant, and (3) if the manager of the service station is compensated by defendant for the performance of all of his duties in a total amount each calendar year which on an annual rate basis is not less than the minimum amount hereinafter defined. The term "minimum amount" as used herein shall mean \$5,000 per year escalated upwards or downwards, as the case may be, each calendar year beginning with 1974 in direct proportion to any percentage of change in the U.S. Consumer Price Index of the Bureau of Labor Statistics of the U.S. Department of Labor between January of such calendar year and January of the preceding calendar year. The defendant may compensate such manager by salary, commission, bonus, or otherwise, or any combination thereof.

In essence, the proposed definition includes the requirements that defendant assume some of the risks of the stations, that it pay a minimum salary to the manager, and that it employ those working at the station. The responsibility for liability insurance is unclear from the proposed Consent Order. Otherwise, the Government has apparently obtained in the proposed consent order most of the relief sought in the complaint. A further indicia of employment not mentioned by the Government in its complaint, the right to union organization, is left open.

#### III. CONCLUSION AND ORDER

The proposed consent order is a settlement and, as such, results in some concessions by both parties in face of the uncertainty as to the ultimate decision in this case. At this point, the Court is not prepared to rule how the Supreme Court's rulings on vertical restraints in *United States v. Arnold Schwinn & Co.*, 388 U.S.

365 (1967), apply to this case. Thus, it cannot assess with precision exactly which terms were concessions by the parties.

At the same time, the Court has reviewed the case and determines that it does not appear that the Government has made unreasonable concessions which conflict with the public interest. As stated before, there is no allegation that the Government was motivated by any bad faith or any consideration other than the public interest. Since the Government has the primary duty to represent the public interest in the enforcement of the antitrust laws and since there is no indication the Government has abused its discretion in this case or that it is not motivated by the best interests of the public, the Court will enter the proposed consent order.

It is so ordered.

THOMAS D. LAMBROS,  
*U.S. District Judge.*

Dated: September 10, 1973.

Chairman RODINO. Our next witness, the Honorable Bruce B. Wilson, Deputy Assistant Attorney General of the Antitrust Division, Department of Justice.

Mr. Wilson, we are pleased to welcome you this morning. You know you have a rather lengthy prepared statement and I would hope that in the interest of trying to expedite the hearing, if it would be possible to summarize the more salient points. We will insert the full statement in the record in its entirety. [See p. 84.]

You may proceed.

**TESTIMONY OF HON. BRUCE B. WILSON, DEPUTY ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY KEITH I. CLEARWATERS, SPECIAL ASSISTANT TO THE ASSISTANT ATTORNEY GENERAL**

Mr. WILSON. Thank you, Mr. Chairman. I will try to summarize my statement.

Accompanying me is Keith I. Clearwaters, Special Assistant to the Assistant Attorney General in the Antitrust Division. In accordance with the Chair's request, I will omit certain portions of my prepared statement and attempt to summarize the remainder.

We appreciate the opportunity to be here today to discuss H.R. 9203.

This is a bill which we believe would involve the district courts to a much greater degree in the consent decree process. It could involve inquiry to a variety of matters and in some instances could require a full hearing prior to approval of consent decrees. It could also enhance considerably the standing that private parties would have as a matter of law—as opposed to judicial discretion—to intervene and to oppose Government settlements in antitrust actions.

It would also increase the penalties to corporations for the Sherman Act violations from \$50,000 to \$500,000 and to private individuals from \$50,000 to \$100,000.

Finally, the bill would amend the Expediting Act, to permit appeals from a final judgment to go directly to Courts of Appeals, or directly to the Supreme Court if, upon application by a party, the judge who adjudicated the case enters an order certifying that consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

While we have supported a goodly number of these legislative changes in the past, the Department opposes enactment of H.R. 9203 in its present form. In our view the bill will seriously disrupt settlement proceedings in the courts, and weaken our ability to obtain consent decree settlements from defendants—an ability which we believe to be important in the administration of the antitrust laws.

To understand the adverse impact of H.R. 9203, I think it is helpful to analyze current consent decree practices. When we enter into a consent decree, we sign a stipulation with the defendant, which provides that the proposed decree shall be entered as final and binding within 30 days after it is filed, with one important qualification. The Government reserves the right to withdraw its consent at any time during the 30 days. On the other hand, the defendant is bound by the stipulation and may not withdraw from it.

On the same day we file the stipulation and proposed decree with the court, we issue a press release advising the public in some detail of the terms of the consent decree. A press release also describes the legal action alleged in the complaint. In addition, we alert the public to our consent decree procedure under which the public is entitled to file comments either with us or with the court during the next 30 days.

In a number of major cases we have in the past sought leave of the court to appear before it and to explain, on the public record, the precise manner in which the consent decree is designed to accomplish the purposes of our antitrust program. There have also been cases in the past in which private parties have appeared to argue that modifications should be made to the consent decree or that the consent decree should be rejected in its entirety.

There have also been cases in which private parties have appeared to suggest that there were defects in the consent decree or that the decree should be amended in some respect. In a number of instances we have agreed with those private parties and, unless the defendant consented to what we believed to be necessary changes, we have threatened to withdraw our consent. The bill under consideration contains three interrelated sets of provisions dealing with consent decrees.

These are, first, the required filing of an impact statement with the court by the Department—a statement which would expand somewhat upon our current press release practice.

Second, there would be a required filing by the defendant of a statement describing communications between it and Government officials relating to the decree.

Third, there are provisions expanding the roles of the court and third parties in the entry of decrees.

With the bill, as written, the court would consider itself obligated to evaluate and could take testimony concerning the anticipated effects of the relief contained in the proposed judgment. This inquiry would encompass not only whether the relief is adequate in view of that sought in the complaint, but whether the Government sought appropriate relief in the complaint itself. We have no objection to explaining to the Court the manner in which the consent decree is tailored to achieve the competitive objectives of the relief sought in the complaint.

We are concerned that speculation by the Government and the defendant on the anticipated effects of the relief could lead to each

side claiming victory, which could be highly disruptive at a time when the termination of the law suit is in the public interest.

A discussion of the long-term effects of a judgment also involves a great deal of crystal ball gazing. If done in the abstract, the discussion is likely to be useless. To avoid abstraction, detailed facts must be presented to the court. Many of those facts would likely be contested. In the contest, the settlement may be lost in the adversary process. And in any event considerable time and manpower will be expanded.

The bill also contemplates that the hearing on a consent decree explore the remedies available to potential private plaintiffs damaged by an alleged antitrust violation in the event a judgment is entered.

Section 5A of the Clayton Act provides that a final judgment, in any civil or criminal proceeding brought by the United States under the antitrust laws, may be used as prima facie evidence against the defendant in any claim in any private antitrust action for treble damages. The Clayton Act specifically provides, however, that the Government's judgment may not be used as prima facie evidence if that judgment is in the nature of a consent judgment entered before any testimony has been taken.

As the bill calls upon the court to consider the effect of entry of the decree upon individuals alleging specific injury from the violation set forth in the complaint, it is conceivable that a court might feel compelled to deny entry of the judgment on the grounds that, so long as no prima facie use can be made of the judgment, the public interest requirements of the bill have not been met. In short, a court could require the Department to go to a full trial simply to satisfy the claims of private parties who would naturally wish to avoid the expense of trying their own antitrust cases.

This concern has substantial basis in past experience. From time to time private parties have opposed the entry of consent decrees for the reason that, if the Department does not go to a final litigated judgment, the prima facie use of the judgment by private parties in treble damage actions is lost.

We have in the past and will in the future continue to oppose such attempts by private parties to force us to continue litigation so that their case can be made out. If the relief we obtain by consent decree is adequate, further litigation by the Government would tie up our resources—very limited resources—which might otherwise be employed to prosecute further violations of the antitrust laws.

The bill would also permit the court to explore the alternatives to their proposed judgment actually considered by the Department and the anticipated effects of such alternatives. The first step would presumably be to identify the alternative remedies. These in turn would be evaluated. This exploration could take two forms, both of which we believe would be highly undesirable. First, a court might require the Government to disclose all suggestions which were made by members of the Antitrust Division for relief during the course of settlement negotiations. These negotiations usually involve a number of Antitrust Division personnel, including myself, the staff and the Assistant Attorney General. All possibilities for settlement are explored in internal staff discussions before we take a position with the defendant.

These discussions are, as they should be, very broad ranging and involve assessments of the strengths and weaknesses of our case, the relief which we must have as a very minimum, as well as the relief which we think the defendant will agree to.

I object to the disclosure of these staff discussions and recommendations. I believe it would have a chilling effect on the free exchange of ideas among my staff and the Assistant Attorney General. Without that exchange, our bargaining position with the defendants in consent decree negotiations would be immeasurably weakened.

A second reaction by a district court operating under this bill would be to explore—in some kind of economic atmosphere—various possible alternatives to antitrust relief, using Justice Department experts, the experts of other executive branch agencies, experts brought in by the parties, or experts brought in by the court.

This exploration could be most expensive, time consuming and in the end might bear little relevance to the matter under consideration—resembling a group of highly trained scholars reading their dissertation papers in an almost empty auditorium. The disclosure of the thought processes of the division could force the Government to spell out the strengths and weaknesses of its antitrust programs.

It could give the defendant and defendant's counsel an overwhelming advantage in mapping out a case against the Government. I do not believe that result would be in the public interest.

Turning to section 3 of the bill, which provides for an increase in the maximum fines, we have in the past asked Congress to increase fines under the Sherman Act and we continue to support such an increase. The primary end of the criminal sanctions of the Sherman Act is to preserve free enterprise by deterring illegal activities and practices preventing effective competition. This end can be met only if the sanctions of the Sherman Act provide a meaningful deterrent. By current economic standards, the comparatively moderate range of fines available under the Sherman Act is not an effective deterrent to criminal conduct. The maximum fines have not been increased since 1955. Since the assets and profits of corporations have increased dramatically, making in some cases the imposition of the present maximum fine only a mild tax on profits available through prolonged violation of the law. To maintain the intended deterrent effect of the maximum fine established in the 1955 amendment to the Sherman Act, an increase is badly needed.

The fourth section of the bill would amend the Expediting Act in a manner that would not provide for the power of certification antitrust cases by the Attorney General from the district court directly to the Supreme Court when in the Attorney General's opinion, the case is of general public importance. This was a provision we proposed in a bill in 1969, which was passed by the House, but which died in conference. A conference was never held at the close of the session in 1970.

We think the public interest demands that the Nation's chief law enforcement officer have the authority to bring before the Supreme Court antitrust questions which may have a direct and substantial impact on the economy, and on consumers in general. While we recognize that in most instances private defendants and public plaintiffs should be placed on an equal footing before the courts, we believe that

the need for an early resolution of issues affecting the public interest in competition in the Nation's economy in this case overrides these considerations. This certification power, of course, is simply procedural in nature.

No party would be treated in a preferential manner on the merits. The courts will, I am sure, continue to resolve the substantive issues in an evenhanded manner. We believe the public interest lies in the early resolution of antitrust cases of national import, upon certification by the Attorney General. We therefore oppose the amendments striking the Attorney General's certification power and urge this committee to consider favorably that portion of S. 782 as originally drafted. I have today expressed some reservations of the Department concerning the enactment of the legislation as presently drafted. We would suggest, however, that if H.R. 9203 is reported by this committee containing certain amendments—amendments which have been made in the Senate bill that passed the Senate unanimously—the Department would have no objection to the enactment of this legislation.

First, the Senate Antitrust Subcommittee included certain amendments which were most helpful in clarifying the purpose and scope of the bill. We note that H.R. 9203 as introduced has incorporated these amendments, which were approved by the Senate Judiciary Committee.

Second, amendments were made to S. 782 on the Senate floor. These are crucial to the withdrawal of our opposition of this legislation. I would like briefly to discuss those amendments.

In the event this committee does not incorporate the certification power of the Attorney General, I would like to suggest one technical amendment to H.R. 9203. The bill now provides that either party must make application to the district court for certification to the Supreme Court within 5 days of the filing of a notice of appeal, and that the order of certification must be entered within 15 days. We would propose a technical amendment which would extend the period of filing an application before the district court for a certification of the case directly to the Supreme Court from 5 days to 15 days and for the entry of an order of certification from 15 to 30 days. In cases where the United States has been successful in the district court and the defendant files a notice of appeal, normal processing of a copy of such a notice through the mails to the Department of Justice and to the responsible officials in the Department may simply require more than 5 days. Accordingly, this amendment is proposed so that the period for applying to the district court for an order of certification is not allowed to run inadvertently.

We would propose to strike in H.R. 9203, at lines 13 and 14 of page 3, the language in subsection 2(b)6, which reads, "the anticipated effects on competition of such alternatives." If adopted, the bill would retain a requirement that the public impact statement disclose a description and evaluation of the alternatives which were actually considered by the Antitrust Division in formulating a proposed consent judgment. The language proposed to be stricken would require the staff of the Antitrust Division to speculate publicly as to the effects upon competition which would be generated by the various alternatives to the proposed consent judgment. These anticipated effects quite clearly can be speculated upon by the district court considering a proposed consent judgment or by other interested parties. There is no

reason to require the staff of the Antitrust Division at the peril of later embarrassment to make a public prediction as to the competitive effects of various alternatives which it has considered. It is sufficient if the various alternatives are disclosed to the court and to the public. Then, in an atmosphere infused with comments from the public, from consumers, from suppliers and from competitors, the court can make an informed judgment as to whether the proposed consent decree is in the public interest.

We would also propose an amendment which would strike in line 14 of page 6 in subsection 2(g) the language "except counsel of record," and add a proviso at the end of that sentence to the effect that contacts by or in the presence of counsel of record exclusively with employees of the Department of Justice need not be listed in the description of written and oral communications by or on behalf of a defendant with officers or employees of the Government. The present section, as drafted, it seems to me, is deficient in two respects. First, it permits counsel of record to contact any officer or official of government, however illegitimate or lacking his interest in a particular case pending before the Department of Justice, and second, I think it would tend to have a chilling effect on totally legitimate contacts with the staff of the Antitrust Division.

The amendment which I propose corrects both of these deficiencies. It requires the reporting by or on behalf of the defendants of all contacts with Government officials other than those in the Department of Justice. Second, it does not discourage what are perfectly legitimate contacts in the presence of counsel of record by responsible officials of antitrust defendants. Both of these suggested improvements in the bill will have a salutary effect. We have no objection to the report of an antitrust defendant's lobbying activities structured along these lines.

Last, we would propose an amendment to H.R. 9203 at section 2(e)2, lines 3 to 5, striking the comma after the word complaint, and striking "including consideration of the public benefit to be derived from a determination of the issues at trial."

The Senate Committee on the Judiciary in reporting S. 782 declared that section 2(e) was not intended to force the Government to go to trial for the benefit of potential private plaintiffs. We would hope that this committee would agree that this is not the purpose of Government prosecution under the antitrust laws. However, inclusion of the language contained in H.R. 9203 is in our view an invitation to the court to require the Government to go to court for some unstated reason, even though the relief secured by the Government in the proposed consent decree is fully adequate to protect the public interest in competition.

Mr. Chairman, that concludes my remarks, and I would be happy to answer any questions which you or the other members of the subcommittee may have.

Chairman ROVINO. Thank you very much, Mr. Wilson.

Mr. WILSON. First of all, I don't know whether I heard you correctly, but I believe that while your prepared statement talks about "strong" reservations concerning H.R. 9203, in your statement now I think I heard you say "some" reservations.

Mr. WILSON. Mr. Chairman, if the bill were amended along the lines which I suggested, we would have no objections to its enact-

ment. We do have some strong reservations about some of the provisions.

Chairman RODINO. I thought you said strong reservations.

Mr. WILSON. And we would like to see those provisions out of there.

Chairman RODINO. I just wondered whether or not there has been attention to just soften the blows, so to speak.

Mr. WILSON. I don't think so, Mr. Chairman.

Chairman RODINO. Mr. Wilson, on page 6 you make much of intervention in an antitrust case or cases, and it seems to me that you seem to think that is almost a creation of new rights, and as result of the opportunity being provided to individuals after having available documents, that this might open up a new avenue of intervention. Frankly, while I recognize that you may have some apprehensions there, I do not see how you can consistently support the Senate bill, which you say you do, because the same public impact statements and comments are provided for in both bills.

Mr. WILSON. On the question of intervention, Mr. Chairman, I would hope that the legislative history of the bill would indicate there is no intention in this bill to broaden the avenues of intervention. Now, having said that, let me make it clear that we will welcome the views of private parties and other interested persons, to come into the Department or to the court to participate in hearings on consent decrees as amici curiae. The problem of intervention is that it gives the private party the right to continue the proceedings, to take appeals in the cases where the Government believes and the court has subsequently determined that a settlement is in the public interest. We do not think any broadening of the right of intervention would be a wise idea.

Chairman RODINO. Mr. Wilson, you continue to use the word intervention. Is there any intervention used here in the bill? Is there any place at all in either bill, the right of intervention?

Mr. WILSON. No; Mr. Chairman. We're simply concerned that the bill could be construed to broaden the right of intervention. My recollection of the Senate report is that it specifically provides it is not intended to broaden the existing right of intervention. The language which was used and about which we are concerned is that at the bottom of page 5, where it indicates that the court may authorize full participation in proceedings before the court, by interested persons or agencies, and it refers to appearances as amici curiae. We're concerned that that language might be construed to broaden the existing right of intervention as it has been spelled out by the courts under the Federal rules of civil procedure.

Chairman RODINO. On page 7, you cite the *Buckeye* case, and you quote it there as saying, "United States which must alone speak for the public interest." Wasn't that a private case in which the United States was not a party, and further, this is a probably more interesting question that I would like to put to you, are you implying that the Congress has not the power or the right to address itself to public interest in antitrust cases?

Mr. WILSON. Certainly I am not implying that the Congress has no right or interest in antitrust cases. The statement is that, at some point or other, Mr. Chairman, it seems to me that some official of the United States must be charged with enforcing the antitrust laws and that is presently the Attorney General of the United States. That

certainly does not mean that, in speaking for the United States, the Attorney General should not exercise an informed judgment, informed as to all of the comments of all interested parties, as to whether or not the court action he is proposing to take in a particular antitrust suit is indeed in the public interest. What I am saying ultimately is that some official, now the Attorney General, must have the authority to speak for the United States in antitrust matters.

Chairman RODINO. Well, we certainly do not deny that, and I do not think we even suggest that. I think the result is that it is always basic where there is a need to reform a certain proceeding, then I think the right of the Congress to speak out legislatively and to assert itself in the public interest ought not to be questioned.

Mr. WILSON. Congressman, Mr. Chairman, I am not questioning the right, obviously, of the Congress to enact this bill. What I am speaking of in that quote on page 7 is that the United States must alone speak for the public interest with respect to a particular antitrust case. The ultimate decision must reside with some responsible official. Now, the procedures under which he exercises that responsibility are obviously a proper concern of the Congress of the United States.

Chairman RODINO. Thank you.

On page 26 of your statement, you mention that there is no reason, however, to require the staff of the Antitrust Division of the Justice Department at the peril of later embarrassment to make a public prediction as to the competitive effects of various alternatives which it has considered. I am just curious to inquire as to what you are suggesting or what your meaning is as to the peril of later embarrassment. What could possibly embarrass the Justice Department if it were acting in the public interest, and were you suggesting that there were certain alternatives and made certain predictions?

Mr. WILSON. In making any public prediction, any public official is taking a certain amount of risk that his prediction will be correct. It seems to us that if we go to the point of telling the court and telling the public what alternatives we have actually considered with respect to a proposed judgment, then the court, other interested parties, and the public generally can make that kind of prediction just as well as we can. To ask that we lay it on the line as to what we think is going to happen in the future, and it turns out what we think is going to happen doesn't happen with respect to a broad range of alternatives, it seems to us to require us unnecessarily to speculate in that manner.

Chairman RODINO. Well, I certainly appreciate it while you say it. However, since the action that you take is because you were attempting that in the public interest, I do not know why this ought to be of such a concern in the ultimate, when you achieve a satisfactory resolution of the problem.

Mr. WILSON. We hope in each case we achieve satisfactory resolutions of the problem. But this is an unnecessary risk.

Chairman RODINO. Unnecessary risk that anyone takes that is going to make a decision in values that are important as these matters are, and if you are making certain public predictions to achieve a public result, isn't that contemplated in the strategy you use—when you consider these matters?

Mr. WILSON. It seems to us, Mr. Chairman, if we go so far as to disclose what we have actually considered as alternatives to a pro-

posal, that we should not be required to speculate publicly, to predict, or make predictions as to what would happen under each of these alternatives. It seems that public economists and other interested parties can do that just as well as we can.

Chairman RODINO. That is true. I do not want to prolong this, but has the Justice Department ever felt that something stopped when it makes certain predictions of statements—in its business review letters, they make predictions there. Have you ever considered that that might be embarrassing and therefore make no such predictions because it might not turn out?

Mr. WILSON. Mr. Chairman, in antitrust enforcement generally we are required to make a certain economic prediction. Anytime you are required to do that, as we are under the Clayton Act, you get into questions that we may be wrong. But it just does not seem to us to be necessary under this legislation, and to achieve the purposes of this legislation to require us to make predictions which otherwise we would not have to make.

Chairman RODINO. Mr. Hutchinson.

Mr. HUTCHINSON. Thank you.

Mr. Wilson, I understand that you support the Senate-passed bill, is that right?

Mr. WILSON. We would have no objection to the enactment of the Senate-passed bill. I think that is the statement of our official position.

Mr. HUTCHINSON. You don't oppose it, then?

Mr. WILSON. That is right.

Mr. HUTCHINSON. And the list of amendments which you set forth on page 24 of your statement, these amendments are intended to be amendments to the House bill?

Mr. WILSON. That is correct, Congressman.

The House bill, as I understand it, is identical to the bill as reported out of the Senate Judiciary Committee. What we would recommend is that the House concur in the six amendments which were made on the Senate floor to the bill. I think it's actually seven. One is a very technical amendment. If the House would adopt the bill without the certification power in the expediting act—at page 9, under subsection b—the seventh is a technical amendment. If you will look at b, and then under subsection 1, there used to be a subsection 2 and 3 there which contained the Attorney General's certification power, and a power on the part of the district judge sua sponte to certify a case to the Supreme Court. The Attorney General's certification was No. (2), the district court's sua sponte power was No. (3), and those two subsections were stricken in the Judiciary Committee. As you can see, that left the one, and the section ought to run on without numbered subsections if the House adopts it in this form.

Mr. HUTCHINSON. Are you suggesting, then, even in the Senate-passed bill that the House should reinsert at least the certification of authority of the Attorney General?

Mr. WILSON. That would be our very great preference.

Mr. HUTCHINSON. And not the sua sponte power?

Mr. WILSON. No, we would have no objection to the court's sua sponte power.

Mr. HUTCHINSON. You are willing to go that far?

Mr. WILSON. Yes, sir.

Chairman RODINO. Would the gentleman yield?

Mr. HUTCHINSON. Yes.

Chairman RODINO. Do you think that is a vital and necessary amendment for reinstating of it, Mr. Wilson?

Mr. WILSON. Mr. Chairman, the third section of this bill, section 4, deals with the expediting act revisions and has a considerable history. It was worked out originally between the American Bar Association and the Antitrust Section with the concurrence, I believe, of at least some Justices of the Supreme Court and the Judicial Conference, with the concurrence of the Antitrust Division and with the concurrence of the Solicitor General. The certification power was considered important enough by the former chairman of this committee, as I understand it, that that is what the conference in 1970 got hung up on. I consider it, and I think I believe at least the former Solicitor of the United States, General Griswold, considered it to be a very important provision. When we do a case which involves a question of general public importance in the administration of justice under the antitrust laws, that is when we have to get that case to the Supreme Court and get a definitive answer as to the principles of law.

On the other hand, a great number of antitrust cases are really not important enough, and we feel sort of guilty about bothering the Supreme Court with cases which are in the lower class of importance. We would to take them to the court of appeals.

I can think of one which we presently have appealed now, which involves questions of relief in our case against Topco Associates. The case has been to the Supreme Court once and there is no reason why a question of this sort should go to the Supreme Court again.

So we do believe that the certification power is an important provision and it should be reinserted.

The other part of this particular section of the bill which we consider to be extremely important is that which gives us the right to appeal to the court of appeals from the grant or denial of a preliminary injunction by the district judge. This is especially important in merger cases today. In a typical merger case where we go to the district court for a preliminary injunction, the defendant quite frequently comes in and says, "Judge, if you grant this injunction, our shareholders will lose umpteen million dollars." This is a tremendous burden put on a single judge where there is no appeal from it if he grants the injunction. We consider this and the other both very important parts of this bill.

Chairman RODINO. Thank you very much.

Mr. Hutchinson.

Mr. HUTCHINSON. Pursuing this particular aspect of the bill for a moment, do I understand correctly that if most appeals in antitrust matters went to the circuit court of appeals rather than directly to the Supreme Court that the Department would be able to take interlocutory matters up to get decisions on interlocutory matters through the circuit court of appeals which it cannot now do?

Mr. WILSON. That is correct, Congressman. Presently we have no avenue of appeal in the event that the district court denies our request for a preliminary injunction. This would not make all interlocutory orders appealable under the provisions of section 1292 of title 28. It would make possible only appeals from the grant or denial of a preliminary injunction.

On page 8, lines 21 through 24 provide that any appeal from any interlocutory order entered in any such action shall be taken to the court of appeals pursuant to section 1292(a)(1), and section 2107 of title 28 of the United States Code, but not otherwise.

That excludes from the interlocutory appeal provision section 1292(b), which is a provision whereby a district judge can certify that the question is of general importance in the resolution of that particular case. That is not included in this provision. A right of appeal is provided only from the grant or denials of injunctions.

Mr. HUTCHINSON. Thank you.

Now, I would like to begin with the Senate bill as it is the bill you said you wouldn't have any objection to. First I want to ask you about the provision in this bill that requires publication.

In the Federal Register matters are really of a judicial nature. Can you point out any other place in the law where the Federal Register is resorted to for matters in the court?

Mr. WILSON. Well, a consent decree is obviously an action which requires the participation of both the executive and the judicial branches of the Government. At the time that we lodge our proposed consent judgment with a court, other than the ministerial act of filing the judgment by the clerk, there really has been no judicial action at that time.

So, up to that point, it is really action on the part of the executive department. It is my understanding that the lands and natural resources division of the Department has adopted a procedure largely modeled after our present consent decree procedures, but there is also included a printing of the proposed consent judgment in pollution cases in the Federal Register. I don't see there is any confusion on that. I understand they have adopted that procedure, Congressman.

Mr. HUTCHINSON. So if there is a matter which has to be finally resolved within the judicial branch, still the vehicle of public notice available to the executive branches are being used. I cannot very easily describe my apprehension about it. It is just another one of the problems of the separation of powers between the branches of government. I just wonder how the courts will look on the idea of having matters before them published in the Federal Register.

Mr. WILSON. Well, the intent, Congressman, is to get notice of the proposed judgment out to interested parties. We think the notice, even under our existing procedures, gets out to those parties that might be interested in any proposed consent judgment. Our press releases are always picked up by the antitrust trade press—the Antitrust and Trade Regulation Reporter and the CCH Reporter cover them rather fully.

On occasion, courts have required us to publish notice of proposed judgment in newspapers of general circulation in the area involved. The whole purpose of this is to get the word out that the United States is proposing to enter into a consent judgment in this particular case.

Mr. HUTCHINSON. If no one is disturbed by the fact that you are using a document which is intended to give notice of administrative actions to notice of actions within court cases, I suppose it is not crucial. But I feel that the point should be raised.

The next point I wish to consider is the requirement for publication of a public impact statement. You indicated in your remarks this would be a broader description than you presently make. How much greater an

administrative burden is it going to cast upon you? Is it going to require a lot more time, a lot more money and so on?

Mr. WILSON. I think it is going to require some more time and I would hope that the Congress would give us some more money in this respect. I do not think it is going to be an intolerable burden by any stretch of the imagination. Especially in our larger cases where you have questions of general public importance, we attempt to make our press releases quite full, quite detailed and on occasion they run as many as 6, 7, and 8 pages in describing the allegations of the complaint, the settlement, and how the proposed consent decree remedies the competitive evils which we attacked in the original complaint.

I think it is going to require some more effort on our part but it is not an intolerable burden.

Mr. HUTCHINSON. Is this public impact statement itself going to be subject to judicial scrutiny? Will someone be able to question the adequacy of the impact statement and possibly delay your operations?

Mr. WILSON. I suppose that is a possibility. It certainly has happened in the environmental impact statements which are filed under NEPA. I imagine the precedents which have been developed there would be applicable to this kind of public statement. I would hope we would be able to make our public impact statement as full and complete as possible as required by the proposed legislation.

Mr. HUTCHINSON. But is it going to invite law suits or going to prevent them?

Mr. WILSON. Well, I suppose, Congressman, that whenever you impose a requirement on an executive agency, you open up the possibility that there will be litigation as to whether that agency has complied with that requirement.

Mr. HUTCHINSON. And there are groups in this country who have their cap set on that very problem.

Mr. WILSON. Congressman, I do not think there are too many groups going around looking for litigation, solely for the purpose of litigation.

Mr. HUTCHINSON. Well, we are talking about the consent decrees in antitrust cases and so is it not possible that there are some groups or organizations in the country who will challenge every one of these public impact statements in order to delay the decrees?

Mr. WILSON. I do not think so, Congressman.

In the past where we have had comments from the public under our present consent decree procedures, these are or have been honest differences with respect to a consent decree. I have not seen people coming in and filing with us for the purpose of delay, no, sir.

Mr. HUTCHINSON. Now, that raises the next question in my mind: this question of standing. The proposed statute provides for a period of 60 days in which anybody can come in and file any kind of a letter or comment or observation about the proposed consent decree and then it goes on to say that the court may take these matters into consideration. It does not say that the court shall, but I suppose it's expected that the court would take them into consideration.

Does not that mean that people who are not parties are having some input into a judicial proceeding? The problem is have we forgotten all about standing?

Mr. WILSON. Congressman, under our present procedure anybody can come in and file comments with the court. The courts have been quite liberal in granting people that right.

Mr. HUTCHINSON. But we have not put it into a statute heretofore, have we?

Mr. WILSON. No; but I think that the provisions that allow for public participation are salutary ones. This is in accord with our present procedure and antitrust cases—by their very nature—affect competition, affect the public in general, and under those circumstances, I think that it is a very healthy procedure for the court and Department of Justice to be apprised of the comments that the public makes, apprised of comments others make who will be affected by the provisions of the consent decree, such as the defendant, customers of the defendant, and competitors of the defendant.

I think it is important that we have those comments and that knowledge before we finally enter a proposed consent decree.

Mr. HUTCHINSON. I suppose that the only theory upon which you permit people to have an ultimate standing in the lawsuit is to have some input into the record. I suppose the theory upon which you can justify it is that the lawsuit, although technically commenced, hasn't really proceeded. All this is preliminary to a lawsuit. Is that right?

Your present procedure, I recognize but it is hard for me to understand how it is at all judicial.

Anyone may write a letter and the judge, by this legislation, is not mandated now, but is strongly urged to take these matters into consideration.

Mr. WILSON. If a particular interested party came up with a comment in the form of a letter or brief, which really raised a serious question as to whether or not we ought to proceed with entry of a proposed judgment, I certainly think we and the court ought to know about that.

It is not a question, Congressman, of these people coming in here as parties. This is the point I was trying to make, when we were discussing the possible broadening of the intervention aspects of this bill, we do not believe that these people in general have standing to intervene as parties. But what we are trying to get here is a full range of information on the potential effects of the proposed decree. I do not think that is all inconsistent with normal judicial processes.

Mr. HUTCHINSON. I don't know, I had always supposed the judge was to make the decision upon the record before him. The record before him heretofore is not included. There is just a lot of correspondence which was received from people who were volunteers in the situation.

Mr. WILSON. Well, this does not seem to us to be an unusual situation. Quite frequently, the record before a judge, at the time he is considering entry of the proposed consent decree, does include a number of communications from interested parties.

Mr. HUTCHINSON. Outside the case?

Mr. WILSON. Outside the case. It is a situation we live with every day.

Mr. HUTCHINSON. How long has this been going on?

Mr. WILSON. I suppose, Congressman, since the 30-day comment procedure was adopted under Attorney General Kennedy in 1961.

Mr. HUTCHINSON. I see.

Now, the next question I have of you regards a provision in this bill.

The judge apparently has to make a determination as to what is "in the public interest." Now, under the present procedures does the judge determine what is "in the public interest"?

Mr. WILSON. Under the present procedures, Congressman, the judge will not infrequently conduct a hearing, hearing arguments as to whether terms of a proposed consent decree are indeed in the public interest.

I can think of one example, one suit against the automobile manufacturers which alleged that they conspired to delay the introduction of antipollution devices.

Judge Curtis out in Los Angeles had a full hearing, heard argument from persons appearing as amici curiae and from the Department as to why particular provisions of that consent decree were in the public interest.

I think that is a good example. That is a case where, after we lodged the decree with the judge, some interested parties came in with comments to the effect that the patent provisions of that proposed decree were not strong enough to protect the public interest. We modified those provisions. In other words, we told the defendants that unless you agree to this modification in this particular judgment, we are going to withdraw our consent.

They agreed to the modification and then went before the court and had a rather full argument why this particular decree now is in the public interest. So, yes, they do make that determination.

Chairman ROBINO. Would the gentleman yield?

Mr. HUTCHINSON. Yes, sir.

Chairman ROBINO. Just to get it clear in my mind, Mr. Wilson, the judges cannot order the Justice Department to enter into a consent decree against the Justice Department's people, can they?

Mr. WILSON. No, Mr. Chairman.

Mr. HUTCHINSON. And they would not be in that position under this bill?

Mr. WILSON. I do not believe they would, Congressman. They would be in a position under this bill to say, "Justice Department, what you have done is not in the public interest and I am not going to enter into this consent decree." But they have that power today.

Mr. HUTCHINSON. I asked Senator Tunney the meaning of the phrase at the bottom of page 4: "The Court shall determine that entry of that judgment is in the public interest as defined by law." What does that mean to you, sir? It's hard for me to find any definition of "in the public interest" in the law.

Mr. WILSON. That phrase to me, Congressman, means that—just give me a minute to find it here, I am working out of the bill as printed in the Congressional Record.

Mr. HUTCHINSON. Subsection E of section 2 of the Senate bill.

Mr. WILSON. Yes, I have it. Now, to me that phrase, Congressman, means that whether the proposed consent decree adequately remedies the competitive ills which we perceived at the time we filed the complaint; in other words, does the proposed consent decree carry out the purposes of the public interest as defined in the antitrust laws?

Mr. HUTCHINSON. I agree that the public interest requires the carrying out the competitive enterprise system. But could the legislation state this more clearly? You do not suppose that a judgment that

comes forward with a decree would completely define what those words meant.

Mr. WILSON. I think it would be better drafting, Congressman, if you struck the word "law" and put in there as defined "by the antitrust laws of the United States." I think that is fairly clear as it is.

Mr. HUTCHINSON. Well, the chairman informs me that other members of the subcommittee have appeared, and my time is up, and I yield the floor, Mr. Chairman.

Chairman RODINO. Mr. Mezvinsky.

Mr. MEZVINSKY. Thank you, Mr. Chairman.

I initially just want to make a comment, Mr. Wilson. I would hope that maybe you could pass this on, this is not just only to yourself, but others in the Department that I gather that the statement was given to the committee last night about 7:30 p.m., and it would be helpful to members of the committee if we could have the statement to look at, at least somewhat prior to a few hours before the hearing. I don't know what the delay was on your part, you have had some problems within the Department I know, but it would be helpful if we could have it at least the day before.

Mr. WILSON. Yes, sir. I would apologize for that, Congressman, but, in our own defense, I think I should point out that the Assistant Attorney General is attending an industrial development conference in Tokyo, my director of operations is conducting his semiannual visit to the west coast field offices, my director of policy planning was making a speech in Seattle, and one of my special assistants has been tied up almost totally on a patent reform bill. In addition to this appearance today, in approximately 22 minutes—if I read your clock correctly, 32 minutes—I am due over in the Senate to testify before Senator Tunney's committee, and we just got stretched a little bit thin.

Mr. MEZVINSKY. I would hope maybe if notice is given to you in ample time, you would try to get the statement to us so that we are in a better position to evaluate it prior to the hearing.

Now, I have a few questions that I would like to ask you. The \$500,000 penalty is too low; wouldn't the Justice Department be in favor of increasing the penalty?

Mr. WILSON. I think that we would have to get a little experience with the \$500,000. Clearly, the \$50,000 isn't enough, I have heard opinions from others that we ought to go to a percentage of the profit fine, such as exists under the EEC; I would point out that there is a certain difference between the antitrust laws of the United States and those of some European countries, which do contain a percentage of the profit margin.

The Europeans do not have provisions for treble damages, so that the sole deterrent in Europe is the percentage of profit fine, and obviously it can be very substantial.

We do have the additional deterrent of the treble damage action. I think we would have to have a little more experience and a lot more consideration given to the interrelationship of a percentage of profit margin and whether or not we would continue to have treble damages.

I personally happen to be in favor of compensating those who have been injured by a particular antitrust violation rather than having the compensation solely going to the Treasury of the Government.

Mr. MEZVINSKY. OK. Now, it is my understanding with the amendment that interagency documents fall under the exception of the Freedom of Information Act. What would be the attitude of the Department concerning a provision that would exempt these documents from the exceptions of the Freedom of Information Act? In other words, make them available to the public.

Mr. WILSON. You are talking here, Congressman, solely about interagency documents rather than the interagency materials?

Mr. MEZVINSKY. Yes, between agencies.

Mr. WILSON. For example, a document that would come to us from say, the Department of Commerce. I think there are other provisions of this bill which are going to require adequate disclosure of communications from other agencies to the Department. In other words, if the bill is amended so that it reads, as the Senate bill does, that the defendant has to file a record of all contacts with any representative of the Government, other than those contacts by or in the presence of counsel of record with representatives of the Department, you are going to pick up that kind of thing. The Court is going to have the opportunity to ask questions about a particular meeting of a particular defendant, as with a representative of the Department of Commerce, and what did the Department of Commerce do as a result of that? So I think you are going to adequately pick up and get out into the public view contacts of that type.

Mr. MEZVINSKY. So that basically, you won't have any objection to having that exemption taken out if that is the case and there shouldn't be any case to withhold the interagency documents from public view, would there?

Mr. WILSON. I think that once you have identified the contact, Congressman, that is sufficient. I think there may be a perfectly legitimate interest on the part of some of the other agencies in the resolution of a particular case brought by the Department. I think they ought to have the opportunity to tell us about it, without their views having necessarily to go in the public record. As long as the initiation of the interest is disclosed, I would oppose requiring that kind of memorandum to be placed on the public record.

Mr. MEZVINSKY. Now, the last point I want to make, Mr. Wilson, concerning certainly this bill and the effect of it, is your feeling as to the need to beef up the Antitrust Division of the Justice Department. That is so you can adequately handle consent decrees, let alone the major issues of antitrust. Would you care to comment about—the Senator mentioned the request of \$3 million and the Senate provided \$1 million. Do you feel there is a real need within the Antitrust Division to beef it up as far as staff, so you can more adequately attempt to deal with the enforcement of the antitrust laws?

Mr. WILSON. Congressman, I have said around this country that if we are really serious about having competition as the regulator of our economy, if we are really serious about not going for more manmade governmental regulations, if we are really serious about antitrust, the budget should be substantially increased, yes, sir.

Mr. MEZVINSKY. Thank you, Mr. Chairman. I have no further questions.

Chairman RODINO. Thank you. Mr. Dennis?

Mr. DENNIS. Mr. Wilson, I take it in glancing at your statement, and correct me if I am wrong, the Department is in favor of this legislation

if the amendments which you discuss in this statement are adopted, is that a correct view?

Mr. WILSON. Congressman, I think our official position is that, if the bill were amended to read as it passed the Senate, we would have no objection to it. We would strongly prefer in section 4 of the bill to have the Attorney General's certification power—in other words, his power to get a case directly from the district court to the Supreme Court of the United States. That was stricken in the Judiciary Committee in the Senate and we would like very much to have that back yet.

Mr. DENNIS. So if that certification power which was stricken in the Senate were put back in and the other amendments which you discuss were likewise inserted, you would then have no objection to the bill.

Mr. WILSON. That is correct, Congressman.

Mr. DENNIS. I take it that unless those things are done, you do object to the bill. Is that right?

Mr. WILSON. Yes, sir.

Mr. DENNIS. And for reasons which you have more or less set forth and stated in the heading?

Mr. WILSON. Yes, sir.

Mr. DENNIS. You have put it in somewhat of a negative manner, you would have no objection to the bill if these amendments were made. Do I gather from that that you are not particularly enthusiastic about it even so, or is that an unfair inference?

Mr. WILSON. I do not think that is a fair inference, Congressman. The Congressman is aware that there are certain technical phrases which are imposed by us by the Office of Management and Budget—certain technical phrases such as this. We have no objection to the bill at all.

Mr. DENNIS. Well, all right.

Regarding this section which requires publishing consent decrees during the period for public responses, what exactly is the effect of the public responses?

Mr. WILSON. Under the legislation, Congressman, we would review the responses as we do now under the present period, which is 30 days. We will be required, under this legislation, to publish in the Federal Register our response to the comments.

We do this—in court—by and large in the case of any great public importance today. We make a response to the comments which we receive during the 30-day period, either in a memorandum or argument before the Court at the time we move to have the decree finally entered. So this is really not a tremendous added burden to the procedures which we go through now.

Mr. DENNIS. Would these responses be among the things that the Court is supposed to consider in determining whether the decree is in the public interest, as defined by law or in the antitrust laws?

Mr. WILSON. I think that the Court would certainly consider both the comments and our response to them in determining whether or not the proposed consent decree carries out the purposes embodied in the antitrust laws.

Mr. DENNIS. There is apparently nothing in the bill which requires you to make any change because of these public responses. I presume you are supposed to consider them. You can respond to them by saying you are off base, if you want to, I suppose.

Mr. WILSON. That is right, Congressman. On occasion we have responded in that manner. On other occasions we have responded by indeed telling the defendant we are going to withdraw our consent unless you agree to modifications which are suggested by those comments. So it really depends upon the merits of the positions contained in the comments.

Mr. DENNIS. All right, thank you.

I do not have anything else at the moment, Mr. Chairman.

Mr. MEZVINSKY [presiding]. Mr. Hutchinson.

Mr. HUTCHINSON. I have one further question, Mr. Wilson. Your last colloquy with Mr. Dennis raised this question in my mind. At the present time, when you receive these public reactions, you make your responses to the Court. The Court's function is to determine whether the proposed decree is within the purpose of the antitrust laws.

Now, the bill says the court is supposed to determine whether it is in the public interest and the bill also calls for a public impact statement. If this bill were tidied up a bit, and we were to use some phraseology about the purpose of the antitrust laws in lieu of the public interest, and if we could devise some more descriptive or restrictive terms in the public impact statement, would you think at least offhand, I would think that would make an improvement in the bill. Do you see what I am getting at?

Mr. WILSON. Yes, Congressman.

Mr. HUTCHINSON. I am a little alarmed about this public impact statement because I have seen what happens with regard to an environmental impact statement.

Mr. WILSON. I suppose, Congressman, if you change that to read, "A statement of the impact of the proposed judgment on competition," this is really what we are talking about. Those of us who are in charge of the Antitrust Division, of course, would like to think that what we are doing is in the public interest and I think that the amendment that I suggested earlier, that the public interest is defined in terms of the antitrust laws or the public interest in carrying out the purposes of the antitrust laws, or something like that, that we would have no objection to it.

Mr. HUTCHINSON. Thank you.

Mr. MEZVINSKY. The committee counsel, Mr. Falco, has a couple of questions.

Mr. FALCO. Mr. Wilson, in your statement you express support of the floor amendments to S. 782. These floor amendments presently incorporate the Freedom of Information Act into the Penalties and Procedures Act in antitrust, don't they?

Mr. WILSON. Yes, sir.

Mr. FALCO. What legal effect is there if exemptions to one act are incorporated into another piece of legislation? For example, would the policy of the incorporated act, be excluded when only its exemptions are incorporated?

Mr. WILSON. I do not really think so. I think at the time that the Congress passed the Freedom of Information Act, it made a legislative judgment that there were certain classes of information which were in the executive branch, which were not going to be subject to disclosure. I think they simply made this the proposed legislation consistent with the intent of Congress when it passed the Freedom of Information Act.

Mr. FALCO. You do not think the district court would have a problem of reading the Freedom of Information Act and the proposed act in *pari materia* so as to focus emphasis on the exceptions to that policy and disclosure as it presently is contained in the Freedom of Information Act?

Mr. WILSON. I do not think so. These are really both—the Freedom of Information Act and this legislation—disclosure type legislation—as Senator Tunney put it, ventilation. What we are doing is simply pulling exceptions by reference of the Freedom of the Information Act. You could for example, simply take those exceptions which are specified in the Senate bill and write them in the same language in this bill. It wouldn't make any difference as far as I can see.

Mr. FALCO. Do you consider the Government when claiming a Freedom of Information Act exemption, has the burden of coming in and proving that it falls within that exemption and this burden would remain the same under the Antitrust Procedures Act?

Mr. WILSON. I think that is correct.

Mr. FALCO. Directing your attention to the expediting act revisions which you support, could you explain how Judicial and Departmental resources will be conserved if layers of appellate review are added to the present process?

Won't you have simply a conservation of litigation sources but a swelling of the appellate resource expenditures in the division?

Mr. WILSON. You might have a moderate increase in the appellate resources of the division to take care of the case we now lose in the district court and simply conclude that they are not important enough to bother the Supreme Court with.

If, in other words, we have an avenue available to the Court of Appeals, we might appeal some cases which we do not, today, take to the Supreme Court.

On the other hand, I think that there is probably going to be a conservation of litigation resources in another area. In the merger case area, for example, where presently we cannot appeal from the grant or denial of a preliminary injunction, we could, it would seem to me, quite frequently, have a situation where you have your preliminary injunction hearing before the district judge. We would put in just about our whole case, the defendant would put in about his whole case; and the district judge decides one way or another. It would then go to the Court of Appeals and whichever way it is disposed of there—you might have a conclusion that once we have had that kind of a full hearing on a preliminary injunction—the way the Court of Appeals will decide dispositive. So you might have some conservation of litigation resources there, some slight expansion of appellate resources in the other area I mentioned.

Mr. FALCO. How about the appeals in the cases that are actually litigated, not just a review of interlocutory decrees, because right now your right is to go to the Supreme Court?

Mr. WILSON. That is correct. It seems to me that you are really not going to have much impact in that kind of a case which has been fully litigated and the fully litigated court decision is entered. This is especially true if you get the certification power into the bill, whereby the Attorney General is going to decide whether this is a case of general public importance which should go to the Supreme Court

now. In that case it would go to the Supreme Court. In a case whose importance is somewhat less it would go to the Court of Appeals.

If it goes to the Court of Appeals and we lose there and the Attorney General or the Solicitor General, having made the decision that it was not important enough to go directly to the Supreme Court, there would be some question as to whether we would take it further unless we were to lose terribly badly in the Court of Appeals.

Mr. FALCO. The majority of your testimony is predicated on your hope that we restore the Attorney General's certification?

Mr. WILSON. I think so, yes. Obviously, if we don't have that certification power, there are cases of general public importance in which we will then add a layer of review in the Courts of Appeal before we get to the Supreme Court.

Mr. FALCO. What has your research disclosed, as reasons that have eroded the need for the U.S. Government's right of appeal to the Supreme Court and the replacing of this right with a placing of the appeal within the discretionary jurisdiction of the Supreme Court which includes, doesn't it, the discretion not to hear that case at all?

Mr. WILSON. If I understand your question correctly, in other words, why do we want to go to the Court of Appeals in some cases? The answer is simply because there are some cases which just aren't important enough to take to the Supreme Court.

Mr. FALCO. That is a qualitative judgment, isn't it?

Mr. WILSON. Yes, I suppose it is.

On the other hand, it is a qualitative judgment concurred in by the Supreme Court of the United States. The justices quite frequently chastise us for troubling them with little cases. Quite frequently they chastise us for not having the benefit of intermediate review by the Court of Appeals when we get up there. This is a provision of this bill which has been strongly supported by the Supreme Court itself.

Mr. FALCO. Doesn't the congressional statutory scheme in present law for antitrust enforcement contemplate full trials in Government antitrust cases so that private parties can avoid the expense of trying their own antitrust cases and obtain restitution for damages? Aren't consent decrees in a proviso to title 15, section 16a?

Mr. WILSON. No; I don't think there is anything in the present legislation which indicates that we ought to go trial at least solely to benefit particular treble-damage plaintiffs. This is a consideration which we take into account in deciding whether or not to enter into a consent decree or in criminal cases whether or not to acquiesce in the entry by the defendants of pleas of *nolo contendere*. If there are substantial private plaintiffs, especially if they are public entities, this is a consideration which we take into effect and where you have that situation you will quite likely oppose the entry of such pleas.

I think that the congressional scheme is a bit different than that. The Congress didn't approve *prima facie* effect until after you had a full trial.

Mr. FALCO. As a matter of statutory construction, if you were trying to assess a congressional purpose presently enacted and you looked at title 15, section 16(a), the main sentence is followed by a proviso; is it your position that the subsection and the proviso do not have to be read together to constitute a statutory scheme? Isn't the proviso generally looked upon as an exception to the main rule?

Mr. WILSON. Well, if you are going to state principles and make an exception to it, I do not think that necessarily implies that the Congress preferred one over the other.

It is simply a question of what the Congress intends. So if we have a trial, the effect of the judgment is *prima facie* in the subsequent proceeding. If we don't have a trial, if we have a consent decree, I don't see anything that would cause a problem.

Mr. FALCO. In all these regulatory cases, you say that the entire statutory scheme must be looked at to get the meaning of what Congress intended and that this is by reading all of the pieces together and not the exempting provisions alone.

Mr. WILSON. I would have to review the regulatory filings we have had recently, but in the particular statute to which you refer—the Clayton Act—I don't see there is a congressional preference one way or the other.

Chairman RODINO. Did you have a question?

Mr. POLK. I would like to direct your attention to the Expediting Act as it appears in sections 4 and 5 of the Senate-passed bill in order to ask the broad question of whether the changes of the Expediting Act are substantially different from a complete repeal of the Expediting Act. Perhaps I should ask a more specific question first.

With regard to section 4 of the bill, it would amend title 15, section 28. How often does the Attorney General request that the trial of an antitrust case be expedited under that section as to the trial of cases?

Mr. WILSON. In other words, your question is how often does the Attorney General request the convening of a three-judge court under the present Expediting Act?

Mr. POLK. Yes.

Mr. WILSON. Very infrequently, because the convening of a three-judge court does not tend to expedite matters. As a matter of formal procedure under that section of the Expediting Act, it is very infrequently.

On the other hand, with respect to antitrust cases in general, most districts have a local rule providing for the appointment of a single judge in protracted cases. As a general practice, we try to get a single judge appointed and that request is generally granted.

Mr. POLK. What would you anticipate that the revision of the act would do with regard to the trial of the cases? Would it be often employed, with the Attorney General filing a request for an expedited trial?

Mr. WILSON. Basically what we are doing is providing here in a single piece of legislation, a type of procedural rule that most district courts have. Now, with antitrust cases, the district court has a local rule providing for the employment of a single judge. We are now saying the Congress has provided for the appointment of a single judge to hear a protracted antitrust case. That is basically what we are doing here.

Mr. POLK. Well, if the section were repealed, wouldn't we be in the same situation?

Mr. WILSON. Well, I am not sure; 93 or 94 judicial districts have rules of that nature. Most of the districts in the major metropolitan centers do, but basically we would be providing for a single uniform rule for antitrust cases.

Mr. POLK. With regard to the next section, that deals with the appeal of the antitrust cases, how does the provision in the Senate bill differ from the complete repeal of that provision in the present law?

Mr. WILSON. Well, I suppose the answer to that is that the procedure, as contained in the Senate bill, does not really differ from a complete repeal of the present Expediting Act except in the provision dealing with interlocutory appeals. If you were to repeal the Expediting Act in toto, you would put antitrust cases under the provision of the Judicial Code, title 28, where you have the entire section 1292 applicable to antitrust cases.

Here we have made 1292(a) (1) applicable to antitrust cases; 1292 (b), providing for interlocutory appeals is not applicable. I suppose it looks this way presently because of the changes which have been made in the consideration of this legislation because it has been winding its way through Congress for the last 4 years.

If you put the certification power back in, you are not completely repealing the Expediting Act.

Mr. POLK. So that at least one difference is that fewer cases can be subject to interlocutory appeal under the Senate language—

Mr. WILSON. That is correct.

Mr. POLK [continuing]. Than they would be under complete repeal.

Mr. WILSON. Correct.

Mr. POLK. I would like to direct your attention to section 1254 of title 28. Let me read it to you:

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted on petition of any party to any civil or criminal case before or after rendition of judgment or decree.

I note that under the Senate language the judgments of the district courts could not be appealed to the Supreme Court unless three things occurred: either of the parties requested expedition of the case; the trial judge agreed with that; and the Supreme Court agreed to hear the case. I take it that if the Senate provisions were not adopted at all, there would be greater expedition of antitrust cases, for it would be at the request of either party and without the concurrence of the district judge.

Mr. WILSON. As a practical matter, I don't think that will make a lot of difference. The cases are few and far between where the Supreme Court has granted certiorari before a judgment has been rendered by the court of appeals. The Court has made it quite clear that it relies a large extent upon the intermediate appellate review which crystallizes the issues involved in the case.

Mr. POLK. But few cases are as important as leading antitrust cases.

Mr. WILSON. We think our cases are important, yes, sir, but I can think of some other ones that are quite important also.

Mr. POLK. Thank you, Mr. Wilson.

Chairman RODINO. Mr. Wilson, I know you have got to go to another meeting in another few minutes, but I want to call your attention to your statement on page 3 which is the same as the statement made by Mr. Kauper before the hearings on the Senate bill and the statement is, and I suspect he was addressing himself to S. 782, before adoption of the amendments, "We could expect a marked decrease in our efficiency and in our ability to initiate broadbase national antitrust enforcement in the years to come." You are making the same statement now at this hearing.

Are you suggesting that if we were to adopt the amendments similar to those enacted in S. 782, as you propose, you would then change your statement and you would be able to address yourself to the broad-based action in the antitrust enforcement?

Mr. WILSON. The bill in the Senate, at the time that statement was originally made by Mr. Kauper read "shall" rather than "may," and it read "the court shall conduct a hearing and consider 1, 2, 3, 4, 5, and 6." That has now been changed to "may." To the extent that courts, indeed, undertake to conduct a rather full-scale hearing, a full-scale review, bringing in experts, calling Government witnesses, calling witnesses from the defendant, and perhaps putting the court's own experts or experts from another interested party—to the extent that happens, obviously this will use up antitrust resources.

Mr. POLK. Wouldn't this be remedied, though, by what you referred to a while ago—more appropriations?

Mr. WILSON. It could be remedied by more appropriations. It could also be remedied by having an indication in the legislative history, for example, that the Congress certainly doesn't mean that the Court is supposed to conduct a full-scale hearing in each and every antitrust case—only where there is serious question.

Chairman RODINO. Mr. Wilson, I would hate to believe that with the adoption of any legislation of this sort, you would talk about expecting a marked decrease in the efficiency and ability of the Justice Department to do the job that it is supposed to be doing and in its ability to exercise broad authority over antitrust enforcement matters.

It would seem to me as though with the adoption of this, the Justice Department would be caving in.

Mr. WILSON. No; I don't think we would be caving in, Congressman. I would like to point out that we have 327 attorneys. That is not a terribly great number if you average it out. That means we have six attorneys per State and that is not a lot of attorneys. You have got two or three of them tied just up on the normal run-of-the-mill antitrust case, and when you get a really major attack, a really major merger or monopolization case, it will take 10 percent of that staff.

Chairman RODINO. I recognize that, but I want you to understand that I am aware, that if we were to adopt this legislation, there would be a greater burden on your job. There would be a need to do things that you suggest that we are not aware of.

Mr. WILSON. Certainly there would have been under the legislation that was originally proposed. The present Senate bill, as the bill passed the Senate, is a vast improvement as I indicated.

And it is an indication to the court that it is to be certainly not the rule that they conduct a full-scale broad-range inquiry into each and every consent decree. That kind of indication would be a further help.

Chairman RODINO. Mr. Wilson, I am going to let you go and would you submit a further statement for the Record, concerning the need to add something to the Sherman Act as an effective deterrent.

I think there was some mention of this.

Mr. WILSON. I believe in that respect I could submit the testimony of former Deputy Assistant Attorney General Walker B. Comegys.

I believe it was in 1970. I cannot remember which body it was.

Chairman RODINO. If you will submit it for the record.

Thank you, Mr. Wilson.

[The prepared statements of Mr. Wilson and Mr. Comegys follow:]  
 Chairman ROBINO. We will now adjourn the hearings until next  
 Wednesday at 10 a.m.

[Whereupon, the hearing concluded at 11:45 a.m.]

STATEMENT OF BRUCE B. WILSON, ACTING ASSISTANT ATTORNEY GENERAL,  
 ANTITRUST DIVISION

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you today to discuss H. R. 9203, a bill known as the "Antitrust Procedures and Penalties Act." I will also refer, where appropriate to S. 782, similar legislation enacted by the Senate.

This bill would, we believe, involve the district courts to a much greater degree in the consent decree process. It could involve inquiry into a variety of matters and in some instances could require a full hearing prior to approval of consent decrees, involving the subpoena of documents and witnesses, and the taking of sworn testimony concerning evidence of the violation alleged in the complaint, the relief to be obtained, the anticipated effects of that relief, the remedies available to private parties, the procedure and standards to be applied for modification of the judgment and the events which might require such modification, alternatives to the proposed judgment, and any special circumstances giving rise to the proposed judgment or any provision contained therein.

H.R. 9203 might also enhance considerably the standing that private parties would have as a matter of law—as opposed to judicial discretion—to intervene and to oppose government settlements.

H.R. 9203 would also increase the penalties to corporations for Sherman Act violations from \$50,000 to \$500,000. Fines levied upon private individuals would be increased from \$50,000 to \$100,000.

Finally, the bill would amend the Expediting Act to require, upon application of the Attorney General the appointment of a single judge to expedite an antitrust proceeding. The Expediting Act would also be amended to place appeals of antitrust cases which have no special significance in the courts of appeals. H.R. 9203 would permit appeal from a final judgment to go directly to the Supreme Court if upon application by a party the judge who adjudicated the case enters an order certifying that any consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

While we have supported certain of these legislative changes in the past, the Department opposes enactment of H.R. 9203 in its present form. In our view the bill will seriously disrupt settlement proceedings in the courts, and would seriously weaken our ability to obtain consent decree settlements from defendants. Even were we able to obtain a meaningful consent decree settlement, under the provisions of H.R. 9203 much time of the Antitrust Division's staff would be spent in court, litigating what would essentially amount to the merits of the case after the proposed decree was entered. We could expect a marked decrease in our efficiency and in our ability to initiate broad based national antitrust enforcement in the years to come.

To understand the adverse impact of H.R. 9203, I think it is helpful to analyze current consent decree practices. When we enter into a consent decree, we sign a stipulation with the defendant which provides that the proposed decree shall be entered as final and binding within thirty days after it is filed—with one important qualification however. The government reserves the right to withdraw its consent decree any time during that thirty days. The private party is bound in stipulation and may not withdraw its consent.

On the same day we file the stipulation and proposed decree with the court, we issue a press release advising the public in some detail of the terms of the consent decree, showing what it is designed to do to protect and restore competition. Our press release also describes the illegal action alleged in the complaint. In addition we also alert the public to the Department's consent decree procedure. Under that procedure we invite public comment to the court and to the Department for thirty days prior to the entry of the judgment.

In a number of major cases we have in the past sought leave of the court to appear before it and to explain on the public record the precise manner in which the consent decree is designed to accomplish the purposes of our antitrust suit and to state the basis upon which the consent decree would serve the public interest. There have also been cases in the past in which private parties have appeared on a limited basis to argue to the court that modifications should be

made to the consent decree or that the consent decree should be rejected in its entirety.

Additionally, there have been cases in the past in which, during the thirty day period I have described, private parties may contact the Justice Department and suggest defects in or amendments to the consent decree. In a number of instances we have agreed with these suggestions and have informed the defendant that unless specific modifications to the decree are accepted by the defendant, we will withdraw our consent. Usually the defendant accepted the suggested modifications.

Before I discuss specific objections which I have regarding H.R. 9203, I think that it might also be helpful if I set out in rather general form the legal principles which presently govern the appropriate roles of the Court and third parties in connection with the entry of consent decrees. Broadly speaking, Congress has charged the Justice Department—the Attorney General—with the duty to protect the public interest in antitrust cases.

Congress did not determine that the public interest would be best protected by the employees of the defendant, by the stockholders or creditors of the defendant, by the suppliers or customers of the defendant, by its competitors or by interest groups—all who have from time-to-time sought to intervene in consent decree proceedings. Each of these groups, after all, has a very particularized interest, an interest frequently far different from that of the public.<sup>1</sup>

Congress determined instead that this crucial law enforcement role should be vested in the chief law enforcement officer of the land—appointed subject to the advice and consent of the Senate—and accountable to the President.<sup>2</sup> This is recognized by the courts, which have said that it is the “United States which must alone speak for the public interest” in antitrust matters.<sup>3</sup>

In line with this Congressional intent, the courts have held that a non-party may not intervene in an antitrust action simply to promote his private cause of action.<sup>4</sup> As a general rule intervention as a party is permitted only where the intervenor can show (a) an interest relating to the subject of the action, (b) that the disposition of the suit may impair their ability to protect that interest, and (c) that their interest is inadequately represented by existing parties. Where the government has patently failed to protect the public interest, intervention has been granted.<sup>5</sup> And in several instances, though formal intervention has not been granted, the courts have nonetheless heard, and carefully considered, the arguments of third parties.

The courts do not simply rubber-stamp antitrust consent decrees. In entering a decree the courts are called upon to perform a judicial act.<sup>6</sup> They have a duty to examine the terms of the proposed consent decree to determine whether it should be adopted as the decree of a court of equity. They are required to examine the decree to see whether it is enforceable, whether it provides relief consistent with the prayer of the complaint, and whether on the whole the consent decree is in the public interest.<sup>7</sup>

But except in cases where a previous judicial mandate is involved and the consent decree fails to comply with that mandate, or where there is a showing of bad faith or malfeasance, the courts have allowed a wide range of prosecutorial discretion. The decision to enter into a consent judgment is viewed by the courts as “an administrative decision and is a part of the implementation of the general policy of the Executive Branch of government.”<sup>8</sup>

Turning now to the proposed bill, H.R. 9203 contains three interrelated sets of provisions dealing with consent decrees. These are (1) the required filing of an impact statement with the Court by the Department, a statement which would expand somewhat upon our current press release practice; (2) the required filing by defendants of a statement describing communications between defendant and government officials; and (3) provisions greatly expanding the roles of the court and third parties in the entry of decrees.

<sup>1</sup> 28 C.F.R. ¶ 50.1.

<sup>2</sup> *Swift & Co. v. United States*, 276 U.S. 311, 331–32. (1928).

<sup>3</sup> *E.g., Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co.*, 269 U.S. 42, 49 (1925).

<sup>4</sup> *U.S. v. Paramount Pictures*, 1971 Trade Cases ¶ 73,526 (S.D.N.Y.), *aff'd per curiam sub nom. Syufy Enterprises v. United States*, 404 U.S. 802 (1971).

<sup>5</sup> *E.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

<sup>6</sup> *Pope v. United States*, 323 U.S. 1, 12 (1944).

<sup>7</sup> See *U.S. v. Automobile Mfrs. Assn.*, 307 F. Supp. 617, 621 (S.D. Cal.). (1969) *aff'd per curiam sub nom; City of New York v. United States*, 397 U.S. 248 (1970).

<sup>8</sup> The wide range of discretion recognized by the courts thus reflects both a respect for the Constitutional separation of powers and the intent of Congress in leaving discretion to the Attorney General in antitrust cases.

More specifically, Section 2(b) of the bill would require the Justice Department to file with the district court a "public impact statement," which would recite, *inter alia*, the anticipated effects of the relief contained in the proposed judgment; the remedies available to potential private plaintiffs damaged by the alleged violation in the event the judgment is entered; a description and evaluation of alternatives to the proposed judgment; the anticipated effects of such alternatives; and an explanation of any unusual circumstances giving rise to the proposed judgment or any provision thereof.

Section 2(e) provides that before entry of the consent judgment, the district court shall make a public interest determination, and may specifically consider:

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

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

Section 2(g) also provides that each defendant entering into a proposed antitrust consent judgment shall file with the District Court a description of any and all written or oral communications by or on behalf of the Department with any officer or employee of the United States concerning or relevant to the proposed consent judgment or the subject matter thereof. In making a public interest determination under Section 2(e) the Court could, I presume, review the record of lobbying activities by or on behalf of the defendant under Section 2(g).

The bill also contemplates that the Court may hold a hearing on these issues, take testimony of government officials or expert witnesses and authorize full or limited participation in proceedings before the Court by interested persons or agencies.

We believe that these provisions, calling as they do for extensive and rather undefined judicial review of antitrust consent decrees, would seriously disrupt the settlement process, impair our ability to obtain meaningful settlements, delay antitrust relief in cases having direct bearing on the health of our economy, and unnecessarily require the use of Department and judicial resources which might be more fruitfully expended in other ways.

The overall dimension of the role proposed for the court should be appreciated. Under Section 2(e), the Court may consider a number of factors, including the anticipated effects of alternative remedies, the effect on private parties, and so forth, factors I will discuss in more detail subsequently. In reaching its decision, the Court may take testimony of government officials, employ consultants, permit intervention, solicit views of other federal and local agencies and take such other actions as it deems appropriate. These are very broad ranging powers which, when coupled with the breadth of the substantive inquiry to be made, suggest something akin to a full-blown trial. While it may be argued that the proposed inquiry is simply into the adequacy of relief, and not into whether the antitrust laws were violated, such an argument is specious. Disagreement over remedy frequently reflects disagreement over facts. Disagreement over facts requires judicial resolution, and that in turn requires a full evidentiary hearing. The result is likely to be precisely what the consent decree procedure is designed to avoid, the extensive expenditure of Department and judicial resources. Presumably Department resources would be expended not only in representing the United States, but in giving testimony and preparing responses as well.

Let me now discuss several specific features of the bill.

With the bill as written, the court could consider itself obligated to evaluate and could take testimony concerning the anticipated effects of the relief contained in the proposed judgment. Indeed, this inquiry apparently would encompass not only whether the relief is adequate in view of that sought in the complaint, but whether the government sought appropriate relief in the complaint itself. We have no objection to explaining to the Court the manner in which the consent decree is tailored to achieve the competitive objectives of the relief sought in the complaint. We are concerned that speculation by the government and the defendant on the anticipated effects of the relief could lead to each side claiming "victory," which could be highly disruptive at a time when termination of the law suit is in the public interest. Any discussion of the long-term effects of a judgment also involves a great degree of "crystal ball gazing." If done in the abstract, the discussion is likely to be useless. To

avoid abstraction, detailed facts must be presented to the Court. Many of those facts would likely be contested. In the contest, the settlement may be lost in the adversary process. And considerable time and manpower will be expended.

The bill also contemplates that the hearing on a consent decree explore the remedies available to potential private plaintiffs damaged by the alleged antitrust violation in the event a judgment is entered. Section 5(a) of the Clayton Act<sup>9</sup> provides that a final judgment in any civil or criminal proceeding brought by the United States under the antitrust laws, which determines that the defendant has violated those laws, may be used as prima facie evidence against the defendant in any claim in any private antitrust action for treble damages. The Clayton Act specifically provides, however, that the government judgment may not be used as prima facie evidence if that judgment is in the nature of a consent judgment entered before any testimony has been taken.

As the bill calls upon the court to consider the effect of entry of the decree upon individuals alleging specific injury from the violation set forth in the complaint, it is conceivable that a court might feel compelled to deny entry of the judgment on the grounds that so long as no prima facie use can be made of the judgment, the "public interest" requirements of the bill have not been met. In short, a court could require the Department to go to full trial, simply to satisfy the claims of private parties who would naturally wish to avoid the expense of trying their own antitrust cases.

This concern has substantial basis in past experience. From time-to-time private parties have opposed the entry of consent decrees for the reason that if the Department does not go to a final, litigated judgment, the prima facie use of the judgment by private parties in treble damage actions against defendants is lost. Under H.R. 9203 we could well be required by a court to go to full trial.

We have in the past and will in the future continue to oppose such attempts by private parties to force us to continue litigation so that their case can be made out. If the relief we obtain by consent decree is adequate, further litigation would tie up our resources—resources which might otherwise be employed to prosecute further violations of the antitrust laws. The courts have consistently upheld our position.

By implying that the district court should consider the effect of the consent decree upon private parties, the legislation might place us in a position of having to engage in endless litigation to obtain the same result which we now reach by consent decree. We do not believe that this portion of the bill is consistent with the public interest in speedy and substantial relief in antitrust cases brought by the government. And we do not believe it is in the interest of the taxpayer who would be required to support full-blown litigation in virtually every case which the government brings. We therefore oppose this feature of the bill.

H.R. 9203 would also permit the court to explore the alternatives to the proposed judgment actually considered and the anticipated effects of such alternatives. The first step would presumably be to identify the alternative remedies. These, in turn, would be evaluated. This exploration could take two forms, both which we believe would be highly undesirable. First, a court might require the government to disclose all suggestions which were made by members of the Antitrust Division for relief during the course of settlement negotiations. These negotiations usually involve a number of Antitrust Division personnel, including myself, and all possibilities for settlement are explored in internal staff discussions before we take a position with the defendant. These discussions are, as they should be, very broad ranging and involve assessments of the strengths and weaknesses of our case, the relief which we must have as a very minimum as well as relief which we think the defendant will agree to.

I would strongly object to the disclosure of these staff discussions and recommendations. I believe it would have a chilling effect on the free exchange of information and ideas among my staff and myself. Without that exchange my bargaining position with defendants in consent decree negotiations would be immeasurably weakened. I believe our law enforcement program would be weakened also.

A second possible reaction by a district court would be to explore in some kind of economic atmosphere various possible alternatives to antitrust relief, using Justice Department experts, the experts of other Executive Branch agencies such as the Commerce Department, the Department of Transportation and the like,

<sup>9</sup> 15 U.S.C. § 16(a).

and experts brought in by other parties or the court. This exploration could be most expensive, time consuming, and in the end might well bear little relevance to the matters under consideration, resembling a group of highly trained scholars reading their dissertation papers in an almost empty auditorium.

The bill also suggests that the district court to explore and consider any special circumstances which give rise to the judgment. I believe this provision is much too vague. If enacted, it could permit a "fishing expedition" into prosecutorial discretion in antitrust cases. Such a judicial inquiry could require a trial on the entire range of issues confronting a prosecutor—including the strengths and weaknesses of the government's theory, the deficiencies in factual proof, the outcome of discovery, the time factor involved in going to trial or getting relief now, the possible relief that might be obtained in light of the risk of litigation, the resources to be committed in this case vis-a-vis alternative—and perhaps most important—cases, and the public consequences of delay in correcting an antitrust violation. The courts do not permit this inquiry now, and I believe it would be inconsistent with both the constitutional nature of the judicial power and the traditional concepts of the adversary process. In the latter sense, I believe that disclosure of these kinds of thought processes in public could force the government to spell out the strengths and weaknesses of its antitrust program and could give defense counsel an overwhelming advantage in mapping out a case against the government. I do not believe that result would be in the public interest.

Section 3 of H.R. 9203 would provide for an increase in the maximum fine on corporations from \$50,000 to \$500,000 and for individuals from \$50,000 to \$100,000.

The Department of Justice has asked Congress in the past to increase Sherman Act fines and continues to support such increase.

A primary end of the criminal sanctions of the Sherman Act is to preserve free enterprise by deterring illegal activities and practices preventing effective competition. This end can be met only if those sanctions provide a meaningful deterrent. By current economic standards the comparatively moderate range of fines available under the Sherman Act is not an effective deterrent to criminal conduct. The maximum fines for individuals and corporations have not been increased since 1955. Since that increase the assets and profits of corporations have increased dramatically, making in some cases the imposition of the present maximum fine only a mild tax on profits available through prolonged violation of the law. To maintain the intended deterrent effect of the maximum fine established in the 1955 amendment to the Sherman Act, an increase is badly needed.

While to relatively small businesses, \$500,000 in fines may seem excessive, many of our cases are brought against some of the nation's largest corporations. I would stress that it would not be mandatory for the courts to impose the maximum fine. Indeed, courts at present do not often impose even the maximum fine of \$50,000. This judicial restraint is expected to continue. It may reasonably be assumed that the courts will continue to weigh such considerations such as the financial circumstances of the defendant, the nature and duration of the offense, and the effect on the economy.

We believe that the government's antitrust enforcement will be aided by sharpening industry's awareness of the consequences of a Sherman Act violation. The concern of top management for the financial welfare of their corporations should insure management's direct concern with antitrust compliance at operational levels.

Moreover, increased effectiveness in punishment and prevention would likely be possible with respect to firms smaller in size. The courts have a tendency, in my view, to reserve a maximum or near maximum fine for the largest firms: no matter how grave the violations by the smaller corporations or by individual defendants, their fines tend to be scaled down from this maximum. This often results in virtually meaningless penalties for smaller operations although the conduct involved calls for serious punishment.

We therefore support the principle of the increase in maximum fines proposed by H.R. 9203.

Section 4 of the bill would amend the Expediting Act<sup>10</sup> in a manner which would not provide for the power of certification of antitrust cases by the Attorney General from the District Court directly to the Supreme Court when, in the Attorney General's opinion, the case is of general public importance.

<sup>10</sup> 15 U.S.C. 28, 49 U.S.C. 44.

We believe the public interest demands that the nation's chief law enforcement officer have the authority to bring before the Supreme Court antitrust questions which may have a direct and substantial impact on the economy and on consumers in general. While we recognize that in most instances private defendants and public plaintiffs should be placed on an equal footing before the courts, we believe that the need for early resolution of issues affecting the public interest in competition in this nation's economy overrides these considerations. This certification power, of course, is simply procedural in nature; no party would be treated in a preferential manner on the merits. The courts will, I am sure, continue to resolve the substantive issues in an evenhanded manner. Nonetheless, we believe the public interest lies in the early resolution of antitrust cases of national import, upon certification as determined by the Attorney General.

We therefore oppose the amendments striking the Attorney General's certification power and urge this Committee to consider favorably that portion of S. 782 as originally drafted.

In my previous testimony today I have expressed the strong reservation of the Department concerning the enactment of this legislation as drafted. While we will continue to maintain those reservations, we would suggest that if H.R. 9203 is reported by this Committee containing certain amendments—amendments which have been made in the Senate bill, S. 782—the Department would not oppose enactment of this legislation.

First, the Senate Antitrust Subcommittee included certain amendments which were, we believe, most helpful in clarifying the purpose and scope of the bill. We note that H.R. 9203, as introduced, has incorporated these amendments and we believe that this is an improvement over S. 782 in its original version.

Second, amendments were made to S. 782 on the Senate floor, amendments which are key to the removal of our strong opposition to this legislation. I would like briefly to discuss those amendments.

In the event this Committee does not incorporate the certification power, I would like to suggest one technical amendment to H.R. 9203. The bill now provides that either party must make application to the district court for certification to the Supreme Court within *five* days of a notice of appeal and that the order of certification must be filed within *fifteen* days. We would propose a technical amendment which would extend the period for filing an application before the district court for a certification of the case directly to the Supreme Court from five to fifteen days and for the entry of an order of certification from fifteen to thirty days.

In cases where the United States has been successful in the district court and the defendant files a notice of appeal, normal processing of a copy of such a notice through the mails to the Department of Justice and to responsible officials in the Department may simply require more than fifteen days. Accordingly, this amendment is proposed so that the period for applying to the district court for an order of certification is not allowed to run inadvertently.

We would propose to strike in H.R. 9203, at lines 13 and 14 of page 3, the language in subsection 2(b)(6), which reads "and the anticipated effects on competition of such alternatives." If adopted, the bill would retain a requirement that the public impact statement disclose a description and evaluation of alternatives which were actually considered by the Antitrust Division in formulating a proposed consent judgment.

The language proposed to be stricken would require the staff of the Antitrust Division to speculate publicly as to the various effects upon competition which would be generated by various alternatives to the proposed consent judgment. These anticipated effects quite clearly can be speculated upon by the district court considering a proposed consent judgment or by other interested parties. The court retains the right under Section 2(e)(1) of the bill to consider these predicted effects.

There is no reason, however, to require the staff of the Antitrust Division, at the peril of later embarrassment, to make a public prediction as to the competitive effects of various alternatives which it has considered. It is sufficient if the various alternatives are disclosed to the court and to the public. Then in an atmosphere infused with comments from the public, from customers, from suppliers, and from competitors, the court can make an informed judgment as to whether the proposed consent decree is in the public interest.

We would also propose an amendment which would strike in line 14 of page 6 in subsection 2(g) the language "except counsel of record" and add a proviso

at the end of that sentence to the effect that contacts by or in the presence of counsel of record exclusively with employees of the Department of Justice need not be listed in the description of written and oral communications by or on behalf of a defendant with officers or employees of the government.

The present section, as drafted, it seems to me is deficient in two respects. First, it permits counsel of record to contact any officer or official of government, however illegitimate or lacking his interest in a particular case pending before the Department of Justice may be, without listing that contact in the description filed with the court. Second, I think it would tend to have a chilling effect upon totally legitimate contacts with the staff of the Antitrust Division.

The amendment which I propose corrects both these deficiencies. It requires the reporting by or on behalf of defendants of all contacts with government officials other than those in the Department of Justice which is, in reality, the party litigating the action on behalf of the United States. And it does not discourage what are perfectly legitimate contacts in the presence of counsel of record by responsible officers of antitrust defendants. Both of these suggested improvements in the bill will have, I believe, a salutary effect. We have no objection to a report of an antitrust defendant's lobbying activities, structured along these lines.

Finally, we would propose an amendment to H.R. 9203 at Section 2(e) (2), lines 3-5, striking the comma after the word "complaint" and striking "include consideration of the public benefit to be derived from a determination of the issues at trial." The Committee on the Judiciary in reporting S. 782 declared that Section 2(e) was not "intended to force the government to go to trial for the benefit of potential private plaintiffs." We would hope that this committee would agree that this is not the purpose of government prosecution under the antitrust laws. However, inclusion of the language contained in H.R. 9203 is, in our view, an invitation to the court to require the government to go to trial, for some unstated reason, even though the relief secured by the government in a proposed consent decree is fully adequate to protect the public interest in competition.

The language which would be retained in subsection 2(e)—to the effect that the court may consider "the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint"—is fully adequate to protect the public interest. It seems, therefore, that the only effect of the language which is proposed to be stricken from the bill would be to induce a district court to consider whether requiring the government to go to trial would aid private treble damage plaintiffs.

---

STATEMENT OF WALKER B. COMEGYS, DEPUTY ASSISTANT ATTORNEY GENERAL,  
ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, BEFORE THE SENATE JUDICIARY  
COMMITTEE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY, ON S. 3036—MARCH 4,  
1970

Mr. Chairman and members of the subcommittee: I appreciate the opportunity to appear before this Subcommittee to testify in support of S. 3036, a bill to increase the maximum fine which may be imposed upon a corporation for a criminal violation of sections 1, 2, or 3 of the Sherman Antitrust Act. The bill would raise from \$50,000 to \$500,000 the maximum corporate fine which could be imposed on each count of an indictment. It makes no change in the penalty for natural persons, which is a fine not exceeding \$50,000 or imprisonment not exceeding one year, or both, in the discretion of the trial judge.

A fundamental purpose of the criminal sanctions of the Sherman Act is to safeguard our free enterprise system. These sanctions are designed to deter illegal conduct and practices which prevent effective competition. This goal can be accomplished only if the sanctions provide a meaningful deterrent.

By current economic standards, the comparatively moderate corporate fine does not deter criminal conduct as effectively as it should.

In typical corporate hierarchies, middle management is under constant pressure from the top to produce. Unfortunately our experience has been that, under this pressure, some middle management succumb to hard-core antitrust violations, notwithstanding the substantial risk of personal indictment.

The much publicized *Electrical Cases* of 1960 involved indictments of relatively high level middle management and the imposition of corporate fines, at the present maximum rate. But notwithstanding this landmark criminal

prosecution, large knowledgeable corporations have continued to engage in hard-core violations of the antitrust laws.<sup>1</sup> While top management may be personally insulated from the hurly burly of hard-core violation, it has a direct concern with the financial well-being of the corporation. Increasing the maximum fine imposed on the corporation from \$50,000 to \$500,000 should insure that top management is as concerned with middle management antitrust compliance as it is with middle management "performance." It should also help to insure that the corporation does not, after all, profit by antitrust violation.

The *Electrical Cases* are interesting in this regard. In the 20 cases involved—covering multiple counts—29 corporate defendants were fined a total of \$1,786,500 for conspiracies between 1956 and 1960, or an aggregate average annual rate of \$357,300. The industry leaders, GE and Westinghouse, were fined at an annual rate of less than \$100,000 each per year. Yet sales of equipment which were the subject of these conspiracies, amounted to 1.7 billion dollars annually.

Since enactment of the Sherman Act in 1890, the maximum fine has been changed but once. In 1955 Congress increased the maximum penalty from \$5,000 to \$50,000.<sup>2</sup> Since then, the deterrent effect of the maximum fine has decreased substantially because of several general economic developments. In today's economy, the value of the dollar has decreased so that it is obvious that the penalizing and deterrent effect of a \$50,000 fine is far less than it was 15 years ago. Moreover, the relatively low corporate fine, far from commensurate now with the gravity of offenses against free enterprise, fosters a public view that such offenses are not to be taken too seriously. Such a conclusion contributes to erosion of the deterrent value of the present penalty.

In submitting this legislative proposal last fall for congressional consideration, Attorney General Mitchell pointed out that, since the 1955 increase in the maximum Sherman Act fine, "assets and profits of corporations have increased dramatically, while the purchasing power of the dollar has decreased greatly. Consequently, the basic purposes of such a fine—to punish offenders and to deter potential offenders—are frustrated because the additional profits available through prolonged violation of the law can far exceed the penalty which may be imposed. The \$50,000 statutory maximum makes fines in criminal antitrust cases trivial for major corporate defendants."

"To maintain the intended effect of the maximum fine established in the 1955 amendment to the Sherman Act, which is related to corporate profits of fourteen years ago, the increase is obviously needed," the Attorney General asserted.<sup>3</sup>

As stated by the Council of Economic Advisers earlier this year in its Annual Report for 1969, inflation and company growth in size "have lessened the force of maximum fines for criminal violations of the antitrust laws. Because a corporation can be fined no more than \$50,000 for each criminal violation, regardless of the seriousness of the crime or its cost to the economy, the corporate fine is often ineffectual."<sup>4</sup>

And, as said in the 1967 report of the Task Force on Assessment to The President's Commission on Law Enforcement and Administration of Justice, the present statutory ceiling on fines in sentences to Sherman Act defendants makes fines trivial for corporate defendants, notwithstanding the fact that multiple counts may be charged where separate conspiracies are found and the maximum fine may be imposed for each count on which a particular defendant is found guilty.<sup>5</sup>

The years since 1955 have seen a great increase in corporate assets and profits, reducing the effectiveness of the range of fines provided in 1955. Since 1955, the assets and profits of the 500 largest American industrial corporations have increased from \$107,868,512,000 and \$8,266,557,000, respectively to \$361,146,909,000 and \$24,194,773,000, respectively, a three-fold increase.<sup>6</sup> The average net income of the 500 largest corporations is now over \$48,000,000 annually.<sup>7</sup> Thus, if one

<sup>1</sup> For example, subsequent to the *Electrical Cases*, prosecutions involving price-fixing, bid-rigging, or collusive bidding have included actions against large firms in the *Fortune* 500 in the following industries: bakery products, dairy products, petroleum products, and plumbing fixtures.

<sup>2</sup> Act of July 7, 1955, 69 Stat. 282.

<sup>3</sup> Letters from Attorney General John N. Mitchell, September 29, 1969, to the President of the Senate and the Speaker of the House of Representatives, accompanying the proposed legislation.

<sup>4</sup> *The Annual Report of the Council of Economic Advisers*, February 1970, pp. 94-95.

<sup>5</sup> *Task Force Report: Crime and Its Impact—An Assessment*, Task Force on Assessment, The President's Commission on Law Enforcement and Administration of Justice, 1967, p. 112.

<sup>6</sup> *Fortune*, July 1955, Supp., p. 10, and May 15, 1969 Supp., p. 22.

<sup>7</sup> Based on the figures in *The Fortune Directory*, Supp., May 15, 1969 cited in <sup>6</sup> above.

such firm could effect but a one percent increase in its net income through an antitrust violation, it would be adding in excess of \$480,000 to its income annually. This is almost 10 times the present maximum fine. And, because of the time lag between the institution of the conspiracy and its detection and punishment, the potential gains may be substantially greater.<sup>9</sup> Certainly, the present \$50,000 fine is inadequate to punish or prevent such violations. The high incidence of hard-core violations since 1955 would tend to confirm this fact.

Compared with assets and profits, fines imposed last year in cases involving four defendants among *Fortune's* top 24 industrial corporations for 1968 amounted to \$300,000. The net income of the four firms fined<sup>9</sup> approached two billion dollars in 1968. Thus the total fine represented approximately .015 per cent of the total net income of the four. I might say here that if a maximum fine above \$50,000 had been available to us over the last three and one-half years, a period of time on which I have gathered some specific data on fines, we very likely would have recommended fines exceeding the \$50,000 maximum per count against approximately 20 of the corporate defendants in a half-dozen of our prosecutions.

The moderate size of the maximum penalty also creates difficulties in punishing and preventing violations by firms smaller than the nation's giants by fostering the view that the maximum fine is to be reserved for the giants, no matter how reprehensible the conduct. This results in courts scaling down fines on smaller corporations, even though the depredations of such firms involve sales, profits, assets, and market effects for which a maximum or near maximum penalty is appropriate and even though the character of the offenses calls for the strictest retribution.

In the vast majority of antitrust cases defendants seek to plead *nolo contendere*, in part, it is said, out of a belief that judges will impose lesser sentences on *nolo* pleas than after guilty pleas or conviction.<sup>10</sup> If it is assumed that there is an inclination on the part of the courts to impose lower fines on *nolo* pleas, the high incidence of judicial acceptance of such pleas further argues for an increase in the maximum fine on corporations.<sup>11</sup>

Fines authorized by statute in other countries for violations similar to those punishable under the Sherman Act can be much more stringent. For example, in the European Economic Community a fine of up to \$1,000,000 may be imposed, or, if the violation is done "wilfully or through negligence," this may be increased to 10% of a defendant's business turnover for the preceding year.<sup>12</sup>

There need be no fear that increasing the maximum fine will work undue hardship on the small corporate violator. S. 3036 merely raises the ceiling on fines; it does not set a floor under them. The size of the fine under any ceiling rests with the trial court. I believe that the courts and the Department generally have exercised substantial discretion and sound judgment with respect to the imposition of fines, in part reflecting consideration of defendants' ability to pay. In only 27% of the cases where sentencing occurred during the last three and a half years did the Department of Justice recommend the maximum fine. During fiscal years 1966 through 1969, about 27% of all corporations fined have received fines totalling \$10,000 or less; nearly 40% fines totalling \$15,000 or less; and nearly 55% fines totalling \$25,000 or less. It may reasonably be assumed that in setting future fines, the courts will continue, in the exercise of their discretion, to consider the means and circumstances of the defendant as well as factors such as the practices involved, duration of violation, degree of culpability, and the effect of the violation on the economy. The Department will continue, in the exercise of its discretion, to use sound judgment in recommendations to the courts regarding fines.

<sup>8</sup> For example, the five criminal cases of the mid-sixties involving sales of pressure pipe covered conspiracies lasting up to eleven years.

<sup>9</sup> American Oil (Standard Oil, Indiana); Socony-Mobil (Mobil); Gulf; and Humble (Standard Oil, New Jersey).

<sup>10</sup> *Task Force Report: Crime and Its Impact—An Assessment*, Task Force on Assessment, The President's Commission on Law Enforcement and Administration of Justice, 1967, p. 111.

<sup>11</sup> The *Task Force Report* cited above notes, at p. 112, that over a six-year period from mid-1959 to mid-1965 *nolo* pleas were accepted in every case in which the Government did not oppose the plea, and in 96 percent of the cases in which the Government was opposed. And *nolo* pleas were accepted in nearly 87 percent of the antitrust prosecutions for which fines were imposed in the period July 1, 1968 through December 31, 1969. *Increasing Criminal Penalties Under the Sherman Antitrust Act*, House Report No. 91-799, U.S. House of Representatives, 91 Cong., 2d sess., accompanying H.R. 14116, p. 3.

<sup>12</sup> *Regulation No. 17 to Implement Articles 85 and 86 of the Treaty of Rome*, Council of the European Economic Community.

Nor should there be fear of hardship on the corporation inadvertently violating the law. The Department generally seeks indictments only for hard-core violations, such as price-fixing conspiracies.

An increase in the maximum fine, which may be imposed on corporations for violations of the Sherman Act, may also aid in our fight against organized crime. For a number of years many areas of legitimate business enterprise have been invaded and the control thereof seized by organized crime. Often the small firm or marginal operation has proven most vulnerable to the inroads of underworld forces, but there is growing evidence that these forces no longer are confining their efforts to the small business sector. Commonly, organized crime, moving in with violence and intimidation, attempts to secure a monopoly in the product of service of an invaded business. Success brings monopoly profits through higher prices to the consumer. Competitors are eliminated and customers firmly tied to the supplier controlled by the organization.<sup>13</sup>

A year ago the Attorney General stressed the possibility of applying antitrust principles to organized crime.<sup>14</sup>

Since then the Antitrust Division has participated in several investigations with various Strike Forces looking into charges of unfair competition involving organized racketeers in legitimate business.

Several of these investigations have progressed quite far. Typically, the pattern that emerges is that garden-variety restraints of trade are enforced by the use of physical violence, union corruption and bribery to governmental officials.

Normally organized crime appears to run its legitimate business operations through front men. Even if we were able to convict these front men under criminal law, they can easily be replaced.

But it is also important to remember that most of the businesses we are investigating represent substantial investments of organized crime funds running into the millions of dollars. Therefore, a fine of a half million dollars, with an accompanying court injunction could very well remove these substantial threats to our legitimate business community.

We believe that, in addition to strengthening enforcement in the traditional antitrust criminal area, increasing the maximum corporate fine will prove a more effective barrier than the present maximum to the operation of legitimate business enterprise by organized crime in ways violative of the Sherman Act.

Civil remedies under the Sherman Act can prevent continuation of unlawful behavior, and perhaps dissipate its effects, but in no way can the civil or criminal sanctions available to the government achieve restitution. And profits gained through violation cannot be divested. A fine is the only redress available to the government against the corporate offender. It should be an effective deterrent to future wrong-doing by even the largest corporate offenders and by those tempted to participate in, or condone participation in, an illegal conspiracy. As observed in the Stigler Report released last year—which urged upward revision of Sherman Act fines through legislative action—"the deterrent sanction in antitrust is weak . . . [T]he maximum fine of \$50,000 will deter only a very small corporation."<sup>15</sup> The maximum corporate fine should be raised to \$500,000 to make available the imposition of penalties fitting to the gravity of the offenses against our economic system.

The House of Representatives has already passed H.R. 14116, a companion bill to S. 3036. The Department of Justice respectfully urges speedy and favorable action by the Senate on S. 3036.

<sup>13</sup> See remarks of Sen. McClellan, *Cong. Rec.*, Vol. 115, No. 43, pp. S2632-S2633, March 11, 1969.

<sup>14</sup> Address of Attorney General John N. Mitchell before the Antitrust Section of the American Bar Association, March 27, 1969.

<sup>15</sup> *Report of the Task Force on Productivity and Competition*, III. "Recommended Changes in Antitrust Policies—D. Antitrust Sanctions," *Cong. Rec.*, Vol. 115, No. 98, p. S6477, June 16, 1969.

Blank Page

(94)

## CONSENT DECREE BILLS

WEDNESDAY, SEPTEMBER 26, 1973

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 10:05 a.m., pursuant to call, in room 2141, Rayburn House Office Building, Hon. Walter Flowers presiding.

Present: Representatives Flowers, Seiberling, Jordan, Mezvinsky, Hutchinson, McClory, and Dennis.

Also present: James F. Falco, counsel, and Franklin G. Polk, associate counsel.

Mr. FLOWERS [presiding]. We will call the session to order.

Chairman Rodino requested that I preside this morning because of other matters urgently requiring his attention this morning.

Our first witness is Mr. John Paul Jones of the National Newspaper Association who is accompanied by Mr. William G. Mullen, general counsel and secretary.

We would like you gentlemen to come forward and we would be delighted to hear what you gentleman have to tell us.

### **TESTIMONY OF JOHN PAUL JONES, PUBLIC NOTICE COMMITTEE, NATIONAL NEWSPAPER ASSOCIATION, ACCOMPANIED BY WIL- LIAM G. MULLEN, GENERAL COUNSEL AND SECRETARY**

Mr. JONES. Thank you. Good morning, Mr. Chairman and Congresswoman Jordan.

It is a pleasure to be with you this morning and we thank you for allowing us a part of your time today.

My name is John Paul Jones, and accompanying me is William G. Mullen, general counsel and secretary of the National Newspaper Association. Mr. Theodore A. Serrill, executive vice president of the association is at a conference today and is not able to attend, regretfully.

I am the publisher of the Daily News, a daily newspaper in Memphis, Tenn., with a total circulation of about 1,500. It circulates among business people, judges, lawyers, public officials, and the general public. I am also an attorney and am a member of the Bar of the Supreme Court of Tennessee, the Supreme Court of the United States, and the U.S. District Court for the Western District of Tennessee.

I have been a member of the National Newspaper Association for many years, and I am currently serving as a member of its Public Notice Committee. It is the work and interest of this committee which bring me to Washington for this hearing today.

The National Newspaper Association (NNA) represents the interest of more than 8,500 daily and weekly community newspapers across the United States. The association has a limited, but we believe significant, interest in H.R. 9203 sponsored by the chairman of this committee, the Honorable Peter W. Rodino, Jr., and S. 782, a Senate-passed bill which is also before this committee. Both of these bills would require publication of information concerning proposed antitrust consent judgments, would establish procedures for public comment on such proposals and would extend the effective dates of such agreements to at least 60 days after their filing with the courts.

It is not our purpose in coming here today to either support or oppose the enactment of this type of legislation. As a matter of principle, however, NNA believes that any legislation which allows greater public participation in the decisionmaking processes of our Government is valuable. With that in mind, NNA agrees with the concepts involved in this legislation.

The interest of the association, however, is more specific than that. NNA is interested in assuring that should this legislation become law, it will adequately protect the public by guaranteeing opportunities for public awareness of the terms and other details of proposed consent decrees, as well as opportunities for public comment.

These bills already provide for newspaper public notice. Our suggestions will deal with how those provisions can be strengthened and made more specific and helpful, both to the public and the courts. We hope this committee, after its deliberations, will accept these suggestions.

Now, as these bills presently read, it directs that there be published in a newspaper of general circulation in the district in which the case has been filed and in the District of Columbia and in such other districts as the court may direct, a summary of the terms of the proposed consent judgment, a summary of the public impact statement to be filed under subsection b, and the list of the materials and documents under subsection b, which the United States shall make available for purposes of meaningful public comment, and in the places where such material is available for public inspection.

The subsection prior to this requires that consent judgments proposed by the United States in civil proceedings under the antitrust laws be filed with the district court before which the proceeding is pending and published in the Federal Register at least 60 days prior to the decree's effective date. The same section then calls for comments from the public relating to the proposed decree.

Now, as stated above, the NNA agrees with the concept of this legislation and particularly with the provisions it contains requiring newspaper public notice. We do suggest some minor modifications however.

First, we would suggest that the number of publications be reduced from seven times in 2 weeks to three times in 3 weeks. You will note that this serves the dual purpose of lessening the number of publications and correspondingly the cost, while at the same time extending the period in which the publications would appear in newspapers.

We make this suggestion because of the common occurrence today of 2-week vacations. By publishing for a minimum of 3 weeks—at

least 15 days—those favoring this legislation can be assured that even persons who are away for up to a 2-week period will be sure of an opportunity to read the notice. Four publications over a 4-week period would probably be better, but we honestly believe that a 3-week period is adequate.

Second, we suggest that the notice, as published in newspapers, contain an invitation to the general public to send comments concerning the published material to the Attorney General. This invitation might be a part of the summary of the public impact statement, a part of the public notice. To be safe, however, and in order to make the notice to the public more meaningful, we suggest that the bill specifically require that the notice contain this invitation to the public.

Third, we suggest that the bill be amended to require the party responsible for making the publications to file sworn proof of publication and copies of the notice as published with the U.S. district court having jurisdiction in the case.

This requirement would complete the record in a given case and make it easy to ascertain at a later date whether or not the notice provisions of the law were complied with. It would also make it easy for an appellate court to make the same determination simply from the record of the case in the district court.

In our appearance before the Senate committee, a question was raised as to the cost of the newspaper public notice requirements of this legislation. We believe that if our suggestion that the number of publications be reduced to three, that the costs could be as little as \$25 and in no event more than \$100. for three publications. That is, a total of three notices could be printed for no more than \$100.

Now, like any other good commodity prices, newspaper advertising varies from State to State. This \$25 and \$100 limit was given by a publisher from Detroit before the Senate, and upon his study of this proposed legislation, it appeared that these figures were in line. I guess if I had to give another estimate to give two persons' opinions, the maximum cost could be increased from \$100 to \$150. But I can't see the maximum being more than \$150, even in the most complex case, because what we have here is a summary, and not a word-for-word presentation or repetition of some legal document. The length of the notice would be determined, of course, by the drafter of it, who will probably be the U.S. attorney in conjunction with the attorney for defendant. The costs will be borne by the United States in some instances, and it is conceivable that in some cases it will be borne by the other party. The lawyers who are drafting these documents are going to be conscious of cost, and there is plenty of established custom and precedent for compressing legal notices, which call for summary rather than "in full" renditions.

Now, another question was raised in the Senate as to the method of determining which of several newspapers in an area would carry a particular notice. The individual U.S. attorney in each case should decide which newspaper or newspapers should carry the notice in order to adhere to a court's ruling in a specific case.

There are statutes in each State which establish the qualifications of a newspaper for these notices, and they vary from State to State and under certain circumstances.

Of course, a court could specify newspapers by name, but we believe a better practice would be to leave that up to the local U.S. attorney.

Most State laws specify requirements which newspapers must meet in order to be eligible to carry notices required by State law. It is our belief that any newspaper approved for the publication of notices required by State law should be eligible for the publication of this type of notice.

At the time NNA testified before the Senate committee on this legislation, the committee had before it a provision which would have required that this type of information be published only in the Federal Register. While NNA is not opposed to the idea of this type of material also being published in the Federal Register or for that matter being distributed as a press release, we believe that the only way to assure that the notices will reach the public in every given case is to require their publication as public notice in newspapers.

Now, "public notice" means nothing less than an official notice published in a newspaper. It is our hope that our comments today have helped to convince the members of this committee of the validity of this belief. We firmly believe that any other type of notice to the public in this age of modern communications is totally inadequate.

Public notice is a concept in our court procedures and in our law, and it has been proven over the years to be the only dependable way to inform the public and to actually insure that in every given case, notice will be published. Newspapers who receive this type of advertising have absolutely no interest whatsoever in the litigation. It is a matter of advertising to them, and they handle it as such, and the proof of publication is sworn to by the publisher and goes in the record in the case.

We thank you again for allowing this time. We will be happy to answer any questions which the committee members may have. We will also be pleased to provide the committee staff with the specific language to effect our suggestions.

Mr. FLOWERS. Thank you, Mr. Jones. I am interested in your conclusion that the association prefers publication three times during a 3-week period to 7 days for 2 weeks consecutively, which would be 14 publications, actually. Do you take in the local cost factor, and are you convinced that it would be a better job of reaching the public that way? Is it your contention that publication three times over a 3-week period would be better than 14 days consecutively?

Mr. JONES. Seven days consecutively, Congressman.

Mr. MULLEN. Seven days.

Mr. FLOWERS. Seven days over a 2-week period.

Mr. JONES. Yes, Congressman Flowers, that is our contention.

Mr. FLOWERS. It would be better, and obviously it would be cheaper. Do you have an estimate of how much less expensive that would be?

Mr. JONES. Yes, sir, we do. For example, weekly notice in some of the smaller communities, there are only weekly newspapers. Weekly newspaper rates are lower than daily newspaper rates. If in the community you have a weekly and daily paper, then the U.S. attorney has the option of using either paper and put it in three times in 2 weeks, while in the other system, it would have to be in the daily paper seven times at a rate higher than the weekly newspaper.

Now, that is not going to be true in every instance, but in the great majority, because weekly rates are lower. Also, newspaper rates are charged per inch per insertion, and when you take the number of

times from seven down to three in a daily paper, you are saving a cost of more than 50 percent.

Mr. FLOWERS. Well, from my own experience, three times once a week for 3 weeks is sort of the standard for publications, and I was just wondering if you were trying to keep it in line with other things such as mortgage foreclosures.

Mr. JONES. Right.

Mr. FLOWERS. I think it would be a strong position to rely upon, too.

Has your association done any particular studies of other notifications such as mortgage foreclosures to substantiate your premise that members of the public do read legal notices of this sort?

Mr. JONES. Well, we have done this study, Congressman. We have consulted the American Newspaper Publishers' Association Research Center's figures on how many newspaper readers read through the whole paper, and as you know, most legal notices don't appear on the front or the back covers.

Mr. FLOWERS. You have to read through the whole paper to get through them, isn't that right?

Mr. JONES. Yes. This study concluded that 92 percent of adults turn through the whole paper. That is a pretty high figure. It does surprise some people. This is a study scientifically conducted by a very prestigious and efficient organization, the American Newspaper Publishers' Association.

The National Newspaper Association continually works with its members to improve the effectiveness of public notices. We have a seminar planned on this subject at our annual convention in Hot Springs, Ark., in 2 weeks. This is part of a continuing effort by member publishers of NNA to make public notices more eye catching, more attractive to the person who reads the paper. Some of our newspapers sometimes, for example, in printing court dockets, print the judge's picture with the court, and things like that. It is a part of the creative art of publishing, and we feel that the readership of these notices is proven by the use of them over the years.

In the case of property mortgage foreclosures, the property is sold at the courthouse steps in every State in this country, and the real estate industry is not complaining about the lack of bidders.

We feel that public notices should not appear behind the classified section. Rather, as they should appear in one conspicuous location on a regular basis such as in the entertainment section or the sports section, or maybe the financial section.

Mr. FLOWERS. Shouldn't all legal notices be together in one newspaper section?

Mr. JONES. Yes, in the same place.

Mr. FLOWERS. Otherwise, a person who was looking for a particular public notice might miss one he was really looking for.

Mr. MULLEN. Could I add just one comment to Mr. Jones' comments?

In our experience, not official studies or surveys, but our experience in talking with publishers, and members of the public, the notices are read by the people who are concerned with them. Lawyers, real estate people, judges all have an interest in this and make a practice of reading the notice.

Mr. FLOWERS. I would agree to that but I find it hard to believe that only 8 percent of readers miss public notices.

You request that the parties should file sworn proof of publication. Is failure to file a departure from the norms?

Mr. JONES. Yes, sir. Most State laws require that the publications of the notice involved in a court proceeding be followed up by sworn proof of publication, which is an affidavit by the publisher, containing a verbatim copy of the notice in the record. For example, it would help an appellate court looking at the record to be able to easily satisfy itself that the publication requirement had been complied with even though it was not an issue in the case. It also makes a much better record for posterity and abstract people and so forth. The proof of publication is usually included in the cost of the notice. The publisher does not get paid anything extra for it. We feel that it is a meritorious proposal.

Mr. MULLEN. Usually it's a routine matter for the publisher to provide the affidavit, as part of publication to whomever inserts the notice.

Mr. FLOWERS. The trust of your testimony, in this respect, is that publications in the Federal Register would not be sufficient to constitute public notice, isn't it?

Mr. JONES. Sir, it's simply not published in enough Federal districts in the country and not available to the general public to the extent that newspaper publication would be.

Mr. FLOWERS. Thank you. I have no further questions.

Mr. HUTCHINSON?

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Do I understand your suggestion to be that whereas the bill before us requires publication for 7 days over a period of 2 weeks, that in order to accommodate publication by weekly and daily papers, that the bill should be amended to provide for three publications over a 3-week period, or something like that?

Mr. JONES. Three publications over a—excuse me.

Mr. MULLEN. Over a 3-week period. Once a week for 3 weeks.

Mr. HUTCHINSON. You're making that recommendation that the bill be amended in that way?

Mr. MULLEN. Yes, sir.

Mr. HUTCHINSON. I think from my own experience and practice of the law, that this change would conform to what is now being done in some areas of the law, although certain areas do require more than three publications. Let me ask this one question. In metropolitan areas, or in communities where there is only one daily paper, could this still be satisfied by one publication each week in that daily paper?

Mr. JONES. Yes, sir.

Mr. HUTCHINSON. That is all I have.

Mr. FLOWERS. Ms. Jordan, do you have any questions?

Ms. JORDAN. I would just like to thank Mr. Jones for coming this day and for giving his views on the subject.

Mr. FLOWERS. Mr. Dennis?

Mr. DENNIS. Thank you, Mr. Chairman.

I think I understand the gentleman's views, and I appreciate them.

Mr. FLOWERS. Mr. Mezvinsky?

Mr. MEZVINSKY. I just want to thank him also, and I have no questions at this time, Mr. Chairman.

Mr. FLOWERS. Thank you very much, gentlemen. We appreciate your appearing in force.  
 [The prepared statement of Mr. Jones follows:]

STATEMENT OF JOHN PAUL JONES, PUBLIC NOTICE COMMITTEE, NATIONAL  
 NEWSPAPER ASSOCIATION

INTRODUCTION

Thank you, Mr. Chairman, for allowing us a part of your time today. My name is John Paul Jones. Accompanying me are Theodore A. Serrill, executive vice president and William G. Mullen, general counsel and secretary of the National Newspaper Association. I am the publisher of The Daily News, a daily newspaper in Memphis, Tennessee, with a total circulation of about 1,500. It circulates among business people, judges, lawyers, public officials and the general public. I am also an attorney and am a member of the Bar of the Supreme Court of Tennessee, the Supreme Court of the United States and the United States District Court for the Western District of Tennessee.

I have been a member of the National Newspaper Association for many years and I am currently serving as a member of its Committee on Public Notice. It is the work and interest of this committee which brings me to Washington for this hearing today.

The National Newspaper Association (NNA) represents the interest of more than 8,500 daily and weekly community newspapers across the United States. The Association has a limited, but we believe significant, interest in H.R. 9203 sponsored by the Chairman of this Committee, the Honorable Peter W. Rodino, Jr. and S. 782, a Senate-passed bill which is also before this Committee. Both of these bills would require publication of information concerning proposed antitrust consent judgments, would establish procedures for public comment on such proposals and would extend the effective dates of such agreements to at least sixty (60) days after their filing with the courts.

It is not our purpose in coming here today to either support or oppose the enactment of this type of legislation. As a matter of principle, however, NNA believes that any legislation which allows greater public participation in the decision-making processes of our government is valuable. With that in mind, NNA agrees with the concepts involved in this legislation.

The interest of the Association, however, is more specific than that. NNA is interested in assuring that should this legislation become law, it will adequately protect the public by guaranteeing opportunities for public awareness of the terms and other details of proposed consent decrees, as well as opportunities for public comment.

These bills already provide for newspaper public notice. Our suggestions will deal with how those provisions can be strengthened and made more specific and helpful, both to the public and the courts. We hope this Committee, after its deliberations, will accept these suggestions.

PRESENT NOTICE PROVISIONS

H.R. 9203 and S. 782 now contain identical newspaper public notice requirements. The pertinent language is contained in the new subsection (c) which these bills propose to add to Section (5) of the Clayton Act. It reads:

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

The subsection prior to this requires that consent judgments proposed by the United States in civil proceedings under the antitrust laws be filed with the District Court before which the proceeding is pending and published in the Federal Register at least sixty (60) days prior to the decree's effective date. The same section then calls for comments from the public relating to the proposed decree.

## SUGGESTED AMENDMENTS

As stated above, NNA agrees wholeheartedly with the concept of this legislation and particularly with the provisions it contains requiring newspaper public notice. We believe, however, that the notice provisions could be significantly improved by three simple modifications.

First, we would suggest that the number of publications be reduced from seven times in two weeks to three times in three weeks. You will note that this serves the dual purpose of lessening the number of publications and correspondingly the cost, while at the same time extending the period in which the publications would appear in newspapers.

We make this suggestion because of the common occurrence today of two week vacations. By publishing for a minimum of three weeks (at least 15 days) those favoring this legislation can be assured that even persons who are away for up to a two week period will be sure of an opportunity to read the notice. Four publications over a four week period would probably be better, but we honestly believe that a three week period is adequate.

Second, we suggest that the notice, as published in newspapers, contain an invitation to the general public to send comments concerning the published material to the Attorney General. This invitation might be a part of the summary of the public impact statement, a part of the public notice. To be safe, however, and in order to make the notice to the public more meaningful, we suggest that the bill specifically require that the notice contain this invitation to the public.

Third, we suggest the bill be amended to require the party responsible for making the publications to file sworn proof of publication and copies of the notice as published with the United States District Court having jurisdiction of the case.

This requirement would complete the record in a given case and make it easy to ascertain at a later date whether or not the notice provisions of the law were complied with. It would also make it easy for an appellate court to make the same determination simply from the record of the case in the circuit court.

## GENERAL COMMENTS

In our appearance before the Senate Antitrust and Monopoly Subcommittee relative to S. 782, a question was raised as to the cost of the newspaper public notice requirements of this legislation. We believe that if our suggestion that the number of publications be reduced to three, that the costs could be as little as \$25 and in no event more than \$100, for three publications. That is, a total of three notices could be printed for no more than \$100.

Another question was raised as to the method of determining which of several newspapers in an area would carry a particular notice. The individual U.S. attorney in each case should decide which newspaper(s) should carry the notice in order to adhere to a court's ruling in a specific case. Of course a court could specify newspaper(s) by name, but we believe a better practice would be to leave that up to the local U.S. attorney. Most state laws specify requirements which newspapers must meet in order to be eligible to carry notices required by state law. It is our belief that any newspaper approved for the publication of notices required by state law should be eligible for the publication of this type of notice.

At the time NNA testified before the Senate Committee on this legislation, the Committee had before it a provision which would have required that this type of information be published only in the Federal Register. While NNA is not opposed to the idea of this type of material also being published in the Federal Register or for that matter being distributed as a press release, we believe that the only way to assure that the notices will reach the public in every given case is to require their publication as a public notice in newspapers.

The Federal Register, for example, has a total circulation of only 36,000. A large proportion of that total is limited to Washington, D.C. Even if press releases are made available, local media editors may judge them to be of little news value or may not understand their news value and therefore such items may not come to the attention of the public.

## PUBLIC NOTICE MEANS NEWSPAPER NOTICE

To the thousands of newspaper publishers whose interests are represented by NNA, "public notice" means nothing less than an official notice published in a newspaper. It is our hope that our comments today have helped to convince the



members of this Committee of the validity of this belief. We firmly believe that any other type of notice to the public in this age of modern communications is totally inadequate.

If notices to the public are to serve the needs of the public, they must be made available in a manner to guarantee that they will reach as many people as possible. Notices in newspapers are specifically designed to achieve this goal and their value for such purposes has been recognized by legislators at the Federal, state and local level for many years.

Thank you again for allowing us this time. We will be happy to answer any questions which the Committee members may have. We will also be pleased to provide the Committee staff with specific language to effect our suggestions.

Mr. FLOWERS. The next witness will be Mr. Dan McGurk, president of the Computer Industry Association.

Mr. McGurk, we are happy to have you here.

**TESTIMONY OF DAN MCGURK, PRESIDENT, COMPUTER INDUSTRY ASSOCIATION, ACCOMPANIED BY C. JACK PEARCE, COUNSEL FOR THE ASSOCIATION**

Mr. MCGURK. Thank you.

I would like to introduce the counsel of the association, Mr. C. Jack Pearce; and with your permission, I would like to have him sit with me.

Mr. Chairman and members of the committee, I appreciate very much the opportunity to appear before you today on behalf of the Computer Industry Association, which is a nonprofit trade association in the computer industry.

I have submitted to all members of the committee a relatively long statement, and rather than going through that piece by piece, I intend today to merely summarize and highlight the major thrust of the comments we have made therein. That is not to say that we don't stand 100 percent behind this statement, and since it contains considerable factual and some detailed commentary on the bill, I would urge the committee to read it, if they have the opportunity.

Mr. FLOWERS. Mr. McGurk, we will make your prepared statement a part of the record at this time.

[The prepared statement of Mr. McGurk follows:]

**STATEMENT OF DAN MCGURK, PRESIDENT, COMPUTER INDUSTRY ASSOCIATION**

On behalf of the Computer Industry Association, I thank you for the opportunity to submit views to the Subcommittee on the provisions of H.R. 9203, which deals with Department of Justice consent decrees, and expediting antitrust cases. These provisions touch upon a topic of major interest to the people and enterprises in the computer industry. While industry members may be able to focus on the interest of the body public as a whole less sharply than their own immediate concerns, we believe that the over-all interest throughout the country in the proper and expeditious disposition of antitrust litigation, by consent decree or otherwise, is very substantial.

Let us, at the outset, be relatively specific about why many companies in the computer industry think antitrust litigation, and consent decrees, are important.

Put bluntly, we are the inheritors of a concentrated industry problem that two major cases, two consent decrees, and a third major pending suit have not corrected.

The computer industry is dominated by one firm. That firm dominated business machine accounting when the Department of Justice sued it in the 1930's, and settled the case with a consent decree. That firm dominated business data processing when the Department of Justice sued, alleging monopolization, in 1952; and settled the case with a more extensive consent decree.

Now, after seventeen years under the second consent decree we can see that the same firm dominates the central area of electronic data processing—general purpose digital computer systems manufacture and sale.

After forty years, the basic industry structure remains—one giant, several dwarfs, and numerous mice. Major inhibitions on the growth of smaller firms still exist. By our count, thirteen private treble damage antitrust actions have been instituted in recent years challenging alleged monopolistic tactics of the dominant firm. The government is now almost five years deep in its own, third, attempt to deal with the monopoly problem.

The Antitrust Division now seeks a division of the dominant firm into several competing entities. Were this or another resolution of the case embodied in a third consent decree, that decree would do much to shape the basic architecture of the computer business for decades to come; the number and disposition of companies in it; the terms upon which sales were made; the opportunities for entry and growth; and, in some significant degree, the nature and uses of the products the industry evolves.

We pointed these facts out to the Senate Antitrust Subcommittee in May of this year. Since that time we have become increasingly concerned about an additional aspect of the problem—the excessive length of time this third litigation attempt is taking before trial begins, ends, and judgment results. We note that H.R. 9203 addresses the problem of excessive delay in antitrust cases. We support wholeheartedly Section 4 of the bill, providing that in cases of general public importance the courts shall cause cases to be expedited in every way. We recommend extending Section 4 to direct the expedition of relief ordered as well as trial aspects, in major cases.

If important cases are not expedited to prompt and effective conclusions, or if it is said that the current judicial machinery cannot be made to work promptly and effectively, then, gentlemen, I submit that you may have to make some legislative judgments on specific industries, as foreshadowed by Senator Hart's Industrial Reorganization Act. You may, indeed, be making legislative judgments about industry divestiture legislation of one sort or another much sooner and more broadly than any of us would have supposed, because of the past failure of our antitrust law enforcement system.

Let me attempt to impress upon you, if I may, the size of the problem. The computer industry is one of the major lines of commerce in this country. The computer industry is one of this country's fastest growing business sectors. Today producers in the computer industry, broadly defined, receive an estimated \$13 billion in revenues annually, and users of computer equipment and services may spend a comparable amount within their own establishments. Computers, together with communications facilities, are assuming a role in the economy analogous to that of the nervous system in the human body. Computers keep track of business records, personal records, patients in hospitals, chemical plant operations and the progress of space flights.

The business often seems glamorous and exciting. Aside from the glamour element—which we in the industry have been known to play up on occasion—this industry seems increasingly to be a basic requirement for a highly productive, high integrated, complex economy with a high rate of economic activity.

The computer industry uses American labor skills in a way producing a high added value. It contributes over a billion dollars to our international balance of payments. This industry is an expression of the leading edge of the skills and technology of the American people. It is not accident that the world's most developed economy is the world leader in computers; rather, our position in the field is a direct result of our over-all level of development.

As a leading-edge industry, the computer industry can play an important role in achieving efficiency, progressiveness, and world competitiveness for a high labor cost, affluent economy.

How important, then, is a competitive industry structure in this industry sector? We believe it is extremely important. As I have set out in a footnote, small and medium sized firms have made major contributions to the art of electronic data processing.<sup>1</sup>

<sup>1</sup> Among these commercial innovations were: (1) First general-purpose electronic digital computer—Eckert-Mauchly Associates (later Univac); (2) First magnetic drum memory—Computer Research Corp. (later NCR); (3) First magnetic tape auxiliary memory—Eckert-Mauchly Associates (later Univac); (4) First commercial solid-state computer production—CDC; (5) Linear programming—Bonner & Moore; (6) First commercial integrated circuit computer—Scientific Data Systems (later Xerox); (7) Commercial keyboard to tape or disc data entry—Mohawk Data Sciences, Computer Machinery Corp.; (8) Gen-

In our view a more competitive industry structure would lead to a wider range and more rapid rate of development, and expand and prolong our international advantage.

If this is so, then we have to face the fact that forty years of failure to apply the antitrust laws effectively is now costing us these additional margins of domestic progress and international standing when we need both.

The specifics of other industry situations differ. If monopoly problems are as significant in other major industries as in ours, then any major amendment to antitrust legislation, of the sort now before you, is well worth your most careful consideration.

We understand the consent decree provisions of H.R. 9203 to be intended to add a degree of public scrutiny and public accountability to the procedure for settling government cases by agreement between the government and the defendant. We think this a desirable objective. Given the importance of antitrust enforcement, significant improvement in any major feature is worth striving for. The attached memorandum (Attachment C) prepared in consultation with counsel, is submitted in hope of assisting the Subcommittee in some measure in its effort.

We would like to make clear that our suggestions concerning possible ways to improve consent decree and trial administration are not intended to reflect adversely upon the intentions or capacities of the Antitrust Division leadership or staff. We believe the leadership and staff of the Division are characterized by a high level of dedication and diligence. The Division serves a unique and vital role in keeping our free enterprise economy competitive and efficient. The Division's orientation toward efficient markets and its methods of achieving them constitute a form of trade regulation superior to many others. We believe the Subcommittee should heed Mr. Kauper's concern that the consent settlement process not be made so litigious that advantages of flexibility, expedition, and efficient use of manpower are lost.

The 1956 consent decree which affects the computer industry has never been cited as a "sell-out" decree, or as a horrible example of breakdown in the settlement process. We do not suggest that the current government suit should be settled by consent decree, under either current or revised procedures. Given the failure of two consent decrees to create competitive conditions in the industry, it is possible that a solution to which the parties can agree will not solve the problem, and the necessary steps can be taken only by a court order based on a full trial.

We do try to face a few facts. The 1956 decree did not achieve the basic goals of the Justice Department suit, as the economy evolved. Consent decrees are important instruments of antitrust enforcement in this and other industries. As one witness before the Senate, Mr. Worth Rowley, observed, there are few "regularized and effective checks" governing consent decrees. If this important process can be improved, all those who participate in the economic life of this country may gain, over time.

Now let us get to the delay problem. As we see it, the computer industry sector, users of computers especially, suffers from justice delayed over forty years.

To make matters worse, the government case, to which the smaller members in various niches, nooks and crannies of the industries must look for the opening up of a competitive market, has been under way for four years and eight months without a trial date being set.

In all frankness, I must say, gentlemen, that this is almost incredible, and, in my opinion, indefensible. In the computer industry a firm, or even a significant sub-market of the industry, can be born, have an exhilarating surge of growth, encounter the limitations on growth resulting from the dominant company's presence and practices, and, in some cases, wither, within a space of four years and eight months.

eralized time sharing—Rand Corp., MIT, Dartmouth; (9) Virtual memory—Burroughs Corporation; (10) Digital plotting of computer output—California Computer Products.

Another very large—perhaps the most important—factor in the reduced cost of computing, particularly in the last ten years, is the amazing cost reductions in solid-state components made by the semi-conductor companies. Aside from architectural innovations, which have maximized the use of these modern circuits, the cost of semi-conductors has been reduced about 30% each year for the last decade. This reduction in cost of components is what has made possible the enormously reduced cost of "hardware." The cost of "software" has moved in the opposite direction. This illustrates the point made in the text: the computer industry is built upon a very broad layer of technical ability in this economy.

Attached are chronologies (Attachments A and B) of the IBM case and the El Paso cases thus far. You will observe that the El Paso case is eighteen years old. Nine years have been taken in struggle over the divestiture ordered in that case, and it is not yet finished.

These two cases are, unfortunately, only recent examples of a continuing problem. Also attached is a copy of an excerpt from a book entitled "The Super-lawyers" in which a prominent defense lawyer describes his outstanding abilities in creating similar situations (Attachment D).

Because we are close to the IBM case, I point out a few salient points concerning it. The IBM case was filed January 17, 1969. According to the court file, a few days short of a year later, the plaintiff had finished answering the defendants' "interrogatories." In October of 1970, 21 months after filing, the plaintiff got around to originating a major request for defendants' documents.

The parties took a first cut at defining the issues in the case in March of 1972, three years after the complaint was filed. As of today, there has been no definitive final statement of the issues which are to be tried.

According to a newspaper account—I have no personal knowledge of this—the case was delayed prior to 1972 because the chief judge for the Southern District of New York held up the assignment of the case to a single judge for all purposes until an additional judge was appointed by the President to his District.

Whatever the cause of the delay before 1972, we continue to see delaying tactics and a procedural slowness that do no credit to the judicial system. Let me give you an example.

In September 1972 the New York Court ordered IBM to give the Justice Department copies of material it had excised from microfilm on grounds of attorney-client privilege. IBM challenged this before the District Court, then took it to the Court of Appeals, and the Supreme Court. The Court of Appeals ruled it had no jurisdiction. The Supreme Court declined to stay the trial judge's order. The defendant then deliberately withheld the documents in contempt of court. This started another round of hearings before the District Court, and an appeal from the District Court order fining the defendant for contempt. The whole process has taken about a year, and a lot of the hours of the attorneys of the Department of Justice which, in our opinion, should be devoted to laying before the judge the evidence in the case.

As private citizens and companies subject to suit, we surely want our courts to be fair in all litigation; especially government litigation. I venture to say that none of the members of the Association I represent really believes that he is entitled to four years before even getting around to polishing off a definition of the issues in a case. Nor would we suggest that our companies are entitled deliberately to stand in contempt of a court order which, after all, merely requires that a corporation show the court some documents relevant to whether it did what it is accused of having done. If any company does expect that, it is, in my opinion, asking for a lawless society.

With due deference to lawyers, courts, the government, and the judicial system—I am, after all, only one among many men who have helped make and peddle computers—I submit that the American people are getting a great deal less than they should get out of the law and the courts, in this kind of situation. If this is not intolerable, it should be.

In our memorandum on H.R. 9203 (Attachment C), we have submitted to you suggestions for adding to Section 4 of H.R. 9203 to help prevent this sort of thing happening in the future. In brief, we suggest that the discovery process be tightened up, deliberate refusals to disclose documents subject to discovery be punished sufficiently to stop the practice of trying to hide the ball from the court, and some restraints be put on promiscuous appeals from District Court orders for the purpose of delay.

We would expect that some might say that moving discovery along more rapidly in major antitrust cases, and providing for more review of consent decrees, would cost the time of many attorneys, and much money.

We can understand how an agency with resources as limited as that provided the Antitrust Division would be somewhat concerned about any set of requirements, however well intentioned, that impose a significant new workload on it. As this Committee may know, the Division's budget for policing the antitrust laws across the entire economy is on the order of only \$11-12 million a year. Numerous agencies with much more limited mandates receive multiples of this kind of funding.

In our view, the answer to concern about additional workload lies at least in part in increasing the resources given to the Antitrust Division. The Associa-

tion has expressed this view to the Office of Management and Budget, the Justice Department, and to the Judiciary Committee of the Senate. And we would make the point to you. Let us be concerned about efficiency and economy in the judicial process, and in law enforcement. Let us also take the time and money to do a thorough and effective job in major cases where the economic stakes for the nation run into the billions of dollars. One of the most cost effective measures to improve competition in our economy might well be to significantly increase the budget of the Antitrust Division.

As to the discovery and case expedition aspect of increased expense requirements, I am led to observe that much if not most of the money spent in the case I have seen seems to be spent in thwarting discovery. If the case includes a major monopolization, the defendant does not lack for money. He is generating excess profits daily.

I have already indicated our views on the matter of increasing the funding for the Antitrust Division, insofar as the government side of the funding equation is concerned. We would much rather see the government spend \$25 million a year in tax dollars and bring even the most important cases to a fair and just conclusion in, say, five years, than to see the government spend \$12 million and let the case drag on inconclusively for decades. In either event, defendants will spend multiples of what the government will.

I have used a number for Division funding twice the current Division budget. I do not necessarily suggest that you double the budget tomorrow. As a chief executive, I learned that you have to build organizations carefully. I suppose this may be even more true in government operations with key decision making functions. I do suggest that you and the Division should have a well-thought-out plan for staffing up the Division over a few years. I also suggest that this plan should make specific provision for accelerated handling of major actions. And I venture to suggest that when the Division knows it has a major, complex action on its hands it should formulate very clearly and specifically a program for handling that case on a planned, thoroughly-worked-out timetable.

I can tell you this. The dominant company in the computer industry didn't get where it is today without having this kind of management capability. The firms I worked with had to have a capacity to organize in the way I am suggesting the Division and the courts organize, just to survive.

We are all human and all plans, including litigative plans, are apt to slip. If we are all humans. I would think the government and the courts could acquire management skills as well as salesmen, mathematics professors, English majors, and the diverse assortment of other people who make up the computer industry.

Finally, we are looking down the appeals road. We have the El Paso case before us. We have seen appeals used as a delaying tactic in the early years of the IBM case. We wonder how long we will have to wait for a final implementation of relief in this case. Five years? Ten years? Fifteen years? Twenty years?

We would suggest that you consider allowing a direct appeal to the Supreme Court for any case certified as of major importance by either the Attorney General or the deciding District Court. This could reduce appeal time in the most significant cases. We would also suggest that you consider inserting language in the bill directing that in cases deemed to be of major importance expedited attention be given to effectuating final relief, as well as the initial trial of the case. If the case is important enough to be explained in trial, it is important enough to justify prompt, expedited implementation of the court's judgment. That, after all, is what the case is or should be all about.

I am prepared to respond to any questions you may have as best I can.

#### ATTACHMENT A

##### *Chronology of Government and major private IBM cases*

First major Justice Department antitrust suit against IBM.	1932.
Second major Justice Department suit against IBM: monopolization charged.	1952.
Consent decree settlement-----	1956.
Control Data Corp. suit against IBM (alleging monopolization).	December 1968.
Third major Justice Department suit against IBM monopolization.	January 1969.

Telex suit against IBM filed-----	January 1972.
First tentative definition of triable issues in <i>U.S. v. IBM 3rd</i> .	March 1972.
Government tentative definition of triable issues, and tentative statement of relief sought in <i>U.S. v. IBM 3rd</i> .	October 1972.
Control Data suit against IBM settled-----	January 1973.
District court decision in <i>Telex v. IBM</i> -----	September 1973.
Depositions in Government case ordered available to public.	August 1973.
Discovery in <i>U.S. v. IBM 3rd</i> finished-----	(?)
Final definition of issues in <i>U.S. v. IBM 3rd</i> -----	(?)
Trial schedule for <i>U.S. v. IBM 3rd</i> -----	(?)
Trial in <i>U.S. v. IBM 3rd</i> -----	(?)
Relief ordered in <i>U.S. v. IBM 3rd</i> -----	(?)
Relief effective in <i>U.S. v. IBM 3rd</i> -----	(?)
Length of time from first major Justice Department action against IBM to date.	41 years.
Length of time from first comprehensive consent decree to date.	17 years.
Length of time from filing of Justice Department complaint to date.	4 years 8 months.
Length of time taken for Telex trial: from complaint to district court decision.	1 year 9 months.
Length of time from Control Data complaint to settlement.	4 years.
Length of time from <i>U.S. v. IBM 3rd</i> complaint to effectuation of relief.	Estimate 8 to 15 years.
Length of time from Justice recognition of monopoly problem to effective cure.	50 years to infinity.

## ATTACHMENT B

*Chronology of U.S. v. El Paso Natural Gas*

Justice sues El Paso for acquisition of Pacific Northwest pipeline.	July 1957.
Federal Power Commission approves merger-----	December 1959.
U.S. Supreme Court finds FPC could not exempt merger from antitrust laws.	1962.
District court finds merger not violative of antitrust laws.	1963.
Supreme Court finds merger violates antitrust laws and orders divestiture without delay.	1964.
District court accepts El Paso divestiture plan-----	1965.
Supreme Court finds divestiture plan unacceptable and assigns case to different district court.	1967.
District court adopts new plan for divestiture-----	1968.
Supreme Court takes appeal on motion of two young lawyers and finds second divestiture plan inadequate.	1969.
Supreme Court dismisses motion to make divestiture optional.	June 1972.
Previously chosen purchasers of divested assets held disqualified by district court; new purchasers chosen.	August 1972.
Supreme Court denies appeals on selection of new purchasers.	March 1973.
Final divestiture-----	(?)
Time from Supreme Court order of antitrust violation and direction to effect divestiture without delay until final relief effective.	9 to 10 years.
Time from filing of suit to final relief effected-----	16 to 17 years.

## ATTACHMENT C

## MEMORANDUM ON PROVISIONS OF H.R. 9203

## I. CONSENT DECREE PROVISIONS

*General comment*

The objective of the consent decree provisions of the bill should be to integrate the possible gains of additional public scrutiny and judicial intervention with the primary advantages of consent decree procedures—expedition and flexibility in achieving the basic purposes of government prosecutions of antitrust law violations. The costs of additional procedures should not exceed their direct and indirect values.

*Specific provisions*

## A. Section 2(b) :

1. The requirement of 60 days public review is a small loss in expedition; at least in major cases, if not all cases, the advantage of public review would outweigh this cost.

2. The "public impact statement" requirement of the Justice Department is analogous to the requirement that the judge explain his decision after trial with an opinion. This seems neither unreasonable nor unduly burdensome, since the Department has hopefully reasoned out the impact in arriving at a proper consent decree.

## B. Section 2(c) :

Public display, and response to comments, would seem to serve the purpose of public visibility without unduly burdening the Division; certainly this would seem to be the case in major suits. The section might be marginally improved by making explicit the requirement that the court get a copy of public comments, and terming the Department's commentary on views submitted an *analysis* rather than a *response*.

## C. Section 2(d) and (e) :

Taken together, these two subsections require that the court make a judgment that entry of the decree is or is not in the public interest, and authorize the judge to enter upon an extensive inquiry to support that judgment.

If extensive inquiries become commonplace, much of the utility of consent decrees could be dissipated. Arguably, this would be unlikely, because judges generally seem more inclined to settle cases than to extend them. Arguably, on the contrary, a court might feel the statute required inquiry to support an independent "public interest" finding in almost every case.

The potential for an amount of independent inquiry clogging up courts and the Department's enforcement program could be limited in several ways, including:

(a) Language in the bill and legislative history to the effect that the independent inquiry authority is to be used discriminately and with a view to the advantages of expeditious disposition of cases.

(b) Language in the bill limiting the use of the explicit "public interest" finding and any supporting inquiry to major cases as certified by the Attorney General or the District Court. Such "major case" designation would also control appeal direct to the Supreme Court, and be defined with reference to (1) The amount of commerce involved; (2) Governing legal principles involved; and (3) Unique and especially significant impact on structure or conduct in the particular industry involved, or on other significant portions of the economic fabric closely linked to and affected by the line of commerce involved.

(c) Language in the bill confining judicial action to situations in which the decree seems clearly inadequate or perverse.

This might be done, for example, by predicating any refusal to sign a decree and inquire further into the matter upon a finding that the entry of the judgment is or appears likely to be inconsistent with the public interest, as distinguished from requiring an affirmative finding of consistency with the public interest in all cases. Elements to be considered would be excessive shortfall in achieving the goals of the lawsuit, visible and substantial anti-competitive potentials in the proposed judgment, or other compelling circumstances.

(d) Some combination of the above.

## D. Section 2(f) :

The Assistant Attorney General has objected to exposing the direct negotiations of plaintiff and defense counsel. Other witnesses have suggested limiting disclosure to communications with Executive Branch entities *other than* the Antitrust Division. The latter approach would seem to advance the cause of public information without cramping those immediately involved in the negotiation of the decree. If greater disclosure is required, this might be considered at a later time.

## E. Section 2(g) : No Comment.

*Concluding suggestions as to consent decrees*

Public understanding of and impact upon the consent settlement process is highly desirable. This should be achieved while leaving room to work for the specialists charged with the enforcement job. What emerges from the legislative process should contain provisions tending to significantly increase public awareness and discussion of what is going on in individual cases. The net result should be to diminish the likelihood of short-falls in performance, without requiring a detailed, extensive judicial second-guessing of the settlement in every case. H.R. 9203 seems headed in this direction. Refinements of the sort suggested may increase the manageability and improve the net value of the legislation.

## II. EXPEDITING ACT PROVISIONS

*Section 4*

The language of Section 4 of H.R. 9203 directing the judge trying the case or the chief judge of the District in which the case is located "to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited" may be adequate as to trial administration, because of its generality and its clear intent. The language might be improved by a measure of particularization, specifically identifying areas of concern and potential improvement.

If the case is sufficiently important to be expedited in trial, it is probably of sufficient importance to be expedited as to the final relief sought. We would therefore recommend that the expediting act reach the relief stage of the case.

The following language, to be inserted at line four of page eight of the House print of H.R. 9203, would extend the language of Section 4 H.R. 9203 to relief questions, and particularize, without limiting, actions which may be taken to expedite the judicial management of cases in both trial and relief stages.

"Upon and after the filing of such certificate, it shall be the duty of the judge designated to hear and determine, or otherwise to administer, the case, or the chief judge of the district court if no judge has yet been designated, to assign the case for hearing, or, after appeal, such action as is directed by courts of appellate jurisdiction, at the earliest practicable date, and to cause the case to be in every way expedited with respect to the duties to be performed by the court, including the direction and administration of final relief."

Provision for expedition may include, but shall not be limited to :

(1) The assignment of a judge with particular experience and competence in antitrust and trade regulation law, whether from the District in which the case is brought or from another District.

(2) The shifting and limitation of assignments with respect to the judge handling the case, so as to permit adequate concentration of time and effort.

(3) Provision of additional and unusual administrative support, to facilitate the handling of documents, examination of evidence, and supervision of attorneys.

(4) Close supervision of discovery and other pretrial preparation programs, to the end of creating ample, thorough trial records within the shortest feasible period of time, in accordance with the need for prompt adjudication of major issues put in controversy.

(5) Use of supplementary personnel to compile and digest data, assist the judge in analysis, and perform similar functions.

(6) In the case of divestiture or other relief, if necessary and as appropriate, the appointment of a receiver for the assets and operations of the firm or firms as to which division or divestiture is required, to insure prompt and willing compliance with court order.

The last provision (Item 6) may seem a drastic step. Experience in the El Paso case indicates that a determined, solvent company in possession of assets as to which divestiture is required can make that possession equal nine-tenths of the law, in slowing down and complicating division or divestiture. The prospect of a discretionary appointment of a receiver, if found necessary to insure willing compliance with the court order, could diminish a company's incentive to pursue extended guerrilla warfare with a judgment with which it disagrees.

## Section 5

The following language, added to Section 5 of H.R. 9203, is directed toward curtailing observed abuse of the appeals process as to discovery issues in major litigation.

"There shall be no right of appeal from District Court orders requiring discovery of documents and evidence, nor any right of appeal from any District Court order for civil contempt of court as to failure to comply with court orders concerning appearance of witnesses, production of documents, response to depositions and other evidence, discovery procedure, except upon a showing of gross and willful abuse of discretion. Any appeal on grounds of gross and willful abuse of discretion shall be expedited so as to result in the minimum feasible delay of or disruption of pretrial or trial proceedings."

Instinctively, Americans favor the right of appeal from a decision of any single authority. In the case of pretrial discovery of facts relevant to a major government antitrust complaint, the importance of rapid and full discovery of information—or, conversely, the intolerable effects of permitting extensive obstruction of attempts to secure the facts—together with the fundamental soundness of the general policy of having government trials as public and open in all respects as is possible, justify granting a trial judge wide latitude in ordering the production of documents. At least three safeguards remain: The provisions of court rules and traditions of the law concerning evidentiary privileges and protective orders; the prospect of reversal of the judge's final decision if a discovery order prejudices the fairness of the trial; and provision for appeal of a civil contempt order if the judge is acting with a gross and willful abuse of discretion.

Unnecessary delay in appeal can cause burdens and losses commensurate with the economic consequences of the judgment. If major cases require expedited trials they may also require expedited appeals.

We are dubious about entrusting entirely to the trial judge the decision as to whether a case is of sufficient importance to go directly to the Supreme Court on appeal. Both the Court and the Attorney General will be subject to infirmities. The Attorney General is likely to be in a better position to assess the significance of the particular proceeding relative to the entire range of proceedings under way and before the Supreme Court.

We would therefore suggest that an appeal go directly to the Supreme Court if either the Attorney General or the District Court determines that immediate Supreme Court review of the case is of general public importance.

The ability of the Supreme Court to control its own docket, and the public accountability of the Attorney General, can be used to prevent court clogging from unnecessary and imprudent certification by the Attorney General.

## ATTACHMENT D

## EXCERPTS FROM "THE SUPERLAWYERS"

(By Joseph C. Goulden (pp. 294-295))

"In some cases, delay is as important as victory. Profits continue while a proceeding drags. So does the lawyer's bill. When they become old and mellow, lawyers will even brag in public about how they've led the government in circles. Bruce Bromley was an active antitrust attorney in Washington and New York before and after serving on the New York Court of Appeals bench. He was astoundingly candid in a 1958 talk to a conference at Stanford Law School: 'I was born, I think, to be a procrastinator,' Bromley said. 'I quickly realized in my early days at the bar that I could take the simplest antitrust case that (the Justice Department) could think of and protract it for the defense almost to infinity.' In one of his early cases Bromley defended an antitrust action against Famous Players-Lasky Corporation, a theatrical and movie booking company, for block sales of motion pictures. Famous Players said to exhibitors, in effect, 'If you want a license to exhibit one hundred four pictures we are going to make next year, you must take them all, or you cannot have any.'

"Bromley boasted, 'That proceeding lasted fourteen years. The record was nearly 50,000 pages, and there were thousands of exhibits. I was on the road for four years almost without interruption, sitting in sixty-two cities . . . We won that case, and as you know, my firm's meter was running all the time—every month for fourteen years. The president of that company was a good friend of mine, and the company was very prosperous. He was accustomed to road show

productions of the most lavish nature and feature pictures that cost a million dollars or more. He saw nothing at all untoward in this young lawyer of his making a road show production out of his lawsuit.'

"Bromley also defended United States Gypsum against an antitrust suit filed in 1940. Thurman Arnold, then the Assistant Attorney General for antitrust matters, knew Bromley's skill at muddling a case and sought to expedite the suit by convening a special three-judge court. He told Bromley, 'I'll fix your kite, my friend.' Bromley laughs. 'The case lasted eighteen years. That three-judge court was a lawyer's paradise. We had discovery of hundreds of documents. There were six sets of defendants and six lawyers. The proof of the government, which took nearly a year, consisted in large part of comments or admissions of coconspirators. At the trial a document would be offered in evidence and then handed to each defense counsel, who would take five or ten minutes to read it. Each one would then get up and object.' The presiding judge wanted a good record, 'so he made each attorney state very carefully the grounds for each objection. Then he would state his ground when he came to rule . . . This served as a sort of inspiration to his brethren, and they finally got the habit. The one on his left would concur and state what he thought was the ground. Once in a while the fellow on the right would dissent, and of course he had to state his ground. . . . We went on for months and months and months. . . .' Lamentably for Bromley and other chronic procrastinators, tightened procedural rules now make it more difficult—but not impossible—to stall an antitrust proceeding."

Mr. McGURK. Thank you, sir.

We believe very strongly that this is a very important piece of legislation and we support it wholeheartedly. Although we have submitted certain specific changes that we suggest be incorporated with the legislation, not only do we support it, but one of my major purposes here today is to describe to you some of the reasons we believe it to be important and why we think it should be adopted.

As of today, the United States is the world leader in the formulation of antitrust legislation. It is, I believe, one of the important sources of our economic strength and viability. However, in the enforcement field today, it would appear that we tend to be falling behind the other countries of the world, and although this bill is to specifically change the legislation, we believe it will aid in the enforcement of the legislation that we already have.

There are three major provisions of the bill, as you know. The increase of the penalties for violations, and I won't comment on that. That seems like an obviously clear-cut, necessary change, with the inflationary period and the size of corporations today.

Secondly, it has to do with consent decrees, and I will have considerable comment on those, and on expediting them, which I think is perhaps the most important aspect of the bill at the present time.

Consent decrees, as you may know, Mr. Chairman, are the unusual outcome of the antitrust actions brought by the Justice Department. The Justice Department claims a win rate in the area of 75 percent and over 80 percent of those wins are consent decrees. So the consent decree is an extremely important tool, and therefore improving it as a tool for enforcement of antitrust, we believe to be vital.

The disadvantages that consent decrees have, and the remedy which this bill proposes, is that the public be brought into the process of determining consent decrees: The public be given an opportunity to comment, interested parties who are familiar with the problem be able to have their views considered by the court before the decree becomes final. I think this has been an important problem in the past, that the public interest is sometimes not considered. This is particularly apparent to members of the computer industry. There have been three gov-

ernmental actions for antitrust against the same company over a period of 40 years.

The first one resulted in a negotiated settlement, the second one resulted in a consent decree, and the third one has no trial date, although it was instituted almost 5 years ago. The consent decree that was entered into in 1956, for example, contains provisions which at the time undoubtedly appeared to have reasonable potential for curing the problem.

However, members of the computer industry outside the Justice Department and the litigants in that particular case could, I am sure, have improved the thrust and comprehensiveness of that consent decree had they been consulted. So I believe that provision of making the public able to sensibly correct and comment on a consent decree is very important.

We have some specific comments in my written testimony as to some of the problems—answers to some of the problems that people raise which have to do with the job of the Justice Department.

Let me get now to expedition, and that is extremely important, because as you gentlemen and ladies undoubtedly know—you have more legal background than I do—the key defense in almost any antitrust suit today is delay. I submitted with my testimony an article from a recent publication that described a top lawyer telling how good a defense delay is in an antitrust case. We firmly believe that since justice delayed is justice denied, this opportunity for private litigants to thwart the Government's antitrust actions by delay should and must be stopped. It is important that antitrust cases be expedited, because if they are not, and the problems are real, then you gentlemen will be asked, as the Congress, to pass legislation directly to cure some of the problems of antitrust in our industry, rather than leave that to the executive branch and the courts.

Let me give you some examples of delay and some data on delay that I believe is pertinent for your consideration.

In the current *United States v. IBM* antitrust suit, which was instituted in January of 1969, there have been over 40 million documents which have been asked for by the Justice Department, which they are attempting to understand and incorporate into their case. The discovery process has taken at least 4 of the 5 years, and any good lawyer can find many ways to slow up the discovery process. There has been an altercation in this case extending to the appellate court, once to the Supreme Court, and again on appeal to the Supreme Court, over 1,000 documents out of 40 million which the defendants believe should not be discovered.

The Justice Department has been tied up for an inordinate amount of time on what appears to be a relatively small issue. Assuming that we want to enforce the laws expeditiously and avoid these delays, how can this be accomplished?

Again, in my industry, the computer industry, there is a recent example of a comparison between governmental suit and the private suit. Three years after the U.S. Government filed an antitrust action on approximately the same grounds as the private company filed one in January of 1972, that company has already gone to court and had a decision at the district court level in their favor. And that, I think, shows how vigorous enforcement, although on a smaller case, can create more expeditious handling of these cases.

One of the great problems that the Department of Justice has is that in any antitrust action, the defendant normally spends 5 to 10 times as much in total manpower and resources as the Department of Justice does, and one of the suggestions that we gave to this committee, not necessarily directly pertinent to this bill, is that the Justice Department should have its Antitrust Division increased in resources over time. We are suggesting, for example, that the \$11 to \$12 million that the Antitrust Division has as the sole way in which our laws in this important topic are enforced, could well be doubled over a reasonable period of time, so they do have the resources to pursue these cases expeditiously, to fight the delaying actions with the necessary multi-teams of lawyers, to match those that the defendant also uses, in order to bring the cases to a more expeditious conclusion.

I think another way which is already in our expediting act, which is slightly amended in this bill, is the appointment of either multiple judges, or a special prosecutor by the Justice Department in extremely large cases. There are a number of ways, that is to say, that these cases can be expedited. Some of them require the legislation before you and some of them require more active support of the Antitrust Division by both the Congress and the executive branch.

As I have outlined in my testimony, the computer industry is one of the top five industries in the world today, in terms of size. All predictions indicate that it will be the largest industry in the world by 1980.

It has been burdened with a serious problem of antitrust as demonstrated by three separate Government suits against the same company in that field over a period of 40 years. We therefore are keenly conscious of the need to enforce our antitrust laws and urge the adoption of this bill.

Thank you, Mr. Chairman.

I would be happy to answer any questions that the committee may have.

Mr. FLOWERS. Thank you, Mr. McGurk.

In addition to the proposed legislation that we hope can be used to expedite antitrust litigation, is there some additional way to have such action, for example by policy formulation and procedure in the executive branch?

Mr. MCGURK. Well, in the executive branch, as I mentioned, Mr. Chairman, we believe that the Antitrust Division of the Justice Department is inadequately funded by about a factor of two. It is our understanding that their budget is between \$11 and \$12 million, and we believe it should be probably, if, this is going to be an important aspect of the improvement of our economic system, it should be funded at perhaps twice that level.

There has been much testimony about the fact that almost any major defendant in an antitrust case spends more in legal fees in its defense than the Antitrust Division spends on all cases in a year. There is one place, in the executive branch, and the second place is connected to that, that is with greater funding and the building up of resources over time, we believe that better management of these resources by such techniques as appointing special prosecutors or managerial groups in the same way that large law firms work, would help.

As far as the judicial system is concerned, I think that the comparison between the private antitrust suit that I mentioned and the Government one is instructive. It is not solely because it was a private litigant. In that private suit, the judge assigned to the case was a judge who had no other responsibilities than the trial of that case. As a consequence, he became extremely familiar with the background of it. He conducted the trial in a most timely manner, he had the opportunity to read something like 40,000 pages of documents that were submitted in the case, and I believe by his final decision he showed an understanding of the industry which is unusual for such a nonmember. By contrast, the judge in the Federal case has a caseload of some 400 other cases, one of which is a small one called Penn Central, and as a consequence, cannot possibly give the same time and energy to this important governmental case as if he were unloaded.

So we believe in both areas there can be direct actions which can improve the litigation in important antitrust cases.

Mr. FLOWERS. Mr. McGurk, if you have any knowledge yourself of the in-house operations of the Antitrust Division, could you tell us if they are efficiently using the money that they now have, the \$11 or \$12 million? Do you have any judgment on this?

Mr. MCGURK. My opinion, my belief, sir, is that they are dedicated, hard-working group of individuals who appear to use their resources quite well. I am sure that as in any organization spending \$12 million, one can find fault. But in terms of the amount of effort and dedication, I think the working level at the Antitrust Division is using their resources well.

Mr. FLOWERS. I will pass now to Mr. Hutchinson.

Mr. PEARCE. Mr. Chairman, if I may, as counsel, as an ex-counsel from the Antitrust Division?

Mr. FLOWERS. Your name, sir?

Mr. PEARCE. Jack Pearce. I am counsel in Washington, acting as counsel to the Computer Industry Association.

I would endorse what Mr. McGurk said as to the hard work of the Division staff and good use generally of the money they have available.

One of the problems I would suggest, from some personal experience, is illustrated by a major case like the *IBM* case or the *El Paso* case—after a decision was made that there had been a violation of the antitrust laws in the *El Paso* case the parties and the courts have taken 9 years trying to get a divestiture of the company. The Supreme Court judged it should not be acquired. One of the problems here—perhaps you can relate it to a lack of resources, or perhaps a need for somewhat more planning in the Division, and the Court—as Mr. McGurk said, is getting the large major cases being done on an expedited time frame. Within the Division, very often, you will find a senior lawyer will be appointed and he will have one or two seasoned men with him, and perhaps some more junior men with him. This is a constant practice, perhaps the best that can be done with what they now have. If you are litigating against 40 or 50 lawyers, it doesn't get the job done very quickly very often. If they had more resources and simultaneously had some kind of requirement that the trial teams be put on a time frame, or a time schedule, cooperating with the judiciary, of course, then the net effect of that addition of resources and additional planning could be a beneficial change.

Mr. FLOWERS. That all sounds good except for one thing. I am now referring to the *IBM* cases. A private case was just handed down. The Government's case has not been brought up yet. It looks like maybe the profit-minded lawyers carry through and the lawyer who is on a contingency proceeds more expeditiously than the Government lawyer or the defense lawyer.

Mr. PEARCE. I am afraid that is true.

Mr. MCGURK. Mr. Chairman, let me add one comment to that. It is my understanding that the Antitrust Division has a larger team of both lawyers and economists and assistants on this *IBM* case than any other antitrust case in history. One of the problems, I believe, is that because there has not been a background of doing the sort of resource management which as a private entrepreneur I am familiar with, the Justice Department Antitrust Division has no background in doing that. I am sure that if they had more resources and applied them more diligently and managed their resources better, they could do a better job.

I think they are diligent, hard working. I did not say that they managed their resources well. And perhaps that is where they miss.

Mr. FLOWERS. There is a possibility, isn't there, that you could overprepare a case?

Mr. MCGURK. Absolutely.

Mr. FLOWERS. You know, there comes a time when the plaintiff just has to go forward, and it would seem to me that the only conclusion that I can draw from the recent private actions as compared to the Government's *IBM* case, is that the Government is moving maybe too cautiously. Maybe that is in the public interest, I don't know. But 4 years is a long time.

Mr. MCGURK. Almost five, Mr. Chairman.

Mr. FLOWERS. It does not take a long time to prepare a case if you have five lawyers working on it.

Thank you.

Mr. HUTCHINSON.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

I note that you appear on behalf of the Computer Industry Association. Could you describe that association and its membership? I understand you don't represent *IBM*, but do you represent the rest of the computer industry?

Mr. MCGURK. We are a nonprofit trade association, open to everybody. We have invited all companies to join, and *IBM* has not accepted our invitation. We have 25 members. We're only 15 months old, and those 25 members have grown from 7 who founded it 15 months ago, and in general, we represent the smaller companies in the industry. Those that are under \$150 million in annual revenues.

Mr. HUTCHINSON. How many companies are in the industry altogether?

Mr. MCGURK. Well, approximately, I would guess if you excluded a guy in a garage, you know, who might say he is in the industry, there are probably 1,000 companies of various sizes that are participating.

Mr. HUTCHINSON. That many?

Mr. MCGURK. Yes. I don't exclude two people in the garage.

Mr. HUTCHINSON. Pardon?

Mr. MCGURK. I excluded one person in a garage, but not two in a garage.

Mr. HUTCHINSON. I see. All right.

In your prepared statement and your summary statement before this committee now, you have emphasized the importance of expediting these cases. Do you want the law to remain as it is where the direct expedition to the Supreme Court is concerned?

Mr. MCGURK. Congressman Hutchinson, we want that to remain when the case is declared to be an important case. I believe in the bill there is language to designate a case to be an important case. Those we think should go directly to the Supreme Court.

Mr. HUTCHINSON. Would you support wording of the bill in that regard?

Mr. MCGURK. Yes, sir; we do.

Mr. HUTCHINSON. All right.

Now, I believe the bill in its present form would require that certificates of major importance be made by the Attorney General and concurred in by the district court. Your statement suggests that an alternative should be provided so that either the Attorney General or the district court could make the determination.

Mr. MCGURK. Yes, sir.

Mr. HUTCHINSON. Why would you leave it up to the court?

Mr. MCGURK. If you don't mind, I will ask our counsel to answer that question.

Mr. HUTCHINSON. All right.

Mr. PEARCE. There are perhaps—it's a matter of caution, a feeling that the antitrust cases are substantial, of economic importance, a judgment that if either the district court or the Attorney General, for reasons which appear to be good for each of the respective parties, feel the Supreme Court's attention is warranted—the Supreme Court ought to have a chance of putting it on the docket.

Mr. HUTCHINSON. But the United States is the moving party. They are the prosecutors. The court's function, as I have always supposed it to be, is a passive function. For instance, if the Attorney General determines it was not an important case, why should the district court concern itself on this matter? 7

Mr. PEARCE. Congressman, I could concede that that is a valid, if you will, position. It is possible, and in some major cases, by reason of the fact that the administration at that point in time, they might not weigh antitrust very heavily and they may not weigh the case in that particular industry very heavily, and when a large portion of the body would make a different judgment, the court's independent view of the matter and the importance of the matter might be brought into the equation. I would suggest that in my own case, as counsel to the association, my own thinking is that the recommendation to the association would be that I would put the Attorney General's judgment of importance on average, given the ups and downs and people and parties and the administration of justice, on average, I would put the Attorney General's determination as to importance ahead of the court's determination in deciding whether it should go to the Supreme Court. Simply by reason of the fact, as you say, the Government is the moving party, it has the Attorney General—the Attorney General is in a position to look over the whole field of antitrust enforcement at that time,

and can look at the Supreme Court's docket, and all other things being equal, he can make a little more informed judgment as to the relative importance of the matter. The suggestion for putting them both in was an additional bit of caution, if you will.

Mr. HUTCHINSON. Isn't it preferable that the court be removed from this determination?

Mr. PEARCE. That is an alternative.

Mr. HUTCHINSON. Now, in the appendix to your statement, you say:

We are dubious about entrusting entirely to the trial judge the decision as to whether a case is of sufficient importance to go directly to the Supreme Court on appeal. Both the Court and the Attorney General will be subject to infirmities. The Attorney General is likely to be in a better position to assess the significance of the particular proceeding relative to the entire range of proceedings under way and before the Supreme Court.

I wonder if that statement doesn't run contrary to what you have just told us?

Mr. PEARCE. No, if you put the court in a backup position, let us say, as I believe I just tried to say, the Attorney General is probably in a better position most of the time. However, let's suppose that one-one hundredth of the time, the Attorney General declines to make a judgment of importance, and the court as a backstop might make an appropriate judgment that this should go to the Supreme Court.

In that case, the backup of the district court might be important.

Mr. HUTCHINSON. You are asking the district judge to act on a responsibility and duty which is not his. I don't think, the district judges would welcome that.

Mr. PEARCE. Perhaps not. Congressman.

Mr. HUTCHINSON. It seems to me you are asking him to do something out of his proper judicial duties. It is not up to him to determine which way the Government wants to take the case. I don't think the judges should make the determination of what is in the public interest. I think he should make a determination only of what the law requires.

Mr. PEARCE. I might want to respond to that, because that is something I had a few thoughts on.

I think Mr. McGurk wanted to make a comment.

Mr. MCGURK. Yes. I wanted to say that perhaps one of the reasons for suggesting this is that many of us in the computer industry are quite paranoid. Perhaps an example of this would be the case determined by the district court in Tulsa, this governmental case, for example, was filed on the last day of one administration, and has gone through a 4-year administration, and looks to be probably still active when we have a new President.

At the same time, the judicial expedition of this case in the New York court was apparently held up because of an altercation on the appointment of additional judges. We want to try to make sure there is more than one avenue to declaring a case to be of national importance.

Mr. PEARCE. If I may respond to the point you just raised about public interest considerations, I might suggest that in interpreting the word public interest, the court sitting in that antitrust law case would seek to determine whether the decree effectuates the purpose of the antitrust suits. This would be the concept of the public interest determination.

Mr. HUTCHINSON. I thought that was the intent of the language.

The language will have to be perfected to say that more explicitly, though.

Now, you said in your statement, in the appendix on page 2:

Language in the bill confining judicial actions in which the degree seems clearly inadequate or perverse.

Can you suggest that the judge is to determine the matter as it appears to be? That seems to be slightly inconsistent with the public interest. What is the advantage in your mind of making a negative determination instead of a positive one?

Mr. MCGURK. I think perhaps, Mr. Hutchinson, for the reasons you stated, it seems like it's stretching the judicial function to make a positive determination that it is in the public interest. But subsequent to public comment, he could make a negative determination that it appears—it goes against the public interest. It is just a less burden of judicial activity, you might say.

Mr. PEARCE. I might also say—

Mr. HUTCHINSON. Would it be easier under the circumstances to find it inconsistent?

Mr. MCGURK. I think it would be a more complete and difficult job for him to say yes, this is in the public interest, where he might be able to say it doesn't appear to be.

Mr. HUTCHINSON. I see. Well, there is a pretty fine line there.

Mr. PEARCE. Might I suggest, Congressman, that these amendments, the ones that you focused on on page 2, were or are advanced more in the nature of refinements and could be inserted should there be a judgment by the legislature involved that the bill reaches too far and perhaps imposes too much of a burden. These are ways to cut down that burden if people feel there is too much of a burden. These are suggestions as to the consent decree portion, and not intended necessarily to suggest that the bill reaches too far.

Mr. HUTCHINSON. I have no further questions.

Mr. FLOWERS. Thank you, Mr. Hutchinson.

Mr. McClory?

Mr. McCLORY. Would it be your position that in cases of a consent decree, that the decree would constitute or produce a basis for a private suit for treble damages?

Mr. MCGURK. We are not suggesting, Congressman McClory, that the law be changed in that respect. Today a consent decree does not form an automatic basis for treble damages, and we're not suggesting it be changed.

Mr. McCLORY. In regard to expediting, if that sort of element were present, would it not encourage earlier dispositions of antitrust cases by consent decrees for the reason that this delaying action would result in the decrease in damages which would flow as a result of the consent decree?

Mr. MCGURK. That is possible, sir, but our view is that one of the major reasons that defendants are willing to negotiate a consent decree at all, which is an expeditious way to conclude a suit, their major impetus is to avoid treble damage litigation. By putting it there anyway, I think it would pull any incentive to sign a consent decree.

Mr. McCLORY. Isn't a lot of the delay a result of this feeling that ultimately we are going to be able to negotiate a settlement through a consent decree and sort of abstaining action?

Mr. MCGURK. Well, if one says that a person who is violating the antitrust laws is making unjust monopoly profits, delay increases by every day the amount of the profits. Are you suggesting that perhaps by making a consent decree subject to the treble damages, those might be recovered?

However, most people like to kick problems ahead of them and if earning monopoly profits and delaying the case, you end up with a judgment that is no more severe against you in the end, there is no incentive to settle. You do run that risk. I think people are willing to run risks if they can defer their problems sufficiently.

Mr. McCLORY. And you support the increase in the maximum fine?

Mr. MCGURK. Absolutely.

Mr. McCLORY. And that would in itself be a basis for earlier disposition, wouldn't it, to avoid the imposition of a greater fine?

Mr. MCGURK. The fine has been raised, I believe, to corporations to \$500,000. In cases of national interest, \$500,000 is peanuts. For example, in the recent contempt citation in the Southern District Court of New York where the judge held IBM in contempt, he fined them to be what he estimated to be 5 percent of their net profit after tax, daily, which turned out to be \$150,000 per day. A half million is really not a significant number.

Mr. McCLORY. In other words, although you support the increase in the maximum fine, you do not have the feeling that this is going to contribute greatly to expediting the disposition?

Mr. MCGURK. Not in large cases, sir.

Mr. McCLORY. I think that is all.

Mr. FLOWERS. Mr. Dennis.

Mr. DENNIS. Yes, sir; Mr. Chairman.

Just glancing through your statement here, I note that you have a proposal on page 5 which rather limits the right of appeal and discovery. I can appreciate the problem you are driving at, and yet it seems a bit drastic to say that there could be no appeal from the discovery ruling of the district judge, except in cases where there was willful abuse of discretion, when the discovery may decide the local law suit. Have you had any thoughts about resolving this aspect without going quite that far?

Mr. MCGURK. Sir, I think that is because my understanding is that if, for example, the discovery process is later determined on appeal—

Mr. DENNIS. Reversing it, of course, if there is an error, I suppose that is the right.

Mr. MCGURK. That can destroy the whole case rather than permitting a defendant to constantly appeal at every piece of discovery, it's left up to the district judge, and if he is wrong enough, the case will be overturned finally. But in the meantime, in terms of available documentation that is discovered, a proper judicial decision can be reached.

Mr. DENNIS. Of course, if there is a legitimate reason to require discovery on something important, even though a reversal is the end result of expensive litigation, a good deal of damage may have suffered in trade secrets. Regardless of what is in that decree, it may be in the public favor. It is a court question, I think, that requires some balance of thought.

Mr. MCGURK. I think the other aspect, Congressman Dennis, is that it is generally the case that the district court judge is most familiar

with the specifics and is perhaps the best person to judge whether or not the evidence should be held out for various reasons, only if he willfully abuses that discretion should he be overturned. He is the man on the scene and is close to it. We therefore—if you like—want to put the burden back on the defendant and try to reduce insofar as possible the delaying tactics in the discovery process.

Mr. DENNIS. Of course, normally you get appeal from an error. You don't have to show willful abuse or indiscretion, you have to just show an abuse. It is a drastic concept. Maybe you have got a point, but I think you would have to agree, you are going beyond what norms are regarded in the process.

Mr. MCGURK. I am impressed, Congressman Dennis by the grounds for appeal that can be found by an inventive law firm, and I perhaps am relating to these recent experiences where a judge, Judge Edilstein, in the southern district of New York ruled last October that certain documents had to be produced. They were legitimate, and that decision has both entrapped the Justice Department in a whole lot more legal maneuvering and absorbed their resources, delayed their prosecution of the suit, and created multiple appeals. When he, in his discretion, having examined all of the facts, if he is wrong and it's material to the case, then the whole case can be overturned. He runs that risk, and so does the Government.

The delaying tactics in my opinion have been a gross abuse of the judicial system.

Mr. DENNIS. You are putting your finger on a problem which exists not only in antitrust cases. I expect it's more aggravated in antitrust because of the nature, but when I was practicing, and broad discovery was first allowed I was sympathetic to the idea of moving things along and having the truth come out. I was often amazed at the ability of my colleagues to think of reasons why it shouldn't be allowed, and by litigating the discovery process, they would, in fact, try the case. It's a real problem, and yet it is quite vital.

Another more philosophical question is related to this legislation. You want to make the laws as good as they can be as long as we have them, but you make the very persuasive presentation that the fact that under these antitrust laws, they have been trying to break up one combination for 4 years, and haven't gotten anywhere. I just raise the question, and I don't necessarily hold this view, but maybe it's possible that we're trying to legislate against economic forces which are so efficient that they're going to operate however they wish, regardless of what we do. What do you think about that?

Mr. MCGURK. I hope you're wrong, sir. I think the United States has the finest fundamental economic system and philosophy of any country in the world. I think a very important part of that is certain restraints must be put upon the exercise of economic power and that the fundamental antitrust laws were designed to do that.

Mr. DENNIS. Well, of course, they were, and I have always believed in competition too, but for example, one man is efficient, one man is good, and one man isn't so good. Here we sit trying to redress that and it is a pretty difficult job.

Mr. MCGURK. Yes, sir, it certainly is.

I spent some time in the courts, both in New York and in Tulsa where the private antitrust suit was held, and I was extremely im-

pressed by the grasp of Judge A. Sherman Christianson in his understanding of economic forces, his understanding of economic power and his decision, which I think will become a classic in antitrust laws, because it reaches 222 pages and he describes specifically that problem. Was it industry, foresight and skill, that retained this monopoly position, or was it the use of monopoly power in a more raw sense? He came to the conclusion that it was the latter, and I think that is why these things had to be adjudicated. So that our judiciary can examine and come to these conclusions. The thing that disturbs me is that in the Government cases, I can't foresee when the judiciary will have the opportunity to come to a decision. After 5 years and no trial date being set as of yet, the issues have not been joined as to what the specific issues are. The discovery process is still going on. It is a gigantic case, but it is still going on. The judge has to determine the questions that you bring up. I just want to give him that opportunity.

Mr. DENNIS. I think you are undoubtedly correct. That is too long a time.

Mr. MCGURK. And of course, an additional problem, I didn't mention very much here, is that when there is a final adjudication, the relief will be equally painstakingly long if we can look to other places. As an example, the chronology of the *El Paso* case, which was long, long enough in the courts, but in the enforcement for the relief, that took another 15 years.

Mr. DENNIS. Of course, they contend in the meantime that all of the economic factors according to the decree have changed, so that the decree was all wrong—not from the legal point of view, but what they were trying to accomplish. It is a very interesting subject, and I don't want to take up too much of your time.

Thank you.

Mr. FLOWERS. I am going to yield to counsel to ask a few questions.

Mr. FALCO. Mr. McGurk, I would like to direct your attention away from the computer industry to another industry, namely, the energy industry. I was interested in your chronology of the *El Paso Natural Gas* case. You make reference to the 1969 Supreme Court that took the appeal on the motion of two young lawyers objecting to a consent decree involving a divestiture plan, as inadequate. Didn't that involve an extraordinary proceeding before the Supreme Court because it felt the public interest was not being served by the settlement reached by the Justice Department and the private industry?

Mr. PEARCE. The answer is yes, that did involve extraordinary circumstances before the Supreme Court when the Supreme Court, in effect, determined that the settlement procedures between the Government and the private party did not adequately protect the public interest.

Mr. FALCO. Isn't there extreme public interest in the cases that have already been tried since issues are remanded on appeal and usually the relief issue?

Mr. PEARCE. Correct. Relief is what the case is all about. If there is first a judge—first a judge must determine whether there is a violation of the antitrust laws, and as Mr. McGurk said, he must make this specific determination if this is a monopolization case, whether success is from skill, foresight, or from predatory tactics. If the

judgment is that there is an antitrust violation, the whole point of the matter is to achieve a more competitive situation, and that then becomes the crux of the matter. If it takes 8 or 9 years to get the relief done, then justice is delayed or denied for that period of time, and if in the *El Paso* case, the whole question of proper relief hangs on whether two young law professors from the State of Utah happen to be in the case or not. I think that is pretty precarious.

Mr. FALCO. It appears that a good portion of your statement relates to the adequacy of relief and discovery matters granted in Government antitrust cases, including those settled by consent decrees. In the Senate, the Assistant Attorney General testified, and I quote:

If, for example, we file a merger case and the defendant agrees to divest the plant which is involved, I seriously doubt that anybody is going to consider any other alternatives.

Isn't it true that in trials of merger cases, the discovery process and public exposure resulting from the actual trial often show a need for other and more effective relief than prayed for in the complaint at the time of its filing, which as you have testified, can be years, and even decades prior to the resolution of the case?

Mr. MCGURK. In other words, you are suggesting that subsequent to the initial filing and prayer for relief therein, there may be additional relief required after the passage of such time?

Mr. FALCO. Yes. Isn't it true that just because a particular merger violation is alleged mere divestiture might not in fact solve the problems which we are interested in, namely, promoting competition in the particular industry or line of commerce?

Mr. MCGURK. Yes, I think that might be true.

Mr. FALCO. Both here and in the Senate, there has been much testimony that the public interest would be protected by simply comparing the prayer for relief and the complaint and the effects of a consent decree when entered. Isn't it true that in rule 54(c) of the Federal Rules of Civil Procedure, relief is to be given to a party entitled to relief, and I quote again, "even if the party has not demanded such relief in his proceedings"?

In consent decrees in merger cases in which divestiture becomes the sole criteria for public interest purposes, isn't it true that the entire factfinding of discovery which usually leads to actual relief that promotes as well as protects competition, is lost?

Mr. PEARCE. You have two questions, counsel, and let me take—agree with both. I would say that the answer to both of those questions is yes.

Let me illustrate with the two cases brought up in this testimony. First, the complaint in the *IBM* case asked only for a very limited set of inhibitions upon the defendant's conduct. In 1972, the Department of Justice filed a statement of tentative proposed relief, which calls for a divestiture of the company, that is a divestiture of the assets and operations into independent competitive entities.

If one were simply to look at the complaint, one would have no appreciation at all of what is now thought to be the proper scope of that suit. As a matter of fact, the Department of Justice complaint asked for less in this major comprehensive Government action than Judge Christianson in *Tulsa* determined was necessary to deal with one part of the computer industry, the peripheral equipment area, in the area of injunctive relief.

Further, the *El Paso* case shows that on more than one occasion, the Department of Justice Antitrust Division agreed with the defendant on the type of divestiture which the Justice Department deemed adequate, and the Supreme Court was put to the trouble, if you will, or made the judgment, that these types of divestitures were entirely inadequate and caused the case to be committed to the district court and changed the district court—the district court judge on one occasion, in its effort to insist upon and get a full divestiture.

Mr. FALCO. And in another sense, aren't you really saying in cases like *IBM* and the *El Paso* case, the real issue is not often a particular merger of specific corporations, but rather the entire structure of an industry and that such real issue is blurred by a narrow focus which determines a Government victory solely with reference to achieving a divestiture of a particular merger in a particular case by consent decree?

Mr. PEARCE. The answer again is yes. I would add, however—just by way of qualification—the problem of industry structure is more clearly posed in a monopolization case, such as the *IBM* situation than necessarily in an acquisition or merger case.

Now, I believe it's true that in a merger case, the question of whether relief has continued 8 years later to be necessary or what form the divestiture takes, or whatever, that it is conditioned necessarily and influenced by the market structure in the given industry, and you must make a determination as to what the relief will in fact accomplish.

I suggest that the monopolization case usually presents the market structure more directly.

Mr. FALCO. You have testified as to the manner in which small members of industry look to Government antitrust cases for opening up competitive markets. Are you criticizing the fact that over 80 percent of Government are settled by consent decrees, because aids to small businesses that are part of the national policies reflected in the antitrust laws may be lost?

Mr. MCGURK. No; we're not objecting to the number of consent decrees, we are saying that the expeditious prosecution of those cases and a sound relief action is what the smaller companies who cannot possibly afford to pursue these cases on their own, they are looking to the Government today, and in both counts, both expeditious pursuit of the cases and the terms of the consent decree sometimes fall considerably short of creating sound competitive markets.

Mr. FALCO. Quite clearly you are alleging that there are recidivistic violations and violators in the computer industry. Is it your position that at some point criminal antitrust action which can only be brought by the Justice Department, should have been brought by the Government?

Mr. MCGURK. Let me make a quick comment on that and give it to Mr. Pearce.

My understanding of the antitrust laws and the prosecution thereof is that a sound solution can be achieved through the civil route, and that the criminal prosecution is normally reserved for cases which don't go to either structural problems, but rather to problems of collusionary practices. Certainly in the computer industry, the civil suit is adequate to solve the problems, if it is prosecuted.

Mr. FALCO. What would you say then would be an effective deterrent to antitrust violations that can only be challenged in civil actions, like a merger case?

Mr. PEARCE. I will have to confess that I am not fully prepared as a lawyer to answer that question in terms of what additional constraints in civil actions would be required.

Counsel, I confess an inadequacy on the point.

Mr. FALCO. Thank you.

Mr. FLOWERS. If you would like to submit us something in that regard, we will be happy to receive it.

Thank you, gentlemen, for being with us this morning. We appreciate your testimony.

Our next witness is Prof. Howard R. Lurie, Villanova University Law School.

Would you come forward, and we will receive your testimony at this time.

**TESTIMONY OF HOWARD R. LURIE, PROFESSOR, VILLANOVA  
UNIVERSITY LAW SCHOOL**

Professor LURIE. Thank you, Mr. Chairman, and members of the committee.

My name is Howard R. Lurie, and I am professor of law at the school of law of Villanova University in Villanova, Pa. My primary teaching responsibilities are in the areas of antitrust and trade regulation. I have been on the Villanova faculty since September 1968. Prior to that time I served as a trial attorney with the Federal Trade Commission in the Division of General Trade Restraints of the Bureau of Restraint of Trade.

I admit at this time having a strong bias in favor of sound antitrust legislation and vigorous enforcement of the law. I am not convinced that we are enjoying the benefits of either at the present time. I am, therefore, somewhat ambivalent toward H.R. 9203 and S. 782. I share the concern which prompts this proposed legislation, and believe that some of the provisions could be of great value. However, in my opinion the legislation is inadequate to deal with the real problem, and if my worst fears are realized, may actually be counterproductive. Allow me to elaborate.

This legislation, in addition to amending the Expediting Act and increasing the penalty for violations of the Sherman Act, would reform the Justice Department consent decree procedure by opening to public scrutiny and comment the Justice Department's decision to terminate an antitrust proceeding by entry of a consent judgment.

As a condition precedent to the entry of any consent judgment proposed by the Justice Department, the bill would require:

(1) the publication in the Federal Register (a) of the terms of the proposed consent judgment; (b) any written comments relating to it; (c) Department of Justice responses to those comments; and (d) a statement describing the public impact of the consent judgment.

(2) the filing with the court of (a) all contacts by a defendant with Government officials relevant to the consent judgment; and (b) copies of such "materials and documents which the United States considered determinative in formulating the proposed consent judgment;" and

(3) a judicial decision that the entry of the consent judgment is in the public interest.

This proposed legislation, if effective, should insure that any consent judgment entered in any Justice Department antitrust case will be in the public interest. My fear is that the legislation will not be effective in insuring adequate antitrust enforcement on the part of the Justice Department. I see the enactment of this legislation as an expression of a lack of confidence on the part of the Congress in the enforcement of the antitrust laws by the Department of Justice, especially in the entry of some consent judgments. That lack of confidence is entirely justified. However, in an effort to open to public view the disposition of consent judgments, and, thus, insure that they are in the public interest, this legislation may in fact further conceal from public view terminations not in the public interest of antitrust proceedings by the Department of Justice.

There is little in this proposed legislation with regard to consent judgments that could not be accomplished by the Justice Department on its own if it wanted to do so. The justification for the legislation, therefore, must be that it brings about or insures a result that would not otherwise obtain. In other words, this bill assumes that the Justice Department will act differently with the legislation than without it, and that the change will be in the public interest. Assuming, therefore, that the Justice Department's settlement of some antitrust cases has not been in the public interest, the question is whether this legislation will be an effective remedy. If the failure on the part of the Justice Department is due to mere neglect or incompetence, the legislation may be an effective remedy.

If, on the other hand, the ineffective settlement is deliberate, this legislation may exacerbate the situation. Take a hypothetical situation: A Justice Department antitrust investigation is the target of improper influence by corporate officers upon high Government officials. The result today might well be a consent judgment that provides some, albeit inadequate, relief. But the existence of the antitrust investigation and its settlement become matters of public record and may become the subject of public and congressional criticism and scrutiny. If the proposed legislation becomes law, improper efforts to curtail or emasculate an antitrust proceeding, to be effective, must come at an early or precomplaint stage and result in the termination of the investigation rather than the issuance of a complaint and settlement by consent judgment. From the standpoint of an antitrust violator, therefore, this legislation places a premium on attempting to interfere with or squelch an investigation at the earliest possible stage. I might add, even should these efforts on the part of a violator prove unsuccessful, this legislation as currently drafted would not require their disclosure, since the only communications that need be disclosed are those "concerning or relevant to the proposed consent judgment."

Any communications prior to the formulation of the proposed consent judgment are, arguably, exempt from disclosure. Such early interference may also be more serious since it may prevent the initiation of, or cause the early termination of an investigation prior to the time that a violation of the law, as evidenced by the investigative file, is evident or established. Such failures to investigate further, if questioned, can frequently be justified on the grounds that the investiga-

tion had failed to produce sufficient evidence of a violation of law to warrant further investigation.

It has been said that over 80 percent of all antitrust cases are settled by consent, and that the consent process enables the Justice Department to conserve its vital resources. This legislation may not be desirable if it in fact deters the entry in good faith of consent judgments. It is entirely possible that this legislation will deter or prevent the Justice Department in some, and defendants in other cases from settling disputes by consent, even in good faith. Let us examine the possible deterrent effect upon the Justice Department first.

The bill requires that before entering any consent judgment proposed by the Justice Department, "the court shall determine that entry of that judgment is in the public interest." An adverse determination is either appealable or it is not. If it is, the Government must engage in litigation over whether it can dispose of a case without litigation. If it isn't appealable, the Government may have to litigate a case which from the standpoint of a wise allocation of resources may not be justified. Under the proposed legislation the Government's allocation of its resources is irrelevant to a decision to settle by consent, and need not—perhaps even may not—be considered by the court in its determination. Arguably, a nonparty could challenge the court's determination to enter the consent decree if based upon such a consideration. The Government may, therefore, forgo bringing some weak—either factually or legally—but legitimate cases if only partial relief can be obtained by consent. Thus, instead of partial relief, there may be none.

I am also concerned about the effect that subsections (e) and (f) of this bill might have in producing litigation that could encroach upon the Justice Department's resources and delay the settlement of cases. Subsection (e) which requires the court to determine that the entry of a consent judgment is in the public interest could put the court in the role of a devil's advocate against the defendants and the Department of Justice. I question whether the court can make the determination required under subsection (e) without resorting to some of the procedures of subsection (f), such as appointment of a special master or authorizing intervention, and wonder if its failure to do so provides interested persons a basis for challenging the entry of the consent judgment. Certainly, sufficient litigation to resolve the doubts is bound to arise.

An antitrust defendant might likewise object to consenting to a judgment if this bill becomes law in its present form. One of the major reasons that defendants have been willing to consent to a judgment against them has been the protection afforded by paragraph 5(a) of the Clayton Act which denies prima facie effect in subsequent treble damage actions to consent judgments. Subsection (h) of this bill purports to retain that protection. I submit, however, that the protection of subsection (h) is ineffective. Subsection (b) provides in part:

Copies of the proposed consent judgment and such other materials and documents which the United States considered determinative in formulating the proposed consent judgment shall also be made available to members of the public at the district court before which the proceeding is pending and in such other districts as the court may subsequently direct.

This language could require the production of the entire investigative file. When S. 782 was being considered by the Senate, Assistant

Attorney General Thomas E. Kauper in a letter to Senator Javits objected to this language and it was amended. Kauper's objection was directed at having to produce those Government documents which "may be considered in one way or another to have entered into the determination of the Government to enter the settlement, and therefore would be 'determinative.'" Thus, S. 782 was amended to exempt from disclosure materials and documents protected by section 552 (b) (4) and (5) of the Freedom of Information Act of title 5 of the United States Code. Not exempted by the Senate amendment was material covered by section 552 (b) (7) which relates to "investigatory files compiled for law enforcement purposes." I suggest that subsection (b) covers more than simply those materials and documents which were relevant to the Government's decision to settle the case by consent, but covers in addition those which were relevant to the formulation of the consent judgment. In other words, the bill calls for the disclosure of those materials and documents which were relevant to the relief, and that of necessity includes those materials and documents which go to establish or prove the violation of law. I suspect that antitrust defendants are going to be very reluctant to allow disclosure of such materials and documents. Their value to treble damage plaintiffs is obvious. If the evidence can be obtained at little or no cost, the unavailability of prima facie effect of a consent judgment is insignificant. Of course, this provision could be amended to exempt matter protected by paragraph (7) as well as paragraphs (4) and (5), but that would emasculate the provision. Without either the Government's thinking or the Government's evidence, I think it would be difficult for one to determine whether the settlement is in the public interest.

Please understand that, contrary to how my testimony may sound, I support the required disclosure of the investigative file in consent judgment cases. Likewise, I believe that 5(a) of the Clayton Act should be amended so that judgments in criminal antitrust cases where the defendant pleads nolo contendere will not be denied prima facie effect in subsequent treble damage actions. The ability of a defendant to plead nolo contendere and avoid prima facie effect is, at the present time, a tremendous escape hatch for corporate criminals. By consenting in a criminal case and pleading nolo in a companion criminal action, a defendant may emerge from an antitrust violation with no more than a slap on the wrist and an admonition to "go and sin no more." As a practical matter, without the advantage of the prima facie effect of a prior Government judgment, some private damage actions may never be brought. Injured parties are thus denied compensation, and defendants are permitted to keep their ill-gotten gains. Shielding defendants from the only effective means some injured parties may have to recover for their injuries is unlikely to have a significant deterrent effect. Furthermore, competitors may have been so seriously injured that competition itself may be permanently impaired. Until obedience to the law is less costly to potential violators than disobedience, the latter is likely to flourish.

At the outset of my testimony I suggested that I was in complete agreement with the concern which prompts this proposed legislation, but that I considered it inadequate to deal with the real problem. Consent settlements which are not in the public interest are but a symptom of a more serious problem. There is a lack of confidence in

the handling of antitrust cases by the Department of Justice. Without suggesting that the Department is corrupt or rotten to the core—neither of which it is—one can suggest that it is not free from improper political influence. We have witnessed attempts, sometimes successful, on the part of corporate antitrust violators to influence the outcome of antitrust proceedings by reaching high Government officials. So long as the enforcement of the antitrust laws is under the direct control of politically concerned officials, the danger of improper influence exists. The solution to the problem is to render impossible, or at the very least more difficult, the ability of politicians to improperly influence the antitrust enforcement machinery. I submit that this can best be accomplished by vesting all governmental antitrust responsibility in a single Government agency as independent of political control as a representative democracy can permit. Such an agency should be able to submit its own budget to the Congress, enforce its own subpoenas in the courts, and take its own cases to the Supreme Court without going to the Solicitor General. Only when the antitrust enforcement machinery is free to operate in the public interest can we be confident that the outcome of its proceedings will be also.

I thank you for the opportunity to present my views.

Mr. FLOWERS. Thank you, Professor Lurie.

Are you for the bill or against the bill?

Professor LURIE. As I indicated, Mr. Chairman, my feelings are somewhat ambivalent. I suppose if given this bill on a take-it-or-leave-it basis, as is, I would take it.

Mr. FLOWERS. Thank you.

Well, perhaps you have some specific modifications that you would recommend in the bill as it is now?

Professor LURIE. I would suggest the tightening of the lobbying contact provision so that it includes those contacts by corporate officers at a stage earlier than the consent judgment itself, which seems to me to be a loophole in the bill as presently drafted.

I think I would clarify the provision dealing with the court's determination of a consent judgment being in the public interest to make it clear whether that judgment or that determination by the court is an appealable determination, whether the court really "may" consider some of these factors or "must" consider them, and whether it can consider factors not presently contained in those two paragraphs of the subsection.

Mr. FLOWERS. Well, moving to some questions that Mr. Dennis raised, or Mr. Hutchinson raised, do you think that the courts should maintain a passive role in these cases, or would you allow more active participation on the part of the judge?

Professor LURIE. I would not place any responsibility on the judge which is not a strictly judicial function. I don't think it is the role of the courts to make determinations in antitrust cases as to whether the settlements are in the public interest.

It seems to me that under the adversary process we utilize in this country, a determination as to what is in the public interest is best left to the law enforcement individuals. Assuming, of course, there is confidence in those laws. If there is not confidence, then a structural change is necessary in the enforcement machinery.

Mr. FLOWERS. You are basically saying what I have heard many, many times: laws are no more effective than enforcement; is that right, Professor?

Professor LURIE. Right, sir.

Mr. FLOWERS. With vigorous enforcement, perhaps we might receive better results. That too would apply to any new laws, and that would include the one before this committee now, wouldn't it?

Professor LURIE. That is correct, sir.

Mr. FLOWERS. Thank you, sir.

Mr. HUTCHINSON, do you have some questions?

Mr. HUTCHINSON. Thank you, sir.

Professor, first I understand your statement to make the point that under the procedures required by this bill, the matter of a consent decree might very well itself become litigated. It becomes a kind of a sideshow in litigation so that the consent decree process would become even more protracted, then the whole thing would become counter-productive.

Professor LURIE. That is a fear I have, sir.

Mr. HUTCHINSON. I thank you for the observation. I think that is something that this committee should consider.

Every time that we set up a machinery in the statute, we make every step of that machinery testable itself in the courts, and so the process becomes even more protracted.

On page 4 of your statement, you say, "Under the proposed legislation, the Government's allocation of its resources is irrelevant to a decision to settle by consent, and need not, perhaps even may not be considered by the court in its determination." I take it that you are referring to that provision of the bill which directs the court to determine that the entry be in the public interest?

Professor LURIE. Yes, sir.

Mr. HUTCHINSON. And I think, as I understand it, that the court, in determining the public interest, need not or perhaps even may not take into account the burden upon the resources in the Department of Justice which the process of this consent decree system will absorb. You are suggesting that perhaps almost all the resources of the Anti-trust Division of the Justice Department may become involved in the settlement of consent decrees, so that they won't have time to do anything else.

At the present time, if 80 percent of the cases are settled by consent decrees, is it fair to say that 80 percent of the resources are now utilized in consent decree matters?

Professor LURIE. I would rather doubt that, Congressman. I would suppose that a great deal of the resources go into the trial and litigation of a small number of cases which must go to litigation. I don't have the figures. I really can't say how much of the Department's resources go into that, but I don't think it would be accurate to say that 80 percent of it goes to consent decrees.

Mr. HUTCHINSON. But you are very apprehensive that once the Congress should enact the procedures set forth in this bill, a much larger percentage of the resources would be required in the consent decree function than at the present time?

Professor LURIE. Yes, sir. It seems to me that any resources of the Department which are spent simply on the subsidiary issue of whether

or not the consent judgment is in the public interest takes resources away from the enforcement machinery that should be used in going after and stopping or halting antitrust violations. Making this "public interest" determination may not further that end whatsoever.

Mr. HUTCHINSON. Professor, the court shall determine that the entry of that order is in the public interest. In your opinion is that an appealable matter?

Professor LURIE. I really don't know, Congressman. I think that is a matter that will probably have to be determined through litigation unless the Congress in its enactment of the bill before it makes clear its feeling on this matter.

Mr. HUTCHINSON. In your opinion, should it be an appealable matter?

Professor LURIE. I can't answer that question without taking a position on the other aspects of this particular provision as to whether or not this is a judicial function.

Mr. HUTCHINSON. I see.

Professor LURIE. If it is an appealable matter, then it's certainly going to eat up additional resources. Deciding that question guarantees that you would have more litigation involved just in the question of whether or not the court ought to have entered the consent judgment. If it is appealable, it certainly puts the court in the rather unusual position that the court would be opposed to the Justice Department and the defendants in the case, which is—

Mr. HUTCHINSON. Yes. All right. I thank you, sir.

I have nothing further.

Mr. FLOWERS. Mr. Dennis?

Mr. DENNIS. First, Professor Lurie, you suggest in your statement that a new separate agency to enforce antitrust laws be created. Do you think that would lead to any better enforcement than we now have or could have under a properly operated Department of Justice?

Professor LURIE. Well, the key phrase in your question is "a properly operated Department of Justice."

Mr. DENNIS. That applies to any agency. Why do you think this new agency would be any better?

Professor LURIE. The only thing that I think it would accomplish, and I think it is significant from the standpoint of the concerns that prompt this legislation, is to give a measure of independence to the agency, to free it from political pressures that it is presently not free from.

Mr. DENNIS. Aren't you assuming a new agency will be free from political influence, whereas an old agency will not? A new agency will be composed of appointees just the same as the old agency, isn't that a fact?

Professor LURIE. That is certainly true, Congressman. The independence which does exist—and that is limited for an independent agency—is a certain measure of freedom that an executive department does not have. I think that what has happened in the last 2 weeks with the Federal Trade Commission's decision to move against the major petroleum companies, and the influence which seems to be being exerted by the Treasury Department to dismiss that complaint indicates there is a great deal more freedom in the independent regulatory agencies than exists in the Department of Justice.

Mr. DENNIS. Of course. I have heard the criticism very often, and I am sure you have too, that the independent agencies lose their effectiveness by eventually becoming dominated by the same special interests they were designed to regulate, and they are then in a worse position than the general governmental agency.

Professor LURIE. This is true with respect to those which are regulating a particular industry. I don't know that the criticism is as accurate with respect to an agency such as the Federal Trade Commission.

I don't think it presently has sufficient independence, and I think an agency like it, or an expanded Federal Trade Commission, with greater independence, might be able to act more in the public interest than it does at the present time.

Mr. DENNIS. I believe you are saying that under our present system we cannot have total confidence in the established law enforcement and regulatory agencies, and therefore an independent agency should be created.

It is my opinion that we should attempt to correct our present problems rather than forget them in the creation of a new agency. Do you understand that conclusion?

Professor LURIE. I think that the legislation which is before this committee seems to suggest that a great deal more scrutiny must be applied to the Department of Justice than to the regulatory agencies, such as the Federal Trade Commission. My reason for suspecting this is that there is nothing in this legislation which would alter the consent decree procedure of the Federal Trade Commission, where you have basically the same problem.

Mr. DENNIS. I don't think that follows, because we are not considering that at the moment. Maybe we should have a bill for that too, but we can't do everything at once.

I am merely looking for the consent decree for the Federal Trade Commission. But as a philosophical matter, I can see what is bothering you, but the idea that we should create a new agency for everything, because we don't like the way some departments are operating, and for instance, that the Department of State—the same thing would be true. Give some of its functions to A, or something else, and my feeling would be that you ought to take these constitutional departments and staff them right and make them right, and ride herd on them. I don't think proliferating new agencies would help.

Professor LURIE. I would agree with you that we ought to ride herd on them and make them work, and I wouldn't want the suggestion to pass that I have no confidence in the executive departments at all. I do have confidence in them, and confidence in many of the officials who are running them. But the very fact that this legislation is before this committee suggests to me that there is a lack of confidence in the handling of these consent judgments by the Department of Justice, and something ought to be done to tighten up the procedures.

What I have tried to point out in my testimony this morning is that as long as there is political control over the antitrust enforcement machinery, people are going to make every attempt to take advantage of it and what you have in this proposed legislation is a means of control which can be subverted.

Mr. DENNIS. Well, I suggest to you that any means of control can be subverted, and probably will be on occasion. But we have to do the best we can to legislate. This legislation might well require improvement, but I guess if I am party to it all, it is with your more general approach with what you say about this particular bill, that I could be in agreement with.

Professor LURIE. I share your concern that proliferation of independent agencies may not be a good thing, and I have reservations about some that have been proposed. But I have not been satisfied with the antitrust enforcement by either the Department or the Federal Trade Commission in recent years. I think their budgets are far too small, and although I can't comment on how efficiently the Department of Justice is using its resources, I suspect a great deal more remains to be done by both agencies, and it is not being done.

I am concerned about this legislation because it seems that it will detract from enforcement if it takes away funds which are available for antitrust enforcement and forces the Department to go into court and litigate subsidiary issues.

Mr. DENNIS. I see your point on that, and I thank you.

Mr. FLOWERS. In the remaining 2 minutes, the counsel has some questions.

Mr. FALCO. Professor Lurie, is it true that presently the courts have the power to refuse to enter consent decrees?

Professor LURIE. Yes, sir, they have that power. I don't know how adequately it's exercised.

Mr. FALCO. Well, the best estimates we have had is that it has been three times in the last 16 years, which contributes to the charge that the courts have rubber stamped consent decrees.

Professor LURIE. Yes, sir, that is true.

Mr. FALCO. But refreshing your recollection on the power presently in the courts to refuse to enter consent decrees: Hasn't it always been held that refusal is not an appealable order? Why do you think, in light of that precedent, that the proposed procedures may create an appealable order contrary to what has been cleared and tested in the courts?

Professor LURIE. I am not sure I follow that question. You are asking me why I think this may be an appealable determination on the part of the court?

Mr. FALCO. Yes.

Professor LURIE. I suppose because of the way the legislation is framed and what has prompted its enactment, if it is enacted, and the required determination that the consent judgment is in the public interest. This bill says the court "shall" determine that entry of the judgment is in the public interest, as determined by law. And then the court is directed to consider some things. I know the language says "may," but I suspect that the courts are likely to read that as "shall."

Mr. FALCO. Based on your experience as a Government trial attorney and relating back to your discussion about the resources at the Justice Department, wouldn't all that would happen be that the trial staff already assigned to an action would have to spend more of its time with the issues rather than adding a flock of new personnel to comply with proposed procedures?

Professor LURIE. Right. I think that is true.

Mr. FALCO. Thank you.

Mr. FLOWERS. We will go on and extend the time for Mr. Polk.

Mr. POLK. Professor Lurie, I am wondering if under current practices, the Department of Justice could settle a proposed lawsuit by private contract?

Professor LURIE. Well, isn't that in effect what the consent judgments are at the present time?

Mr. POLK. Even after the adoption of the bill, a lawsuit could be cut short by private contract, a private contract which would not be filed with the court.

Professor LURIE. I see your point.

Mr. POLK. Wouldn't this bill foster that kind of practice?

Do you find it implied in this legislation, a denial of the Department's right to contract?

Professor LURIE. It's certainly an arguable point, I wouldn't want to go out a limb and say yes or no, but I think that litigation would be bound to flow from the entry of a contract of that type by the parties.

Mr. POLK. I appreciate your candor.

Mr. FLOWERS. Thank you, Professor Lurie.

[The prepared statement of Professor Lurie follows:]

STATEMENT OF PROF. HOWARD R. LURIE, SCHOOL OF LAW, VILLANOVA UNIVERSITY

My name is Howard R. Lurie, and I am a Professor of Law at the School of Law of Villanova University in Villanova, Pennsylvania. My primary teaching responsibilities are in the areas of antitrust and trade regulation. I have been on the Villanova Law Faculty since September 1968. Prior to that time I served as a trial attorney with the Federal Trade Commission in the Division of General Trade Restraints of the Bureau of Restraint of Trade.

I admit having a strong bias in favor of sound antitrust legislation and vigorous enforcement of the law. I am not convinced that we are enjoying the benefits of either at the present time. I am, therefore, somewhat ambivalent toward H.R. 9203 and S. 782. I share the concern which prompts this proposed legislation, and believe that some of the provisions could be of great value. However, in my opinion it is inadequate to deal with the real problem, and if my worst fears are realized, may actually be counterproductive. Allow me to elaborate.

This legislation, in addition to amending the Expediting Act and increasing the penalty for violations of the Sherman Act, would reform the Justice Department consent decree procedure by opening to public scrutiny and comment the Justice Department's decision to terminate an antitrust proceeding by entry of a consent judgment.

As a condition precedent to the entry of any consent judgment proposed by the Justice Department, the bill would require:

(1) the publication in the Federal Register (a) of the terms of the proposed consent judgment; (b) any written comments relating to it; (c) Department of Justice responses to those comments; and (d) a statement describing the public impact of the consent judgment;

(2) the filing with the court of (a) all contacts by a defendant with government officials relevant to the consent judgment; and (b) copies of such "materials and documents which the United States considered determinative in formulating the proposed consent judgment"; and

(3) a judicial decision that the entry of the consent judgment is in the public interest.

This proposed legislation, if effective, should insure that any consent judgment entered in any Justice Department antitrust case will be in the public interest. My fear is that the legislation will not be effective in insuring adequate antitrust enforcement on the part of the Justice Department. I see the enactment of this legislation as an expression of a lack of confidence on the part of the Congress in the enforcement of the antitrust laws by the Department of Justice, especially in the entry of some consent judgments. That lack of confidence is entirely justified. However, in an effort to open to public view the disposition of consent judgments, and, thus, insure that they are in the public interest, this

legislation may in fact further conceal from public view terminations not in the public interest of antitrust proceedings by the Department of Justice.

There is little in this proposed legislation with regard to consent judgments that could not be accomplished by the Justice Department on its own if it wanted to do so. The justification for the legislation, therefore, must be that it brings about or insures a result that would not otherwise obtain. In other words, this bill assumes that the Justice Department will act differently with the legislation than without it, and that the change will be in the public interest. Assuming, therefore, that the Justice Department's settlement of some antitrust cases has not been in the public interest, the question is whether this legislation will be an effective remedy. If the failure on the part of the Justice Department is due to mere neglect or incompetence, the legislation may be an effective remedy. If, on the other hand, the ineffective settlement is deliberate, this legislation may exacerbate the situation. Take a hypothetical situation: A Justice Department antitrust investigation is the target of improper influence by corporate officers upon high government officials. The result today might well be a consent judgment that provides some, albeit inadequate, relief. But the existence of the antitrust investigation and its settlement become matters of public record and may become the subject of public and Congressional criticism and scrutiny. If the proposed legislation becomes law, improper efforts to curtail or emasculate an antitrust proceeding, to be effective, must come at an early or precomplaint stage and result in the termination of the investigation rather than the issuance of a complaint and settlement by consent judgment. From the standpoint of an antitrust violator, therefore, this legislation places a premium on attempting to interfere with or squelch an investigation at the earliest possible stage. (Even should these efforts on the part of a violator prove unsuccessful, this legislation as currently drafted would not require their disclosure, since the only communications that need be disclosed are those "concerning or relevant to the proposed consent judgment." (Emphasis added.)

Any communications prior to the formulation of the proposed consent judgment are, arguably, exempt from disclosure. Such early interference may also be more serious since it may prevent the initiation of, or cause the early termination of an investigation prior to the time that a violation of the law, as evidenced by the investigative file, is evident or established. Such failures to investigate further, if questioned, can frequently be justified on the grounds that the investigation had failed to produce sufficient evidence of a violation of law to warrant further investigation.

It has been said that over 80% of all antitrust cases are settled by consent, and that the consent process enables the Justice Department to conserve its vital resources. This legislation may not be desirable if it in fact deters the entry in good faith of consent judgments. It is entirely possible that this legislation will deter or prevent the Justice Department in some, and defendants in other cases from settling disputes by consent, even in good faith. Let us examine the possible deterrent effect upon the Justice Department first.

The bill requires that before entering any consent judgment proposed by the Justice Department, "the court shall determine that entry of that judgment is in the public interest." An adverse determination is either appealable or it is not. If it is, the government must engage in litigation over whether it can dispose of a case without litigation. If it isn't appealable, the government may have to litigate a case which from the standpoint of a wise allocation of resources may not be justified. Under the proposed legislation the government's allocation of its resources is irrelevant to a decision to settle by consent, and need not (perhaps even may not) be considered by the court in its determination. Arguably, a non-party could challenge the court's determination to enter the consent decree if based upon such a consideration.) The government may, therefore, forego bringing some weak (either factually or legally), but legitimate cases if only partial relief can be obtained by consent. Thus instead of partial relief there may be none.

I am also concerned about the effect that subsections (e) and (f) of this bill might have in producing litigation that could encroach upon the Justice Department's resources and delay the settlement of cases. Subsection (e) which requires the court to determine that the entry of the consent judgment is in the public interest could put the court in the role of a devil's advocate against the defendants and the Department of Justice. I question whether the court can make the determination required under subsection (e) without resorting to some of the procedures of subsection (f), such as appointment of a special master or authorizing intervention, and wonder if its failure to do so provides interested

persons a basis for challenging the entry of the consent judgment. Certainly, sufficient litigation to resolve the doubts is bound to arise.

An antitrust defendant might likewise object to consenting to a judgment if this bill becomes law in its present form. One of the major reasons that defendants have been willing to consent to a judgment against them has been the protection afforded by § 5(a) of the Clayton Act which denies prima facie effect in subsequent treble damage actions to consent judgments. Subsection (h) of this bill purports to retain that protection. I submit, however, that the protection of subsection (h) is ineffective. Subsection (b) provides in part:

"Copies of the proposed consent judgment and such other *materials and documents which the United States considered determinative in formulating the proposed consent judgment* shall also be made available to members of the public at the district court before which the proceeding is pending and in such other districts as the court may subsequently direct." (Emphasis added.)

This language could require the production of the entire investigative file. When S. 782 was being considered by the Senate, Assistant Attorney General Thomas E. Kauper in a letter to Senator Javits objected to this language and it was amended. Kauper's objection was directed at having to produce those government documents which "may be considered in one way or another to have entered into the determination of the government to enter the settlement, and thereby would be 'determinative.'" Thus, S. 782 was amended to exempt from disclosure materials and documents protected by § 552(b) (4) and (5) of the Freedom of Information Act of Title 5 of the United States Code.<sup>1</sup> Not exempted by the Senate amendment was material covered by § 552(b) (7) which relates to "investigatory files compiled for law enforcement purposes."<sup>2</sup> I suggest that subsection (b) covers more than simply those materials and documents which were relevant to the government's decision to settle the case by consent, but covers in addition those which were relevant to the formulation of the consent judgment. In other words, the bill calls for the disclosure of those materials and documents which were relevant to the relief, and that of necessity includes those materials and documents which go to establish or prove the violation of law. I suspect that antitrust defendants are going to be very reluctant to allow disclosure of such materials and documents. Their value to treble damage plaintiffs is obvious. If the evidence can be obtained at little or no cost, the unavailability of prima facie effect of a consent judgment is insignificant. Of course, this provision could be amended to exempt matter protected by paragraph (7) as well as paragraphs (4) and (5), but that would emasculate the provision. Without either the government's thinking or the government's evidence, how can one determine whether the settlement is in the public interest?

Please understand that, contrary to how my testimony may sound, I support the required disclosure of the investigative file in consent judgment cases. Likewise, I believe that § 5(a) of the Clayton Act should be amended so that judgments in criminal antitrust cases where the defendant pleads *nolo contendere* will not be denied prima facie effect in subsequent treble damage actions. The ability of a defendant to plead *nolo contendere* and avoid prima facie effect is, at the present time, a tremendous escape hatch for corporate criminals. By consenting in a civil case and pleading *nolo* in a companion criminal action, a defendant may emerge from an antitrust violation with no more than a slap on the wrist and an admonition to "go and sin no more." As a practical matter, without the advantage of the prima facie effect of a prior government judgment, some private damage actions may never be brought. Injured parties are thus denied compensation, and defendants are permitted to keep their ill gotten gains. Shielding defendants from the only effective means some injured parties may have to recover for their injuries is unlikely to have a significant deterrent effect. Furthermore, competitors may have been so seriously injured that competition itself may be permanently impaired. Until obedience to the law is less costly to potential violators than disobedience, the latter is likely to flourish.

At the outset of my testimony I suggested that I was in complete agreement with the concern which prompts this proposed legislation, but that I considered

<sup>1</sup> (5) U.S.C. § 552(b). This section does not apply to matters that are \* \* \* (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; \* \* \*.

<sup>2</sup> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; \* \* \*.

it inadequate to deal with the real problem. Consent settlements which are not in the public interest are but a symptom of the more serious problem. There is a lack of confidence in the handling of antitrust cases by the Department of Justice. Without suggesting that the Department is corrupt or rotten to the core (neither of which it is), one can suggest that it is not free from improper political influence. We have witnessed attempts, sometimes successful, on the part of corporate antitrust violators to influence the outcome of antitrust proceedings by reaching high government officials. So long as the enforcement of the antitrust laws is under the direct control of politically concerned officials, the danger of improper influence exists. The solution to the problem is to render impossible, or at the very least more difficult, the ability of politicians to improperly influence the antitrust enforcement machinery. I submit that this can best be accomplished by vesting all governmental antitrust responsibility in a single government agency as independent of political control as a representative democracy can permit. Such an agency should be able to submit its own budget to the Congress, enforce its own subpoenas in the courts, and take its own cases to the Supreme Court without going to the Solicitor General. Only when the antitrust enforcement machinery is free to operate in the public interest can we be confident that the outcome of its proceedings will be also.

I thank you for the opportunity to present my views.

**Mr. FLOWERS.** The subcommittee will meet again at 10 o'clock tomorrow morning, and the hearing is adjourned.

[Whereupon, at 12:02 p.m. the subcommittee recessed, to reconvene at 10 a.m. on Thursday, Sept. 27, 1973.]

**INTENTIONAL BLANK PAGE**

(138)

## CONSENT DECREE BILLS

THURSDAY, SEPTEMBER 27, 1973

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 10:05 a.m., pursuant to call, in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. [chairman] presiding.

Present: Representatives Rodino, Brooks, Seiberling, Jordan, Hutchinson, McClory, and Dennis.

Also present: James F. Falco, counsel, and Franklin G. Polk, associate counsel.

Chairman RODINO. We will resume our hearings on H.R. 9203, H.R. 9947, and S. 782.

We are delighted to have this morning as our distinguished panel of witnesses the former Chairman of the FTC, Mr. Miles Kirkpatrick, Mr. Victor H. Kramer of the Institute for Public Interest Representation, Georgetown University Law Center, and Mr. George D. Reycraft, Cadwalader, Wickersham & Taft.

I would assume that each of you, having a prepared statement, might want to at least summarize your statements, and then be ready for some questioning. I would hope that the summary might be such that we might be able to move along so that we will be able to put some questions to you. And each of you may feel free to respond to any of the questions asked. We hope that that would be agreeable.

Mr. KIRKPATRICK. Entirely, Mr. Chairman.

Chairman RODINO. You may proceed.

### TESTIMONY OF PANEL CONSISTING OF HON. MILES W. KIRKPATRICK, VICTOR H. KRAMER, ESQ., AND GEORGE D. REYCRAFT, ESQ.

Mr. KIRKPATRICK. It is a privilege to be here. I shall do my best to summarize my statement—it is on its way here and is being duplicated at this point—so as not to impose on the time of the subcommittee.

It is a privilege to appear this morning in response to the invitation, sir. I should note, as you have, that I was Chairman of the Federal Trade Commission from September of 1970 to February of 1973. However, I am now engaged in the private practice of law, and I should make it clear that I may represent clients that may be affected by the provisions of the bill, and I want to draw that to the attention of the subcommittee since they should be aware of that in evaluating my remarks.

The legislation that is before the committee would modify the anti-trust laws in three major respects. First, the bill would establish a new set of procedures and criteria relating to the negotiation and entry by the courts of consent decrees in antitrust cases. Second, the bill would substantially increase criminal penalties for Sherman Act violations. Third, it would amend the Expediting Act so as to provide for review by the courts of appeal other than in exceptional situations.

Because the last two sections of the bill have been the subject of previous legislative proposals and have already been the subject of broad and informed comment, I would like first to outline my views on those two amendments quite briefly. I will then comment upon the first part of the bill, section 2, in somewhat greater detail.

The fines which are proposed in the bill are \$100,000 in the case of individuals and \$500,000 in the case of corporations. There has been wide agreement that the present level of fines, \$50,000 both for corporations and individuals, does not perform the office of a sufficient deterrent. With that proposition I am in agreement. Violations of the antitrust laws are criminal acts fraught with very damaging consequences to the public interest. Of course, a \$100,000 fine against an individual may be unwarranted in many situations, but that amount is set as a maximum and would undoubtedly be imposed by the courts only in situations where the serious and flagrant character of the violation and the affluence of the individual might warrant it.

The \$500,000 fine proposed as a maximum to corporate violations seems to meet wide acceptance, which I share. Such amount, as a maximum, is not unreasonable.

With respect to the amendments in the bill to the Expediting Act, I have nothing to say except to voice my enthusiastic approval. It seems to me that the Expediting Act, in its present form, has long since been demonstrated to be an anachronism. As the Senate committee report observed, in 1903 the Sherman Act was relatively new and was an almost untried method of restraining combinations and trusts. As the Senate committee report also noted, there was apprehension that the recently created system of courts of appeal, because of their unfamiliarity with the new law and because of the additional time required by their procedures, would delay and frustrate the efforts of Congress to control monopolies. These considerations have been, I believe, swept aside by the course of time, and what has become clear is the desirability, except in very rare cases, of having the enormous records and multiplicity of issues that make up the bulk of antitrust cases unwound and refined by the courts of appeal.

Now I would like to turn to section 2 of the bill, sir. My written statement is more extensive on this point than I will state at this time.

Chairman RODINO. I would like to remind you, as I have already suggested, that the statements will be included in the record in their entirety.

Mr. KIRKPATRICK. Yes. Very well, sir.

Now, turning to section 2 of the bill, I will not attempt to summarize, since that is done in my statement, the provisions as I see them in section 2 of the bill.

At the outset of my discussion, sir, I wish to state that I am wholeheartedly in favor of the purposes, as I understand those purposes, which underlie section 2 of the proposed legislation.

To the extent that the integrity of law enforcement through consent judgments is brought into question through negotiations conducted behind closed doors, I, for one, am certainly in favor of opening the doors and keeping them open. Thus, I believe that it is a reasonable requirement that all contacts made with the United States, except those made by or before counsel of record in negotiation session, should be described and be made available for public scrutiny. There may be some question as to the precise breadth of that requirement, but I will not discuss that now. It seems to me to be a small matter, and I would wholeheartedly, as I say, approve that part of the legislation.

I am in favor also of filing and publication for public comment of the proposed consent judgment for an appropriate period prior to its proposed effective date. I understand that already to be the practice of the Department of Justice, and certainly, it is the practice of the Federal Trade Commission. Both the Department of Justice and the Federal Trade Commission review with care comments received as a result of the publication of proposed consent orders, and both agencies have, from time to time, modified proposed orders in the light of comments received.

The problems with the provisions of the present bill, and it may well be that the purposes to be achieved outweigh the difficulties that I perceive and will sketch, arise out of what I foresee to be the obstacles that will be faced by the United States in respect to the procedures and criteria to be followed by the court in reaching a determination that the public interest is, or is not, satisfied by the proposed decree.

Let me describe two dilemmas that occur to me as possibly created by the procedures of the bill.

Let me assume, for the moment, that a proposed consent judgment has, under the procedures contemplated by the bill, been made public and that the proposed consent judgment differs in ways that appear to be material from the relief sought in the complaint which instituted the litigation. Parenthetically, Mr. Chairman, I would guess that in the vast majority of the cases where the proposed judgment is four-square with the relief sought in the complaint, the procedures would be routine and would give rise to little comment or controversy. That may not be so, however, when the relief afforded by the consent judgment is in some way materially different from that specified in the complaint, or, if not specified in the complaint, materially different from that usually flowing from the character of the violations alleged.

It seems to me that two considerations, among others, may prompt the filing of a proposed consent judgment, significantly different from that originally claimed. One such consideration would be the post-complaint realization, by the Antitrust Division, that there are certain aspects of its case that do not have the strengths that were initially believed to be present. That realization could come through pretrial discovery or after the partial trial of the case itself.

Another consideration which I would like to discuss, sir, which might prompt the United States to accept relief different from that originally sought, would be the conclusion that the relief in the settlement proffered was adequate, although perhaps not as complete as that originally specified in the complaint, and the prosecutor's determination in those

circumstances that the case should be settled, and manpower be thereby released for law enforcement purposes elsewhere.

The determination to be made in both situations which I have described, has traditionally been that of the prosecutor. Where a case has developed weaknesses not clearly perceived at the time the complaint was filed, the dilemma that would be faced by the prosecutor, it seems to me, under this bill is a very real one. If he is to present the consent judgment with candor for the court's determination of its fulfillment of public interest, he may have no choice but to acknowledge to the court that the case's underpinnings are infected with an infirmity, and thus give aid and comfort to the defendant should the proffered judgment be rejected by the court and the case thereafter be tried.

Even more difficult to present to the court are the questions rising out of the prosecutorial discretion which of necessity rests with the Department of Justice. Again, let me make an assumption. Assume that the complaint involves a routine violation of the antitrust law, but one which would involve a long and arduous trial to prove, and assume that the consent judgment is only in minor ways less comprehensive than the relief specified in the complaint. It seems to me that proper law enforcement with limited manpower resources, and that is always a problem, requires the prosecutor sometimes to reach the conclusion that nine-tenths of a loaf here and the release of his resources to enforce the law elsewhere is worth more than the whole loaf which might tie down 5, 10, or 15 lawyers for many months.

I do not see how the assignment of resources over the spectrum of law enforcement requirements, a judgmental process which peculiarly belongs to the prosecutor with his direct concern with the management and allocation of his law enforcement capabilities, can or should be determined by the court. To get a judicial review of the budgeting, policy-planning, and personnel problems that might prompt a particular proposed consent judgment which might require a public disclosure of the ongoing investigations and proposed new prosecutions, that would be entirely improper and unwise. Moreover, since it ultimately is a judgmental question involving the priorities of law enforcement among a great many variables, I doubt that the court would or should be deemed to have competence in that area which is essentially not a judicial but an executive matter.

Now may I by way of footnote, note that by far the major part of the prosecutor's discretion is left untouched by the proposed legislation. Thus, all the decisions as to which investigation to open, which to close, which case to bring, and whether a civil or criminal action, or both, are left completely to the prosecutorial discretion. That may not, I note, be illogical in relation to the purposes of the bill since once a matter has progressed to the complaint stage, a public position has been taken, and unexplained changes in that position, although entirely proper, may prompt public distrust.

I do not know where I personally come out on these questions I have posed. I know that in the great bulk of the cases, the inquiry to be made by the courts into the merits of the consent judgment would be in all likelihood largely routine. In those cases, the legislation would pose neither great difficulties nor, on the other hand, would the legislation in that respect perform any particularly useful office. I speak here

of section 2, of course, I am concerned with the cases that would involve a court's extensive inquiry into the merits of a consent judgment; in those cases, the nature of the prosecutor's problems might be such as to force a trial where a consent judgment would serve the public interest.

Perhaps, as I suggested earlier, the opening up of the consent judgment process to the public view is important enough such that the considerations that I have suggested shrink into comparative insignificance.

Finally, Mr. Chairman, I have one last comment. That portion of section 2, particularly section (e) (2), which deals with the consideration to be given by the court to "individuals alleging specific injury from violations set forth in the complaint," may, it seems to me, start a fresh legal battle over a point that seems to have been decided. As Mr. Wilson of the Antitrust Division testified last week before this committee, the law is pretty well settled that the courts will not require that a consent judgment contain an admission of liability on the part of the defendant; such admission would, of course, be of great advantage to potential treble damage plaintiffs who may seek to sue the defendant upon the grounds of the law violations alleged in the complaint.

The Antitrust Division's view of this has been, as I understand it, that if admissions of liability are required by the courts to be imbedded in consent decrees, the consent decree route would be largely foreclosed. The Division's proposition, and I give it considerable heed, is that any defendant who believes he has the remotest chance of winning the lawsuit would, in the climate of these times, insist upon litigating rather than agree to any admission of liability. Since the great bulk of the cases brought by the Antitrust Division are disposed of by the consent decree procedure, this would be a grievous blow to law enforcement.

With that in mind, I ask myself if it is wise to include the language relating to individuals alleging specific injury in this bill. It settles nothing, it seems to me, and would create a battleground for many years in the future. I think that the language used will give rise to the argument, perhaps persuasive in some instances, to some judges, that Congress meant to open up what now appears to be well-settled law and to invite the courts to reject a consent decree which gives no aid to treble damage plaintiffs.

Again, sir, I express no view on the matter, but I believe that the Antitrust Division's view should be carefully considered. After all, treble damage plaintiffs in this day and age have little difficulty in finding high-caliber lawyers. In those circumstances, I am inclined to doubt that law enforcement by the Government should languish for the purely private purposes of those who are clearly willing and able to bring their own lawsuits.

Thank you for the opportunity of appearing here today.

[The prepared statement of Hon. Miles W. Kirkpatrick follows:]

#### STATEMENT OF MILES W. KIRKPATRICK

It is a privilege to appear here this morning in response to the invitation of this Subcommittee to give you my views on the proposed "Antitrust Procedures and Penalties Act". I was Chairman of the Federal Trade Commission from September, 1970 to February, 1973. However, I am now engaged in the private practice of law, and I should make it clear that I may now or in the future represent clients who might be affected by the provisions of the Bill which this

Subcommittee is considering this morning. Although I appear here as a private citizen, I think it appropriate to point out my professional interests so that the Subcommittee can be aware of them in considering and evaluating my views.

The legislation that is before the Committee would modify the antitrust laws in three major respects. First, the Bill would establish a new set of procedures and criteria relating to the negotiation and entry by the courts of consent decrees in antitrust cases. Second, the Bill would substantially increase criminal penalties for Sherman Act violations. Third, it would amend the Expediting Act so as to provide for review by the Courts of Appeal other than in exceptional situations.

Because the last two sections of the Bill have been the subject of previous legislative proposals and have already been the subject of broad and informed comment, I would like first to outline my views on those two amendments quite briefly. I will then comment upon the first part of the Bill (Section 2) in somewhat greater detail.

The fines which are proposed in the Bill are \$100,000 in the case of individuals and \$500,000 in the case of corporations. There has been wide agreement that the present level of fines, \$50,000 both for corporations and individuals, does not perform the office of a sufficient deterrent. With that proposition I am in agreement. Violations of the antitrust laws are criminal acts fraught with very damaging consequences to the economy and to the public interest. Of course, a \$100,000 fine against an individual may be unwarranted in many situations, but that amount is set as a maximum and would undoubtedly be imposed by the courts only in situations where the serious and flagrant character of the violation and the affluence of the individual might warrant. The \$500,000 fine proposed as a maximum to corporate violations seems to meet wide acceptance, which I share. Such amount, as a maximum, is not unreasonable.

With respect to the amendments in the Bill to the Expediting Act I have nothing to say except to voice my enthusiastic approval. It seems to me that the Expediting Act, in its present shape, has long since been demonstrated to be an anachronism. As the Senate Committee Report observed, in 1903 the Sherman Act was relatively new and was an almost untried method of restraining combinations and trusts. As the Senate Committee Report also noted, there was apprehension that the recently created system of Courts of Appeal, because of their unfamiliarity with the new law and because of the additional time required by their procedures, would delay and frustrate the efforts of Congress to control monopolies. Those considerations have been, I believe, swept aside by the course of time, and what has become clear is the desirability, except in very rare cases, of having the enormous records and multiplicity of issues that make up the bulk of antitrust cases unwound and refined by the Courts of Appeal.

I would now like to turn to Section 2 of the Bill. That Section, in summary, would require the following:

1. The filing and the publication of any consent judgment proposed at least 60 days prior to the effective date of the decree.

2. The filing and publication of all comments on the proposed decree together with the responses of the Antitrust Division.

3. The making available and the publication of a description of "such other materials and documents" which have been considered determinative in formulating the proposed judgment.

4. The filing and publication of a "public impact statement" which would, among other things, describe the nature of the proceedings and the practices involved in the alleged violations of law, explain the proposed judgment "including an explanation of any unusual circumstances giving rise to the proposed judgment or any provisions contained therein," state the remedies available to potential private plaintiffs, describe the procedures available for modification of the proposed judgment, and describe alternatives actually considered and their anticipated effects on competition.

5. A determination by the Court that the entry of the judgment is "in the public interest"; in making that determination the Court may consider a variety of matters including the termination of the alleged violations, provisions for enforcement and modification of the judgment, duration of relief and other related matters. The Court may also consider the impact of the judgment upon the public generally and, more particularly, upon individuals injured by the violations set forth in the Complaint, including the public benefit of a trial. In reaching a determination of the foregoing matters, the Court may take testimony, appoint a special master and authorize the full or limited participation of others in the proceedings. The Court may also review all comments, and the responses thereto of the United States, on the proposed judgment.

Section 2 of the Bill would also require the filing by the defendant of a description of all communications on its behalf, except by Counsel of Record, with any representative of the United States concerning the proposed judgment.

At the outset, I am wholeheartedly in favor of the purpose, as I understand it, which underlies Section 2 of this proposed legislation. To the extent that the integrity of law enforcement through consent judgments is brought into question through negotiations conducted behind closed doors, I for one am certainly in favor of opening the doors and keeping them open. Thus, I believe that it is a reasonable requirement that all contacts made with the United States, except those made by or before Counsel of Record in negotiation session, should be described and be made available for public scrutiny. There may be some question as to the precise breadth of that requirement and possibly the scope of the present language could appropriately be amended such that the exemption from public disclosure would extend not only to Counsel of Record but to others who might be present in meetings with Counsel.

Perhaps, rather than describing the communications made by others present at such meetings, the Bill might require only the identification of the individuals involved. In any event, this is a small matter and the additional amount of paperwork that may be required by the present language may be of little moment compared to the benefit of full disclosure of all communications other than by Counsel.

I am in favor also of filing and publication for public comment of the proposed consent judgment for an appropriate period prior to its proposed effective date. I understand that already to be the practice of the Department of Justice and, certainly, it is the practice of the Federal Trade Commission. Both the Department of Justice and the Federal Trade Commission review with care comments received as a result of the publication of proposed consent orders, and both agencies have from time to time modified proposed orders in the light of comments received.

The problems with the provisions of the present Bill—and it may well be that the purposes to be achieved outweigh the difficulties that I perceive and will sketch—arise out of what I foresee to be the obstacles that will be faced by the United States in respect to the procedures and criteria to be followed by the Court in reaching a determination that the public interest is or is not satisfied by the proposed decree. Let me describe two dilemmas that occur to me as possibly created by the procedures of the Bill.

Let me assume for the moment that a proposed consent judgment has, under the procedures contemplated by the Bill, been made public and that the proposed consent judgment differs in ways that appear to be material from the relief sought in the Complaint which instituted the litigation. Parenthetically, Mr. Chairman, I would guess that in the vast majority of the cases where the proposed judgment is four square with the relief sought in the Complaint, the procedures would be routine and would give rise to little comment or controversy. That may not be so, however, when the relief afforded by the consent judgment is in some way materially different from that specified in the Complaint, or, if not specified in the Complaint, materially different from that usually flowing from the character of the violations alleged.

It seems to me that two considerations, among others, may prompt the filing of a proposed consent judgment with relief significantly different from that originally claimed. One such consideration would be the post complaint realization by the Antitrust Division that there are certain aspects of its case that do not have the strengths that were initially believed to be present; that realization could come through pre-trial discovery or after the partial trial of the case itself. Another consideration which I would like to discuss, sir, which might prompt the United States to accept relief different from that originally sought would be the conclusion that the relief in the settlement proffered was adequate, although perhaps not as complete as that originally specified in the Complaint, and the prosecutor's determination in those circumstances that the case should be settled and manpower be thereby released for law enforcement purposes elsewhere.

The determination to be made in both situations which I have described has traditionally been that of the prosecutor. Where a case has developed weaknesses not clearly perceived at the time the Complaint was filed, the dilemma that would be faced by the prosecutor it seems to me, under this Bill is a very real one. If he is to present the consent judgment with candor for the Court's determination of its fulfillment of public interest, he may have no choice but to acknowledge to the

Court that the case's underpinnings are infected with an infirmity, and thus give aid and comfort to the defendant should the proffered judgment be rejected by the Court and the case thereafter be tried.

Even more difficult to present to the Court are the questions rising out of the prosecutorial discretion which of necessity rests with the Department of Justice. Again, let me make an assumption. Assume that the Complaint involves a routine violation of the antitrust law, but one which would involve a long and arduous trial to prove, and assume that the consent judgment is only in minor ways less comprehensive than the relief specified in the Complaint. It seems to me that proper law enforcement with limited manpower resources (and that is always a problem) requires the prosecutor sometimes to reach the conclusion that nine-tenths of a loaf here and the release of his resources to enforce the law elsewhere is worth more than the whole loaf which might tie down five, ten, or fifteen lawyers for many months.

I do not see how the assignment of resources over the spectrum of law enforcement requirements, a judgmental process which peculiarly belongs to the prosecutor with his direct concern with the management and allocation of his law enforcement capabilities, can or should be determined by the Court. To get a judicial review of the budgeting, policy-planning and personnel problems that might prompt a particular proposed consent judgment which might require a public disclosure of the on-going investigations and proposed new prosecutions that would be entirely improper and unwise. Moreover, since it ultimately is a judgmental question involving the priorities of law enforcement among a great many variables, I doubt that the Court would or should be deemed to have competence in that area which is essentially not a judicial but an executive matter.\*

I do not know where I personally come out on these questions I have posed. I know that in the great bulk of the cases the inquiry to be made by the Courts into the merits of the consent judgment would be in all likelihood largely routine. In those cases the legislation would pose neither great difficulties nor, on the other hand, would the legislation in that respect perform any particularly useful office. I speak here of Section 2, of course. I am concerned with the cases that would involve a Court's extensive inquiry into the merits of a consent judgment; in those cases the nature of the prosecutor's problems might be such as to force a trial where a consent judgment would serve the public interest.

Perhaps, as I suggested earlier, the opening up of the consent judgment process to the public view is important enough such that the considerations that I have suggested shrink into comparative insignificance.

Finally, Mr. Chairman, I have one last comment. That portion of Section 2, particularly (e) (2), which deals with the consideration to be given by the Court to "individuals alleging specific injury from violations set forth in the Complaint," may, it seems to me, start a fresh legal battle over a point that seems to have been decided. As Mr. Wilson of the Antitrust Division testified last week before this committee, the law is pretty well settled that the Courts will not require that a consent judgment contain an admission of liability on the part of the defendant; such admission would, of course, be of great advantage to potential treble damage plaintiffs who may seek to sue the defendant upon the grounds of the law violations alleged in the Complaint. The Antitrust Division's view of this has been, as I understand it, that if admissions of liability are required by the courts to be imbedded in consent decrees, the consent decree route would be largely foreclosed. The Division's proposition, and I give it considerable heed, is that any defendant who believes he has the remotest chance of winning the lawsuit would, in the climate of these times, insist upon litigating rather than agree to any admission of liability. Since the great bulk of the cases brought by the Antitrust Division are disposed by the consent decree procedure, this would be a grievous blow to law enforcement.

With that in mind, I ask myself if it is wise to include the language relating to individuals alleging specific injury in this Bill. It settles nothing it seems to me and would create a battleground for many years in the future. I think that the

---

\*Now may I, by way of footnote, note it may be noted that by far the major part of the prosecutor's discretion is left untouched by the proposed legislation. Thus all the decisions as to which investigation to open, which to close, which case to bring and whether a civil or criminal action, or both, are left completely to the prosecutorial discretion. That may not, I note, be illogical in relation to the purposes of the Bill since once a matter has progressed to the Complaint stage, a public position has been taken and unexplained changes in that position, although entirely proper, may prompt public distrust.

language used will give rise to the argument, perhaps persuasive in some instances, to some judges, that Congress meant to open up what now appears to be well-settled law and to invite the Courts to reject a consent decree, which gives no aid to treble damage plaintiffs.

Again, sir, I express no view on the matter, but I believe that the Antitrust Division's view should be carefully considered. After all, treble damage plaintiffs in this day and age have little difficulty in finding high calibre lawyers. In those circumstances, I am inclined to doubt that law enforcement by the government should languish for the purely private purposes of those who are clearly willing and able to bring their own lawsuits.

Thank you for the opportunity of appearing here today.

Chairman RODINO. Thank you very much.

Mr. KRAMER?

Mr. KRAMER. Thank you, Mr. Chairman.

My name is Victor H. Kramer. I appear here at the request of the committee. I am honored to be here. From 1938 to 1957, I was in the Antitrust Division of the Department of Justice. From 1957 to 1970, I was in private practice specializing in antitrust law. I am now a professor of law at Georgetown University specializing in clinical education in administrative law. I appear here in my capacity as a citizen and antitrust lawyer, and not in any other capacity.

Consent decree procedures. H.R. 9203, like its counterpart S. 782, has three parts. The first deals with consent decree procedures. As I understand it, this part has three broad purposes as follows:

First, to create a greater public awareness of and opportunity for public input into antitrust consent decrees.

Second, to foster more careful judicial scrutiny of antitrust consent decrees.

Third, to require disclosure of the sources of possible pressures on the Department of Justice by powerful men in and out of Government.

Everyone seems to favor the third objective and, therefore, I shall not discuss section 2 (g) of the bill.

I have heard no persuasive opposition to those portions of the bill designed to achieve the objective of greater judicial scrutiny of antitrust consent decrees, specifically subsections 2 (e) and (f). I do not see how there can be such objection because the subsections are purely permissive; they are couched in terms of what a court "may consider" and what a court "may" do. I cannot see any rational basis for objection so long as these subsections are couched in permissive rather than mandatory terms.

The opposition seems to center on subsections 2 (b) and (d) which requires the Government to file "a public impact statement" and to consider the comments of the public concerning the decree.

First of all, let us not overestimate the value of these proposed innovations. They are no panacea. The quality of Government antitrust enforcement depends primarily upon the quality of the lawyers in the Antitrust Division, not on the public interest bar or on lawyers representing competitors or customers of defendant. But this bill seems to me to be a step in the right direction. Consent settlements of major Government civil antitrust cases are the people's business and the people should have the right to be heard.

A major criticism of the bill by the Department of Justice is that it will impede and slow up the process by which antitrust settlements are achieved. I believe the bill will have this effect only in a few antitrust cases.

Most antitrust actions do not involve major industries or at least do not involve major issues of structure or behavior in major industries. These routine cases will rarely evoke public comment or public participation in consent decree procedures. Thus, for most antitrust consent decrees, criticism of the bill boils down to a contention that the bill will add to the burden of the Antitrust Division by requiring it to submit to the courts and file for public inspection detailed explanatory statements and facts. I cannot believe that this criticism is important enough to override the clear benefits that the bill should produce if enacted.

There will be a few antitrust settlements that are of major importance and to be sure the bill if enacted will slow down the settlement process in those cases. This to me is desirable. I can think of some antitrust settlements that should have been slowed down forever. Proposed consent decrees that have enormous impact on the public need greater judicial scrutiny and comments by informed citizens to the court can aid that judicial scrutiny. If a competitor or customer or public interest group convinces the district court that they ought to be heard before a consent decree is entered, presumably all will agree that the hearings should be held. If this be correct, why isn't it in the public interest to require the Antitrust Division to file statements explaining the consent decree in detail, rather than relegating the interested citizen to his own devices to dig out the premises upon which the consent decree is based.

There is one aspect of this first part of the bill in which I have some misgivings. That is its applicaion to criminal antitrust cases as provided in the Senate bill. I am pleased to note criminal cases are out in the House version, H.R. 9203. Major provisions of both the House and Senate bill were not drafted with criminal cases in mind and consequently they make no sense as applied to criminal cases. Thus, subsections 2(b) (3) through (5) are utterly meaningless as applied to a criminal case and it would be impossible for the United States to comply with the law if enacted with a provision, as is the case in the Senate bill, making section 2 applicable to settlements of criminal cases.

Turning now to penalties. Section 3 would increase maximum fines in criminal antitrust cases. For reasons given by other witnesses, I favor this increase. I have nothing new to contribute to this question.

Turning to the final section of the bill, the Expediting Act revisions, I am strongly opposed to repeal of that portion of the Expediting Act providing that jurisdiction to hear appeals from final judgments in civil government Sherman Act cases shall lie only in the Supreme Court. I refer to section 5 of H.R. 9203.

Just as it is the Supreme Court that is best equipped in our judicial hierarchy to deal with issues of personal liberty under our constitution, so it is also best suited to deal with questions of interpretation of our Nation's economic charter of freedom, the Sherman Act.

As a result of the fact that the Expediting Act, for the past 70 years, has required the Supreme Court to pass on most major antitrust cases, that Court has played a role in antitrust exegesis more important and more pervasive than that which it has played in interpreting any other congressional enactment. At least during the past 40 years, the Supreme Court's opinions in antitrust cases have gener-

ally tended to favor the position taken by the Government in those cases. This fact, I fear, is the real reason why there is currently a demand from the organized bar to repeal the Expediting Act. Those practicing lawyers who favor repeal simply don't agree with the Supreme Court's opinions in antitrust cases. They believe that the courts of appeals will be more apt to agree with their point of view.

Be this as it may, there are two principal arguments advanced for abolition of direct appeals. The first is that the Supreme Court is overburdened. But as Mr. Justice Douglas said in a recent dissenting opinion in the *Tidewater Oil* case: "The case for our 'overwork' is a myth."

He also said in that opinion: "The Expediting Act, 15 U.S.C. section 28 et seq., involved in the present case, does not contribute materially to our caseload. In the 1967 term we had 12 such cases but only 3 of them were argued, the others being disposed of summarily. In the 1968 term we had eight, but only three were argued. In the 1969 term we had four, only two being argued. In the 1970 term only two such cases reached us and each was argued. In the 1971 term four such cases reached us, two of them being argued.

"If there are any courts that are surfeited, they are the courts of appeal \* \* \*."

In his opinion, Justice Douglas goes on to cite statistics showing that the judges in the courts of appeals are far more overburdened than the Justices of the Supreme Court. In my view, this opinion of Mr. Justice Douglas destroys the argument for abolition of direct appeals in civil government antitrust cases to the Supreme Court insofar as it is based on the premise that the Supreme Court is overburdened by antitrust appeals.

The second argument for repeal of section 2 of the Expediting Act is that the courts of appeals unlike the Supreme Court can sift through complicated and confused records and find and correct errors by the trial court.

There is absolutely no evidence to support the suggestion that competent counsel cannot make as intelligent a presentation in an appeal to the Supreme Court as in one to the courts of appeals. If there is a confusion of issues presented by the record, there is no reason to believe that that confusion will be more difficult for the Supreme Court to untangle than for a court of appeals.

Many civil antitrust cases brought by the United States raise great issues of economic policy on which opinions, in our pluralistic society, will necessarily sharply differ among men of good will. We in the United States have, for better or for worse, chosen the courts as the forum which is to decide these issues. As long as we are going to continue to cast our lot with the courts as the decisive forum, I believe we will all be better off if the Supreme Court makes the final decision in these cases as promptly as possible. Intervention of the courts of appeals in the civil appellate process in government cases will neither expedite nor clarify the development of our antitrust law.

Thank you, Mr. Chairman.

Chairman RODINO. Thank you, Mr. Kramer

Mr. REYCRRAFT?

Mr. REYCRRAFT. Mr. Chairman, my name is George D. Reycraft, and I appreciate the invitation to appear here today.

I am at the present time engaged in the practice of law as a member of the firm of Cadwalader, Wickersham & Taft, One Wall Street, New York, N.Y. From December 1952 until December 1962, I was an attorney with the Antitrust Division of the Department of Justice. Since that time I have been continuously engaged in the private practice of law in New York and have represented both defendants and plaintiffs in private antitrust actions. And, of course, like Mr. Kirkpatrick, some of my clients may be affected by actions which the Congress takes.

By way of background, I might note that when I left the Antitrust Division I was Chief of Section Operations and as such, responsible for the Washington operations of the Antitrust Division including the Judgment Section. I thus participated both directly and indirectly in the negotiation and review of a significant number of consent decrees.

During my private practice I have also had occasion to negotiate consent decrees with members of the staff of the Antitrust Division of the Department of Justice. On some occasions I have been successful, on others, I have not. It may be of some interest to the committee to note that in two recent situations where I was unsuccessful in negotiating a settlement, the cases went to trial and in both cases, the district court decided against the Department of Justice. One of these cases has now been finally concluded as the Government has decided not to appeal the case. The second case is now under review by the Antitrust Division and may or may not be appealed.

I mention these two cases not to encourage a discussion of either of them on the merits, but merely to note that the Department of Justice does have a downside risk in antitrust litigation. Some cases are stronger than others and some can be successfully tried, while others obviously cannot. Under these circumstances, the importance of consent decree procedures seems clear to me. These procedures afford the Department of Justice an opportunity to realistically assess its litigation chances, frequently after the completion of pretrial discovery, and to accept less than it might originally have sought where the facts justify such a result. Moreover, it would not be humanly possible for the Antitrust Division to try all of the 80 to 100 cases which are brought every year with its existing staff. If most of these cases were not terminated by nolo pleas, guilty pleas or consent decrees, the Antitrust Division would need many times the 300-odd lawyers which it now has. It is also worth noting that the trial of any major case, and especially an antitrust case, is more demanding than the investigation of facts and preparation of internal memoranda some of which turn out to be based on hearsay and therefore not acceptable proof in court.

The number of experienced trial attorneys in the Antitrust Division is limited and I see no way in which even 300 experienced trial lawyers could try 80 to 100 antitrust cases a year. The Antitrust Division does not have that many experienced trial lawyers. Settlement procedures of some sort are therefore essential if the current level of antitrust enforcement is to be maintained. Moreover, these settlement procedures must be capable of being pursued at a substantial saving in lawyer time by both defendants and the Antitrust Division or they simply will not work.

Many cases brought on strong policy grounds but weak evidence may involve very legitimate questions of public interest concerning competitive practices with which the Antitrust Division is properly concerned. The consent decree offers a useful vehicle to compromise these cases and provide a measure of relief against anticompetitive business practices where the available evidence will not meet the rigid standards of proof in the context of a trial.

Balanced against these considerations is the fact that there have been some consent decrees entered into by the Antitrust Division during both Democratic and Republican administrations which have been the subject of very severe criticism, which in at least some cases, I am satisfied, has been legitimate.

It has, of course, been unusual and virtually unique to have the kind of information about antitrust consent decree negotiations at all levels of the administration which has become available in the *ITT-Hartford Fire* case. While I have not reviewed the facts surrounding that merger in any depth, my impression is that there is at least a respectable case to be made for the proposition that the consent decree finally entered into was a reasonable accommodation as a matter of antitrust law. I do have some difficulty squaring the acceptance by the Department of Justice of the Hartford Fire acquisition by ITT with the announced policy and intentions of the Antitrust Division at the time the case was brought. However, as a matter of straight antitrust law, it is not at all clear that the Department of Justice would have been successful in winning that case.

There is, of course, on the other hand, nothing whatever favorable to be said about the apparent circumstances under which backdoor negotiations were held in that case in the Attorney General's office, the Deputy Attorney General's office and the White House. Those appearances have permanently tarnished what might otherwise have been a respectable settlement.

The problem before this committee on this issue is, it seems to me, how to preserve the process of negotiation by which the Antitrust Division can compromise cases and at the same time, preserve the integrity of that negotiation process. One way in which the integrity of the negotiation process could receive additional protection would be to require that no discussion of a pending case be held at any level of the Government unless the staff attorney in charge of the case was present. Such a procedure would be likely to insure that, whatever the result, the discussion would be confined to the litigation.

In general, based upon my observation of the Antitrust Division during 10 years within it and a little over 10 years outside it, it is my opinion that the integrity of the administration of the antitrust laws by the Antitrust Division and those administering them in the Antitrust Division has not been exceeded in any other branch of the Government. I know of no case where settlement discussions were confined to the Antitrust Division itself in which any criticism of the integrity of the negotiating process has even been raised. My overall impression of H.R. 9203 is that in attempting to legislate integrity, which is probably impossible, it is likely to seriously impair the legitimate aims of the settlement procedures.

Probably the principal incentive which any antitrust defendant has to enter into a consent decree is to avoid the risk of trial and the

entry of a litigated judgment which then becomes prima facie evidence on liability in any private suit. A second major incentive is to save legal costs which can be very substantial. The deterrent to violation of the antitrust laws posed by treble damage actions is enormous. Consent decree procedures will therefore be successful only to the extent that they afford to defendants the opportunity to avoid having the case made out against them in public by the Government with the same practical effect as a litigated judgment. The procedures to be successful must also permit a defendant to put an end to his legal expense.

With this by way of background, I would like to turn to comments on some of the specific provisions of H.R. 9203. I am seriously concerned that while H.R. 9203 contains saving language in section 2(h) stating that neither proceedings before the district court nor public impact statements filed under subsection (b) shall be admissible in any private antitrust suit nor constitute a basis for the introduction of the consent decree as prima facie evidence in such a proceeding, the proceedings contemplated by the bill would result in a public record which could be as damaging to a defendant as allowing the consent judgment to constitute prima facie evidence. There is no way to prevent a private plaintiff from subpoenaing the same documents and witnesses used in the contemplated hearing and, in my opinion, section 2(h) offers settling defendants little comfort.

I have no problem in requiring that a public impact statement be filed with every decree. The Department of Justice should, of course, be prepared to support any consent judgment which it submits for the approval of a court. That, however, is an entirely different matter from spreading the evidence on the record.

Paragraph 2(e)(2) of H.R. 9203 requires that the court consider "the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit to be derived from a determination of the issues at trial." And, of course, a defendant would be entitled to respond. This sounds very little different to me than a trial on the merits in which all of the evidence is presented to the court.

Paragraph 2(f)(1) which authorizes the taking of testimony of "Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate:" goes beyond what a defendant would face during a trial. The bill apparently contemplates that wide participation in such determinations and hearings would be allowed.

Paragraph 2(f)(3) authorizes "full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae," and so forth. There is no limit on the number or identity of the "interested persons" who might be allowed to participate.

The standards to be applied by the court such as "consideration of the public benefit to be derived from a determination of the issues at trial" seem to throw the rules of evidence out the window. I have great difficulty conceiving of how a court could properly limit testimony at a hearing under these standards. If I understand the bill correctly, I would prefer to go to trial on the merits and risk a litigated judgment rather than to undergo such a hearing.

I would have no problem at all with the 60-day provision before the decree became effective. As the committee knows, the Department of Justice and the Federal Trade Commission now have a 30-day period.

I would be opposed to section 2(b) of the bill which provides that "copies of the proposed consent judgment and such other materials and documents which the United States considered determinative in formulating the proposed consent judgment shall also be made available to members of the public at the district court before which the proceeding is pending and in such other districts as the court may subsequently direct." I would be concerned that this language would permit, if it did not require, the Antitrust Division staff to submit its entire documentary case for public filing with the court, thus removing a large part of the incentive to settle.

As far as section 2(g) is concerned, I would have no objection whatever to that provision. I would agree with Deputy Assistant Attorney General Bruce Wilson's qualification that statements made by such persons in the presence of their counsel of record be excepted from such disclosure.

On section 3, which relates to the increase of a maximum fine, I have no strong feelings. However, I do think that an increase from \$50,000 to \$100,000, coupled with a 1-year possible jail sentence and the treble damage action is an adequate deterrent.

With respect to section 4, this perhaps reflects the fact that I worked so closely with Mr. Kramer for many years that I agree with everything he said, even to the extent of picking the same quotes out of Justice Douglas' opinion. And I have, indeed, gone on to attach a copy of Justice Douglas' dissent to my statement. And I agree with him also that the overworked myth is an argument largely made by those who are opposed to the development of a coherent national antitrust policy and prefer to have the chaos which I think could result by having the appeals going to 11 different courts of appeals. I think that no case has been made out for changing the Expediting Act which, in my opinion, has been the vehicle which has permitted the development of a coherent national antitrust policy in the past.

I appreciate the opportunity to be here, Mr. Chairman.

[The prepared statement of Mr. George D. Reycraft follows:]

#### STATEMENT OF GEORGE D. REYCRRAFT

My name is George D. Reycraft and I appear here today at the invitation of the Chairman of the Committee. I am at the present time engaged in the practice of law as a member of the firm of Cadwalader, Wickersham & Taft, One Wall Street, New York, New York. From December 1952 until December 1962, I was an attorney with the Antitrust Division of the Department of Justice. Since that time I have been continuously engaged in the private practice of law in New York and have represented both defendants and plaintiffs in private antitrust actions.

By way of background, I might note that when I left the Antitrust Division I was Chief of Section Operations and as such, responsible for the Washington operations of the Antitrust Division including the Judgment Section. I thus participated both directly and indirectly in the negotiation and review of a significant number of consent decrees.

During my private practice I have also had occasion to negotiate consent decrees with members of the staff of the Antitrust Division of the Department of Justice. On some occasions I have been successful, on others, I have not. It may be of some interest to the Committee to note that in two recent situations where I was unsuccessful in negotiating a settlement, the cases went to trial and in both cases, the District Court decided against the Department of Justice.

One of these cases has now been finally concluded as the Government has decided not to appeal the case. The second case is now under review by the Antitrust Division and may or may not be appealed.

I mention these two cases not to encourage a discussion of either of them on the merits, but merely to note that the Department of Justice does have a down-side risk in antitrust litigation. Some cases are stronger than others and some can be successfully tried, while others obviously can not. Under these circumstances, the importance of consent decree procedures seems clear to me. These procedures afford the Department of Justice an opportunity to realistically assess its litigation chances, frequently after the completion of pre-trial discovery and to accept less than it might originally have sought where the facts justify such a result. Moreover, it would not be humanly possible for the Antitrust Division to try all of the 80 to 100 cases which are brought every year with its existing staff. If most of these cases were not terminated by *nolo* pleas, guilty pleas or consent decrees, the Antitrust Division would need many times the 300-odd lawyers which it now has. It is also worth noting that the trial of any major case, and especially an antitrust case, is more demanding than the investigation of facts and preparation of internal memoranda some of which turn out to be based on hearsay and therefore not acceptable proof in Court.

The number of experienced trial attorneys in the Antitrust Division is limited and I see no way in which even 300 experienced trial lawyers could try 80 to 100 antitrust cases a year. The Antitrust Division does not have that many experienced trial lawyers. Settlement procedures of some sort are therefore essential if the current level of antitrust enforcement is to be maintained. Moreover, these settlement procedures must be capable of being pursued at a substantial saving in lawyer time by both defendants and the Antitrust Division or they simply will not work.

Many cases brought on strong policy grounds but weak evidence may involve very legitimate questions of public interest concerning competitive practices with which the Antitrust Division is properly concerned. The consent decree offers a useful vehicle to compromise these cases and provide a measure of relief against anti-competitive business practices where the available evidence will not meet the rigid standards of proof in the context of a trial.

Balanced against these considerations is the fact that there have been some consent decrees entered into by the Antitrust Division during both Democratic and Republican Administrations which have been the subject of very severe criticism, which in at least some cases, I am satisfied, has been legitimate.

It has, of course, been unusual and virtually unique to have the kind of information about antitrust consent decree negotiations at all levels of the Administration which has become available in the *ITT-Hartford Fire* case. While I have not reviewed the facts surrounding that merger in any depth, my impression is that there is at least a respectable case to be made for the proposition that the consent decree finally entered into was a reasonable accommodation as a matter of antitrust law. I do have some difficulty squaring the acceptance by the Department of Justice of the Hartford Fire acquisition by ITT with the announced policy and intentions of the Antitrust Division at the time the case was brought. However, as a matter of straight antitrust law, it is not at all clear that the Department of Justice would have been successful in winning that case.

There is of course, on the other hand, nothing whatever favorable to be said about the apparent circumstances under which backdoor negotiations were held in that case in the Attorney General's office, the Deputy Attorney General's office and the White House. Those appearances have permanently tarnished what might otherwise have been a respectable settlement.

The problem before this Committee on this issue is, it seems to me, how to preserve the process of negotiation by which the Antitrust Division can compromise cases and at the same time, preserve the integrity of that negotiation process. One way in which the integrity of the negotiation process could receive additional protection would be to require that no discussion of a pending case be held at any level of the Government with persons outside the Government unless the staff attorney in charge of the case was present. Such a procedure would be likely to insure that, whatever the result, the discussion would be confined to the litigation.

In general, based upon my observation of the Antitrust Division during ten years within it and a little over ten years outside it, it is my opinion that the integrity of the administration of the antitrust laws by the Antitrust Division and those administering them in the Antitrust Division has not been exceeded

in any other branch of the Government. I know of no case where settlement discussions were confined to the Antitrust Division itself in which any criticism of the integrity of the negotiating process has even been raised. My overall impression of H.R. 9203 is that in attempting to legislate integrity, which is probably impossible, it is likely to seriously impair the legitimate aims of the settlement procedures.

Probably the principal incentive which any antitrust defendant has to enter into a consent decree is to avoid the risk of trial and the entry of a litigated judgment which then becomes *prima facie* evidence on liability in any private suit. A second major incentive is to save legal costs which can be very substantial. The deterrent to violation of the antitrust laws posed by treble damage actions is enormous. Consent decree procedures will therefore be successful only to the extent that they afford to defendants the opportunity to avoid having the case made out against them in public by the Government with the same practical effect as a litigated judgment. The procedures to be successful must also permit a defendant to put an end to his legal expense.

With this by way of background, I would like to turn to comments on some of the specific provisions of H.R. 9203. I am seriously concerned that while H.R. 9203 contains saving language in Section 2(h) stating that neither proceedings before the District Court nor public impact statements filed under subsection (b) shall be admissible in any private antitrust suit nor constitute a basis for the introduction of the consent decree as *prima facie* evidence in such a proceeding the proceedings contemplated by the Bill would result in a public record which could be as damaging to a defendant as allowing the consent judgment to constitute *prima facie* evidence. There is no way to prevent a private plaintiff from subpoenaing the same documents and witnesses used in the contemplated hearing and, in my opinion, Section 2(h) offers settling defendants little comfort.

I have no problem in requiring that a public impact statement be filed with every decree. The Department of Justice should, of course, be prepared to support any consent judgment which it submits for the approval of a court. That, however, is an entirely different matter from spreading the evidence on the record.

Paragraph 2(e) (2) of H.R. 9203 requires that the court consider "the public impact of entry of the judgment upon the public generally and individually alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit to be derived from a determination of the issues at trial." And, of course, a defendant would be entitled to respond. This sounds very little different to me than a trial on the merits in which all of the evidence is presented to the court.

Paragraph 2(f) (1) which authorizes the taking of testimony of "Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;" goes beyond what a defendant would face during a trial. The Bill apparently contemplates that wide participation in such determinations and hearings would be allowed.

Paragraph 2(f) (3) authorizes "full or limited participation in proceedings before the court by interested persons or agencies, including appearance *amicus curiae*, and so forth. There is no limit on the number or identity of the "interested persons" who might be allowed to participate.

The standards to be applied by the court such as "consideration of the public benefit to be derived from a determination of the issues at trial" seem to throw the rules of evidence out the window. I have great difficulty conceiving of how a court could properly limit testimony at a hearing under these standards. If I understand the Bill correctly, I would prefer to go to trial on the merits and risk a litigated judgment rather than to undergo such a hearing.

As the Committee knows, the practice of the Department of Justice at the present time is that every consent decree is entered into upon a stipulation that it will be submitted to the court for its approval no sooner than 30 days after the filing of the stipulation. The purpose of this procedure is substantially in accord with the purposes of H.R. 9203 in providing for a 60-day period before any consent decree becomes effective. That purpose is to permit any member of the public to express his views to the Department of Justice and, in rare cases, to persuade the court that the judgment should not be entered. I would see no objection to the extension of the 30-day period to 60 days for this purpose.

I am opposed to Section 2(b) which provides that: "Copies of the proposed consent judgment and such other materials and documents which the United States considered determinative in formulating the proposed consent judgment shall also be made available to members of the public at the district court before which the proceeding is pending and in such other districts as the court may subsequently direct." In my present capacity as counsel on occasion for antitrust defendants, I would be concerned that this language would permit, if it did not require, the Antitrust Division staff to submit its entire documentary case for public filing with the court, thus undercutting and removing any incentive I might otherwise have to enter into a consent decree.

Section 2(g) requires that "not later than ten days following the filing of any proposed consent judgment, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant including any officer, director, employee or agent thereof or other person except counsel of record, with any officer or employee of the United States concerning or relevant to the proposed consent judgment."

Deputy Assistant Attorney General Bruce Wilson has suggested that statements made by such persons in the presence of their counsel of record be exempted from such disclosure. With that modification, I would have no objection to following this procedure and believe it is a reasonable method of keeping communications concerning the case on a professional level.

Section 3 provides that the maximum fine which a court may impose on any corporation violating the antitrust laws be increased from \$50,000 to \$500,000 and from \$50,000 to \$100,000 for any other person. I am not persuaded that an increase in the fine from \$50,000 to \$500,000 is necessary. I would not be opposed to an increase in the fine from \$50,000 to \$100,000 for both corporations and individuals. In most cases fines assessed under the current \$50,000 limitation are less than that amount. The existence of a possible \$100,000 fine, a one year jail sentence and a threat of private treble damage litigation seem to me to constitute very effective deterrents to deliberate antitrust violations.

Section 4 would revise the Expediting Act to require that appeals from final judgments in suits brought by the United States under the antitrust laws be taken to the Court of Appeals rather than directly to the Supreme Court, and thereafter reviewable by the Supreme Court only upon a *writ of certiorari*. In my opinion, direct appeal of civil antitrust cases to the Supreme Court has been an essential ingredient in the development of a coherent national antitrust policy. The importance of antitrust cases is generally conceded even by those who favor amendment of the Expediting Act on the generally stated ground of relieving the Supreme Court of the alleged burden of reviewing numerous antitrust cases.

Moreover, in bank merger ceases an automatic injunction goes into effect at the time the Department of Justice files suit. Such injunctions are rarely lifted prior to a final judgment. This could mean that bank merger defendants would have to go through three courts rather than two before final judgment. Winning antitrust merger cases by imposing a three to five year delay would be grossly unfair as well as discriminatory.

I am impressed and persuaded by the dissent of Mr. Justice Douglas in *Tide-water Oil Co. v. United States and Phillips Petroleum Company*, 409 U.S. 151 (1972). In that opinion, Mr. Justice Douglas observed that the case for the "overwork" of the Supreme Court "is a myth." He pointed out that the signed opinions of the Court in argued cases totaled 137 in the 1939 term of the Supreme Court compared with 129 signed opinions in the 1971 term of the Court. He pointed out that "in the 1967 term, we had 12 such cases (under the Expediting Act) but only three of them were argued, the others being disposed of summarily. In the 1968 term we had eight, but only three were argued. In the 1969 term we had four; only two being argued. In the 1970 term only two such cases reached us and each was argued. In the 1971 term, four such cases reached us, two of them being argued."

Justice Douglas observed that while antitrust cases represent only a small fraction of the Supreme Court case load, "they represent large issues of importance to the economy, to consumers, and to the maintenance of the free-enterprise system."

It is my view that the interest in repealing the Expediting Act to prohibit direct appeal of Government antitrust cases to the Supreme Court has as its

primary genesis a desire to impede the development of a national antitrust policy by scattering the appellate decisions on antitrust cases among the eleven courts of appeals. In my judgment an effective national antitrust policy is essential to the preservation of our free economy and deserves the expedited treatment which it now receives under the Expediting Act.

There is attached to my written statement a complete copy of Mr. Justice Douglas's dissent in the *Tidewater Oil* case, which answers far better than I could the arguments for amending the Expediting Act.

OCTOBER TERM, 1972

Mr. JUSTICE DOUGLAS, dissenting.

I agree with Mr. JUSTICE STEWART that the appeal of the interlocutory order in this case to the Court of Appeals under 28 U. S. C. § 1292(b) was not barred by the Expediting Act. But I disagree with the intimations in both the majority opinion and the other dissenting opinion that because of our overwork the antitrust cases should first be routed to the courts of appeals and only then brought here.<sup>1</sup>

The case for our "overwork" is a myth. The total number of cases filed has increased from 1063 cases in the 1939 Term to 3648 in the 1971 Term. That increase has largely been in the *in forma pauperis* cases, 117 being filed in the 1939 Term and 1930 in the 1971 Term. But we grant certiorari or note probable jurisdiction in very few cases. The signed opinions of the Court (which are only in argued cases) totaled 137 in the 1939 Term with six *per curiams*<sup>2</sup> or a total of 143 Court opinions while in the 1971 Term we had 129 signed opinions of the Court and 20 *per curiams*<sup>3</sup> or a total of 149 Court opinions. So in terms of petitions for certiorari granted and appeals noted and set for argument our load today is substantially what it was 33 years ago.

The load of work so far as processing cases is concerned has increased. That work is important; and in many ways it is the most important work we do. For the selection of cases across the broad spectrum of issues presented is the very heart of the judicial process. Once our jurisdiction was largely mandatory and the backup of cases piled high. The 1925 Act<sup>4</sup> changed all that, leaving to the Court the selection of those certiorari cases which seemed important to the public interest. The control of the docket was left to the minority, only four votes out of nine being necessary to grant a petition. The review or sifting of these petitions is in many respects the most important and, I think, the most interesting of all our functions. Across the screen each Term come the worries and concerns of the American people—high and low—presented in concrete, tangible form. Most of these cases have been before two or more courts already; and it is seldom important that a third or fourth review be granted. But we have national standards for many of our federal-state problems and it is important, where they control, that the national standards be uniform; and it is equally important where state law is supreme, that the States be allowed to experiment with various approaches and solutions.

Neither taking that jurisdiction from us nor the device of reducing our jurisdiction is necessary for the performance of our duties. We are, if anything, underworked, not overworked. Our time is largely spent in the fascinating task of reading petitions for certiorari and jurisdictional statements. The number of cases taken or put down for oral argument has not materially increased in the last 30 years.

The Expediting Act, 15 U.S.C. §§ 28, 29, involved in the present case, does not contribute materially to our caseload. In the 1967 Term we had 12 such cases but only three of them were argued, the others being disposed of summarily. In the 1968 Term we had eight, but only three were argued. In the 1969 Term we had four; only two being argued. In the 1970 Term only two such cases

<sup>1</sup> It is true that several Justices over the years have expressed the desire that the antitrust cases come to us only by certiorari to the court of appeals. So far as I am aware the only opinion speaking for the Court containing that suggestion is *United States v. Singer Mfg. Co.*, 374 U.S. 174. But there the idea was contained only in a footnote (*id.*, at 175 n. 1); and as Mr. Chief Justice Hughes was wont to say, "Footnotes do not really count."

<sup>2</sup> Not including orders of dismissal or affirmance.

<sup>3</sup> Including orders of dismissal or affirmance.

<sup>4</sup> Judiciary Act of Feb. 13, 1925, 43 Stat. 936.

reached us and each was argued. In the 1971 Term four such cases reached us, two of them being argued.<sup>5</sup>

If there are any courts that are surfeited, they are the courts of appeal. In my Circuit—the Ninth—it is not uncommon for a judge to write over 50 opinions for the court in one term. That Circuit has at the present time a 15-month backlog of civil cases, while we are current. The average number of signed opinions for the Court in this Court is close to 12 per Justice; only occasionally does anyone write even as many as 18; and we have no backlog.

Separate opinions—including dissents and concurring opinion—multiply. If they are added to the total of 149 for the 1971 Term, the overall number would be 328. But the writing of concurrences, dissents, or separate opinions is wholly in the discretion of the Justice. It is not mandatory work; it is writing done in the vast leisure time we presently have.

The antitrust cases are only small fractions of our caseload. Yet they represent large issues of importance to the economy, to consumers, and to the maintenance of the free-enterprise system. Congress has expressed in the Sherman Act,<sup>6</sup> the Clayton Act,<sup>7</sup> the Robinson-Patman Act,<sup>8</sup> and the Celler-Kefauver Act<sup>9</sup> a clear policy to keep the avenues of business open, to bar monopolies, and to save the country from the cartel system which is the product of gargantuan growth.

It is of course for Congress and Congress alone to determine whether the Expediting Act<sup>10</sup> should bring the antitrust cases directly here. While I join the statutory construction in Mr. JUSTICE STEWART's dissent, I do not join that part which expresses to me an inaccurate account of the "overwork" of the Court. We are vastly underworked. One interested in history will discover that once upon a time Hugo Black wrote over 30 opinions for the Court in a Term where only 135 opinions were written for the Court, a few more than we all wrote last Term.

Chairman RODINO. Thank you very much.

Just to deviate for a moment, the stenographer does not have to take this.

[Discussion off the record.]

Chairman RODINO. Mr. Kirkpatrick, you picture some sort of a dilemma arising when complaint relief is compared to consent decree relief because they will inevitably differ. Do not the Federal rules of procedure codify this and provide for relief justified whether or not prayed for in the complaint?

Mr. KIRKPATRICK. I think this is so, your honor, or Mr. Chairman. I do not doubt that. It is the dilemma that faces the prosecutor in the hearing before the court that troubles me. How is he to handle that consistent with the possibility that he may have to go to trial. The consent order may be rejected, and he would have in the meantime admitted some great infirmity in his case, and admitted it candidly before the court.

<sup>5</sup> *Ford Motor Co. v. United States*, 405 U.S. 562; *United States v. Topco Associates*, 405 U.S. 596.

The antitrust cases not argued in the 1967-1971 Terms were either reversed out of hand or affirmed out of hand (some of these being companion cases to those that were argued) or dismissed as moot, or dismissed for want of jurisdiction. There were three dismissed for want of jurisdiction.

*Farbenfabriken Bayer A.G. v. United States*, 393 U.S. 216. Involved an interlocutory order in which we ruled that we had no jurisdiction. *Standard Fruit & S.S. Co. v. United Fruit Co.*, 393 U.S. 406. Involved an effort of a corporation, not a party, to inspect the divestiture plans being submitted to the District Court pursuant to a consent judgment. *Garrett Freightlines v. United States*, 405 U.S. 1035, involved an appeal from a defendant dismissed from the antitrust case because of the primary jurisdiction of the Interstate Commerce Commission over the acquisition in question.

<sup>6</sup> Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C. §§ 1-7.

<sup>7</sup> Clayton Act of Oct. 15, 1914, 38 Stat. 730, 15 U.S.C. § 12 *et seq.*, 44.

<sup>8</sup> Robinson-Patman Act of June 19, 1936, 49 Stat. 1526, 15 U.S.C. §§ 13, 13a, 13b, 21a, 1013.

<sup>9</sup> Celler-Kefauver Act of Dec. 29, 1950, 64 Stat. 1125, 15 U.S.C. §§ 18-21.

<sup>10</sup> For the legislative history of the Act see H.R. Ren. No. 3020, 57th Cong., 2d Sess.

Senator Fairbanks, leading exponent of the Act, said in reporting it to the Senate: "The far-reaching importance of the cases arising under antitrust laws now upon the statute books or hereafter to be enacted, and the general public interest therein, are such that every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object." 36 Cong. Rec. 1679.

Chairman RODINO. Well, is it not one of our purposes to insure that the consent decree relief does not merely cut down complaint relief as a spurious matter, since more relief than prayed for, and often justified by discovery and other pretrial litigation phases are developed by Government prosecution?

Mr. KIRKPATRICK. Yes. I do not know where I come out on that, Mr. Chairman. I like the idea of opening up the process. I think it desirable for many of the reasons that Mr. Kramer has indicated. I do think that it does place some obstacles in the consent judgment process, which is terribly important to the enforcement of the antitrust laws, but it may not do so in the great bulk of the cases. In the routine cases where the relief sought is four square with the relief that is in the proffered judgment, there is no problem there.

Chairman RODINO. Do you believe that this latter kind of obstacle would result?

Mr. KIRKPATRICK. I do not know. And let me raise the second of my problems there, Mr. Chairman. I do not myself really know what the solution is. As Mr. Reycraft has suggested, there are times when with complete propriety the consent decree proffered is not as strong as the relief originally sought. Now, that may be for a great variety of reasons, including the fact that there is more important law enforcement elsewhere. I do not know how you will convince the court of that. I really would doubt that you are going to give it the entire range of the things that you are doing, and say in my judgment this is not as important as that. I think that that is obviously an impossibility before a court, and it would be improper even to disclose the investigations and prosecutions that are contemplated. So, that poses a problem, and I have no solution to it, sir. But, this bill, I think, does raise that question. How much or in how many of the cases is, of course, questionable considering the public purpose that is intended here is a very important one.

Chairman RODINO. You made mention of the "asphalt clause," which is a part of some consent decrees where liability is admitted?

Mr. KIRKPATRICK. Yes.

Chairman RODINO. Do you find any requirements for such in this bill?

Mr. KIRKPATRICK. I am puzzled in that regard. I do not know whether it is intended that section 2(e)(2) raises, opens up that question or not, sir. I flagged it in my statement as a question where I as a lawyer, were I seeking to convince a court that that question should be reconsidered, I think this legislation—I think I would use this as an argument that Congress intended to open up the question again because it speaks of individuals alleging specific injury as being before the court for consideration. I would hope that the law would remain settled the way it is, because I think the Antitrust Division feels that to have such admissions of liability imposed by the court would be a very serious blow to the consent judgment process.

Chairman RODINO. But, I refer you to the bill on page 7, and it would seem to me that your apprehension there is covered, at least in my judgment. Where there is an asphalt clause, the consent judgment is evidence really which is not the case here.

Mr. KIRKPATRICK. I see what you mean, sir. But, the way I was looking at it was the court would conclude not to enter or adopt a consent proffered, unless there was embedded in it the admission of liability,

and I do not think the language in (2) (h) would reach that situation.

Chairman RODINO. You feel there is some question?

Mr. KIRKPATRICK. I do feel there is a question, sir.

Chairman RODINO. Mr. Kramer, in your prepared statement I see that there is a strong position and a vote of confidence for having judicial scrutiny of a proposed consent decree. It would appear to me that the decision to enter into a consent decree flows from first of all the ability to make correct prosecutorial decisions as well as erroneous decisions. By affording the opportunity for judicial scrutiny and a commentary with these various statements by nonparties to aid the court in performing its scrutiny, do you not think that good faith but incorrect decisions to settle would actually be filtered out, and thereby benefit the public and competition?

Mr. KRAMER. All I can say, Mr. Chairman, is that I do, Amen.

Chairman RODINO. Well, I do not think I need address any further questions to you on that. You have made your position clear.

Mr. Hutchinson?

Mr. HUTCHINSON. Thank you, Mr. Chairman.

With regard to the Expediting Act provisions in this bill, perhaps one of the gentlemen can inform the subcommittee how many anti-trust cases reach the Supreme Court each term on an average these days?

Mr. REYCRAFT. Mr. Chairman, in both Mr. Kramer's statement and in my own we quote from Mr. Justice Douglas' opinion in the Tidewater case in which he pointed out that in the 1967 term there were 12 cases under the Expediting Act, but only three of them were argued, the others being disposed of summarily. In the 1968 term the Supreme Court had eight, but only three were argued. In the 1969 term there were four, only two being argued. In the 1970 term only two cases, two cases reached the Supreme Court under the act, and each was argued. And then in the 1971 term four such cases reached the Supreme Court, two being argued. So, the average is a little bit over two a year.

Mr. HUTCHINSON. Between two and three that they actually listen to arguments and decide?

Mr. KIRKPATRICK. And may I point out, Mr. Hutchinson, however, and I do not have the numbers here, there are a considerable number of private antitrust actions that come up to the Supreme Court via the courts of appeals during this period, and I would think they would be at least equal to or greater than the number of cases that arrive through the act.

Mr. REYCRAFT. But, the point is that those cases come up under the certiorari procedure, which that bill would apply to Government antitrust cases, so there would be no change in the number of private antitrust cases that the Supreme Court takes. It has complete discretion in private suits as to whether it will or will not grant a petition for certiorari, and this bill would extend that to Government cases. So, all we are talking about is that average of slightly over two cases a year, which Justice Douglas referred to, which are argued and on which opinions are written.

Mr. HUTCHINSON. Well, does that suggest that there would only be five or six cases a year in this field then that would, under this bill, go through the court of appeals? I mean, it would not add a burden to them either, would it?

Mr. REYCRAFT. Well, that is a difficult question. I have heard it said by members of the Solicitor General's office that appeals that it would not permit the Government to take to the Supreme Court directly under the Expediting Act it would permit the Antitrust Division to take through the courts of appeals, so that there might be some additional appeals taken which would go through the courts of appeals, which would not otherwise have been taken. Sometimes the Solicitor General's office prefers to leave a district court opinion as law rather than to take an appeal to the Supreme Court. So, there is an effective deterrent to overloading the Supreme Court with these cases.

Mr. KIRKPATRICK. May I just add this thought, sir?

Mr. HUTCHINSON. Yes.

Mr. KIRKPATRICK. That I believe the Chief Justice of the United States has spoken on the matter of the Expediting Act, and has indicated his approval of some change so that these cases do not come directly to the Supreme Court.

Mr. HUTCHINSON. Yes. I am aware of that.

Mr. KIRKPATRICK. Mr. Justice Douglas, of course, being not the only one speaking to that matter.

Mr. HUTCHINSON. I understand. Now, I think some mention was made in your comments pointing out that these antitrust cases that are taken by the Justice Department directly to the Supreme Court are national in scope and concern, and something that really should not be decided on different grounds by nine or ten different circuits. Is that a characterization of all antitrust suits, or is that true of only a relative few that actually reach the Supreme Court through the Expediting Act?

Mr. REYCRAFT. Well, it obviously is not true of all antitrust suits, Mr. Hutchinson. The Solicitor General's office does exercise a very real restraint on taking cases which are not of general importance to the Supreme Court, and that I think is reflected by the statistics as to the number of cases which actually reach the Court. There are more cases than that, more civil antitrust cases than that tried which do not get there, and some are disposed of summarily by the Supreme Court itself. The Supreme Court can summarily affirm or the Supreme Court can summarily reverse in an antitrust case, and it has done that.

Mr. HUTCHINSON. Summarily?

Mr. REYCRAFT. Yes, sir, it happened in a bank merger case recently. I believe it was in Texas where the Government lost the case, appealed, and the defendants moved to affirm, and the Court affirmed without any oral argument whatever, just reading the briefs.

Mr. HUTCHINSON. I see.

Turning to one other question, in the testimony of the witnesses yesterday the point was made that the procedures outlined by both the House and the Senate bills would, in effect, create litigation. For instance, we were talking about whether the public impact statement which would have to be filed would itself be a matter of litigation and appeal as to its adequacy; whether the public impact statement would not in the end create a great deal further delay in the resolution of consent decrees because of the litigation and appeals. Do you think there is a validity in that line of argument?

Mr. REYCRAFT. Well, I think there is some, at least some validity, sir. I would think that if I were in the position of opposing the entry of a consent decree on behalf of some person who was injured, or who had

a private antitrust suit pending where I wanted to get the Government's evidence spread out in the record, that I might go into court and ask that the entry of the decree be enjoined because the public impact statement was inadequate, and did not meet the standards which the Congress had set forth in this bill. So, whether I win or lose is another matter, but I think that this is something that does not take a lot of resourcefulness or a lawyer to argue about, whether a public impact statement requires including evidentiary matters, and that is something else that seems to be open to me. We have all, or all of us here at the table I am sure have had the experience of judges, when consent decrees are offered to them now under existing procedures, asking for a statement of counsel as to what the case is about, and what the decree accomplishes and the like. That kind of a public impact statement, or an impact statement like that I see no problem with. And the Government, in fact, does that on invitation of the court. But this bill, it seems to me, if it is to change that procedure, contemplates, or may contemplate a good deal more than that, and that is what worries me.

Mr. HUTCHINSON. This bill also apparently requires even publication in newspapers around the country in a gesture to invite great numbers of the public to respond. And, as a lawyer, do we have any such thing as standing in antitrust cases?

Mr. REYCRAFT. Well, yes, sir; there is a great body of law on standing, and I cannot even summarize it here. In a consent decree there is one important Supreme Court case on that issue which the committee counsel is very familiar with in the *El Paso* case, the natural gas case where the Supreme Court did permit the State of California to oppose the entry of a consent decree. But, it did so under rule 24 of the Federal Rules of Civil Procedure, which as I recall it, required a finding that the intervening party had some sort of a proprietary interest in the matter. And I think it was a little stretching of the law, but this bill, it seems to me, does away with any standing, or standard, and would permit any interested party, as this says, to come in.

Mr. HUTCHINSON. I thank you for that observation. I tend to agree with you.

I yield.

Chairman RODINO. Thank you very much.

Before I pass on to Mr. Brooks, Mr. Reycraft, in view of the fact that you mentioned the *El Paso* case, where the Supreme Court set aside the consent decree in that merger case, because as the Court said and I quote, "the United States knuckled under," and the consent decree, "promises to perpetuate rather than terminate this unlawful merger and threatens to turn loose on the public ineffective measures to restore competition." do you think that that situation might have been avoided had the rules and requirements that are laid down in the bill been followed and pursued more closely?

Mr. REYCRAFT. Well, I would like to say a couple of things about that. First I would tell the chairman that I tried the *El Paso* case for the Government, and I did not participate in the negotiations for a consent decree, and, therefore, did not knuckle under to *El Paso* or anybody else. Nevertheless, I think the Supreme Court reached a very good result by, I would think, arguable law in setting aside that decree. I think maybe some expansion of the Court's discretion to set aside decrees might be valid.

What concerns me in this bill is what would seem to me would require almost a new trial, even beyond the trial that you would get in a litigated case.

Chairman RODINO. Mr. Kramer, might you comment on that?

Mr. KRAMER. I would like very much to comment, Mr. Chairman. And I would like my comment to be framed in terms of further consideration of Mr. Hutchinson's excellent point, which sounded a little technical as he put it, but which really goes to the heart of the decision you are going to have to make on this bill. He pointed out, probably correctly, and nobody can be sure as he himself said, that this bill, if enacted, will enable a substantial group of citizens, the exact dimensions of which we cannot be sure, to appear in court and be heard as to the wisdom of consent decrees. He is right. And the point that those of us who favor this bill are trying to make is that that is good, that is what we need. We need more public participation in the settlement process.

Now, if you do not agree with us on that, if you think that the most important thing is to see that the business of the Department, as the Department judges it, should go forward without interference with busybodies, public spirited citizens, depending upon your point of view, or by competitors, or defendants, then you vote against this bill.

If, on the other hand, you feel that delay in some cases is worth the price of achieving greater public understanding and recognition of the vital issues being settled by some consent decrees, then you vote for the bill.

Chairman RODINO. Well, there have been questions raised as to them having to employ more resources than are available, and delay might bring on further delay, and this might prejudice other matters.

What comment do you have to make there?

Mr. KRAMER. I would be foolhardly, Mr. Chairman, not to say that that is a risk. I do not believe it is a serious risk. I base that on my 20 years in the Antitrust Division, working under very vigorous Attorneys General and not so vigorous Attorneys General, where I witnessed remarkably little public interest in most antitrust consent decrees. I think this bill, to be sure, will cost the taxpayers a little because of these ads that have to be run. To be sure, it will result in a little more writing by the Antitrust Division, but I assure you, and I speak carefully, that in 4 out of 5, at least, and possibly 9 out of 10, antitrust settlements, while the paper will be different, the effect and result will be just about the same as it has been.

Think of the *IBM* case, which is pending, supposing that the Antitrust Division for one reason or another decides to settle that case. In Heaven's name, should not that consent decree be open to the most careful, extensive public scrutiny?

Now, you can settle a consent decree among a bunch of real estate brokers in Atlanta, who cares? And this bill is not going to make any more difference as to how that case is settled than the existing situation.

Chairman RODINO. Thank you.

Mr. Brooks.

Mr. BROOKS. I would ask is it worthwhile to change the 1 in 10, if your statement is correct?

Mr. KRAMER. That is the issue. On balance, I think it is. And the reason I think it is derives from my premises, which some called biases,

about the importance of the antitrust laws. I am deeply concerned, and so is the Chairman of the Federal Reserve Board, about what is happening to antitrust in this country. This is not a partisan political issue. To be sure, it is a political issue, but not partisan. It is not because in recent years whether we have had one party or another in the White House, we are drifting inexorably away from our antitrust goal, and in a minor way, to be sure, I think this bill will tend to rejuvenate and call public attention to the importance of these cases. So it is a chance, it is a risk that I am willing to take. But, I already told you that I would be a fool not to say that possibly it will not work, possibly it will cause undue delay. I do not think so.

Mr. BROOKS. How about the nine which you say would not be altered basically by this procedure? Would it add that much work to the Antitrust Division and would it add much work to the litigants to provide an impact statement?

Mr. KRAMER. I have given considerable thought to this question, and I appreciate your asking. I think for the first year of the bill the burden will be significant. And I think what will happen is that the Antitrust Division people will develop a technique of complying with this bill, and without it ever quite becoming routine, I think that a format and a theory and a structure of these impact statements will be developed that will permit them, after the beginning, to get them out without substantial added work.

Now, let me make one other point. I cannot predict what the district courts are going to do with this bill, but my guess is that, with some exceptions, depending upon the attitude of particular judges, that they will not prolong consideration unless there is a substantial hue and cry from affected citizens, whether they be competitors, customers, or the public.

Mr. BROOKS. The reason I asked that question is that in nonantitrust impact statements required under other legislation on the development of waterways, for example, the impact statements have, and at this point are still, very involved, time consuming, expensive, cumbersome, and sometimes very difficult to understand from the standpoint of an ongoing program. I think of a waterway project that was 90-percent completed, but an environmental impact statement that was not acceptable to a Federal court stopped the entire project. This is what is now being done in my district through that kind of impact statement. Ecological statements as to the impact on the public and so forth are useful, but unless we can make them more concise, for example, by the courts being a little more active in deciding them and resolving them without having them all appealed, impact statements can be a major deterrent to progress and necessary construction.

I would hope that a procedure could be evolved whereby the antitrust public impact statements will not become an obstacle to reasonable or thoroughly logical settlement by the litigants. And we are not trying, I do not believe, to stop these from reaching the court. This is the law. We deal with people in this world, and I hope that we would not let it be a real deterrent to the speedy, reasonable accord that can be reached in some consent decrees.

No further questions, Mr. Chairman. Thank you.

Chairman RODINO. Thank you.

Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman.

I want to state that I think the committee has received testimony here this morning from some experts who are experienced in this area of the law which this bill directs itself to, and I cannot help but feel that the testimony is extremely valuable to the committee in making our judgment.

I note that each one of you is at the present time in the private practice of law, and you are appearing here in your private capacity. I would ask you whether you are here representing any particular clients or groups of clients in connection with the testimony you are presenting?

Mr. RAYCRAFT. I am speaking only for myself.

Mr. KIRKPATRICK. Likewise, just personally; I have no clients behind me.

Mr. RAYCRAFT. Not only might my clients disagree with me, but I think some of my own partners might disagree, too.

Mr. KRAMER. Mr. McClory, I am not in private practice. I am a law professor now, and I do not even represent Georgetown Law School. I am here on my own.

Mr. McCLORY. Well, thank you. One part of this whole subject concerns me, and it relates to the settlement of the ITT case, since that was the subject of extensive hearings by this committee when we considered the subject of these conglomerate mergers here 1½ or 2 years ago. We considered very carefully the merger of the Hartford Fire Insurance Co. into the ITT conglomerate corporation. A merger of this type is the object of rather broad public concern.

One of you has testified with regard to the importance of having a staff attorney present in any conversation which may take place with a government official. The testimony presented to this committee regarding the ITT merger was not in the presence of the staff attorney, and I am sure that there must have been many other conversations, too, perhaps a policyholder would communicate with his Congressman.

How broad or how restricted do you think that such a clause could be, or such a provision could be, with respect to communications with governmental officials on an issue such as that?

Mr. RAYCRAFT. Well, Mr. McClory, the function, of course, of your office and of a prosecutor are entirely different, and I think of all sorts of circumstances, and, in fact, could eliminate hardly any circumstances under which it would not be appropriate to have you discuss any matters of any kind with your constituents.

On the other hand, I can think of very little in the appropriate area which would justify the President or his chief domestic adviser or any other adviser discussing antitrust litigation with the president of a company involved in antitrust litigation. And I think that requiring the staff attorney in charge of the case to be present at any such discussions would keep it from turning to any subject other than the litigation, and I think it would, in fact, eliminate such conversations, because I cannot conceive of any productive discussions on the law coming out of that kind of a context. So I do not think it would have any inhibiting effect whatever on antitrust enforcement. It would merely inhibit those conversations that had to do with other things.

Mr. McCLORY. The other point, or another point, made, and I think it was by Professor Kramer, was with regard to the repeal of the Ex-

pediting Act, insofar as the antitrust cases are concerned, this whole subject of the workload of the Supreme Court, which is also a separate issue.

And do you not think it would be difficult for us to resolve that issue in connection with this piece of legislation? I mean, either the Supreme Court is overworked, as Chief Justice Burger indicates, and requires some fundamental change in the procedures to ease that workload, or it does not. I mean, it relates, it is not only relating to antitrust cases but all types of cases. So your testimony in that respect would be in support of former Justice Warren's position and against that of Justice Burger, insofar as this new level of judicial review that the Chief Justice is recommending?

Mr. KRAMER. Mr. McClory, I think that there is a good deal to your point, and I interpret it as meaning this, that if the Supreme Court is overburdened, and it well may be, the overburden apparently does not come from antitrust cases. And if you go that far, then I say let us not try to cure that problem with this bill, but consider it separately and see what can be done across the board.

So I think the point you have made could be argued either way on the repeal of the Expediting Act. I think it could also be the basis of an argument for not fooling with one little tiny—and I think "tiny" is a fair word, numerically at least—part of the caseload.

Mr. KIRKPATRICK. I think there is an important service to be performed here, whereby the courts of appeals, whereby there may be comparatively few cases each year that come under the Expediting Act, but they are enormous cases normally, with thousands of pages of testimony and exhibits. And to have the court of appeals perform this, it seems to me their natural area with regard to refining those points at issue and to perform that office, it seems to me, is important not only in relieving the Supreme Court of the burden, but of perhaps shaping of the decisional process.

Mr. McCLORY. I think that is all, Mr. Chairman. Thank you.

Ms. Jordan.

Ms. JORDAN. Mr. Kirkpatrick, in your statement you indicated you wholeheartedly approve of the amendments to the Expediting Act.

Mr. KIRKPATRICK. Yes.

Ms. JORDAN. Mr. Kramer, however, takes a slap at the organized bar, stating the reason why the organized bar favors amendments to the Expediting Act is because the Government position is usually favored by the Supreme Court. Is that the reason for your approval?

Mr. KIRKPATRICK. I can assure you that that is not the reason for my approval of these amendments.

I might point out also that a very great number of cases which affect the organized bar are the private treble damage cases, and all of those go to the courts of appeals. But, with great respect to my colleague, Mr. Kramer, I do not give much weight to his point.

Ms. JORDAN. Well, moving on, Mr. Kirkpatrick, how much weight do you give to your reservation or hesitancy in this bill about questions of admission of liability being included in the papers which would be required to be filed under the terms of this act?

Is that really deserving of weight in the first instance?

Mr. KIRKPATRICK. My point there, I think, is in complete accord with that made by the law enforcement officer of the Antitrust Divi-

sion. My apprehension would be that should the courts, as a result of this legislation, adopt a rule of law which would require the admission of liability in consent judgments, there would not be any consent judgments, and that entire avenue of law enforcement would be foreclosed.

Ms. JORDAN. Do you think that it is likely that such a move would be adopted?

Mr. KIRKPATRICK. I simply look at the language, Ms. Jordan, and have reached the conclusion in my own mind that there is some risk in that language, that the courts may think that this matter of settled law, which I regard as settled law, as being reopened by the Congress for further consideration.

Ms. JORDAN. Well, are you prepared to say how far this bill ought to go in its requirements of information which would help one determine the impact on the public of consent decrees?

Mr. KIRKPATRICK. It seems to me it is impact on the public and not an impact on particular potential treble damage plaintiffs that is the important consideration. And I do not know. I have not thought, what changes in language I would think desirable in that regard. But I simply raise that as a flag so that this subcommittee can consider it. I think it would not be a part of the intention of the subcommittee that such a change in law result from this bill.

Ms. JORDAN. Thank you, Mr. Chairman. I have no further questions. Chairman RODINO. Mr. Dennis.

Mr. DENNIS. Mr. Chairman, as a country lawyer, I have been very interested in sitting here and listening to these experienced practitioners discuss the antitrust laws and problems under them, and I am interested in their disagreements, which I guess are to be anticipated with most lawyers. I feel a little bit like the English judge, the common law judge, who was called in to sit in the Admiralty Division, and when he got ready to state his opinion, according to the story, he said, "I hope that there will not be any moaning of the bar when I put out to sea."

But it seems to me the philosophical question that has been bruited here is one of the more interesting ones, and I do not know how you are going to resolve the question of the public interest. Of course, we are only talking about the antitrust laws here. I recognize that. But how far do we take it?

Take the criminal law, for instance. Usually we let the U.S. attorney and the defense counsel decide what happens there completely, without intervention of amicus curiae or public interest groups or anybody else. And I do not know whether it is any less important, really, than this field.

The problem arises in my mind whether what we do not really need to do is try to make our institutions work and our Justice Department function. How far we can successfully go to try to legislate morals and bring in everybody and his brother in a lawsuit.

I would be glad to have any more views the gentlemen have on that, because it seems to me that is a very basic question here. You all have addressed yourselves to it before.

Mr. KIRKPATRICK. Well, Mr. Dennis. I think you raise the central question as I see it. I start with the proposition that to the extent that the consent judgment process has been brought into doubt through closed doors, I think the doors should be open.

Now, whether the doors should be open so that a district court can inquire into the merits of a decree, whether or not that public inquiry or the comments to be made, and those to be heard on behalf of the public interest should not bring their comments to the Attorney General, and his deputies, who are charged under our law and our system of law enforcement, is, it seems to me, the central question.

I tend to think that the kind of public scrutiny that Mr. Kramer advocates is possible and desirable before the law enforcer and not before the courts.

Now, at the Federal Trade Commission, as an example, we had much the same procedure, I think, that is in some ways contemplated here. We had a public notification of any proposed order, and then we would—the matter would come to the Commission, and as a matter of fact, in one case, the Commission held a public hearing on the acceptance of a consent order, which aroused some public opposition. The Commission carefully considers the differences between the order that is proposed to be accepted by it, by the staff, and that which was part of the complaint. But the Commission in that regard is still the law enforcer. It is not a separate judicial tribunal. It is acting after the matter has been taken out of its adjudicatory posture, and it is acting as a law enforcer in making the decision, both the decision as to the range of other opportunities for law enforcement in other areas, and the disposition, if you like, of its lawyers and its law enforcement mechanism, as well as being able to be addressed by the staff as to the possible weaknesses of the case.

Now, that simply is not the function that the judge can play. He is not, he is not there as a law enforcer. He is not there as an attorney general. I think his directions and his day to day activities are an entirely different direction.

Mr. REYCRAFT. Mr. Dennis, if I may comment, my concern is what I perceive yours to be; namely, the proliferation of these hearings. And maybe the way to do it would be to say that in a case which is of general public importance, and maybe those are not the right words, but I share Vic Kramer's concern about the *IBM* case, and that case has such public impact and is fraught with such public interest that it should not be settled privately. And perhaps the district court should be given the power to certify that a case is of such public importance that it should not be settled at all and that it should be litigated and determined by the normal procedures of the courts.

There are a number of decrees, such as the Western Electric and A.T. & T. decree, for example, which had such public impact that I just do not think they should be privately negotiated, even by antitrust and Department of Justice officials with the best motivations in the world. I do not think you can get all of the impact, nor do I think you can get it in private discussions, again, with people of the highest standards of conduct in the Antitrust Division or the Federal Trade Commission.

I think a public hearing on a case like that would be beneficial, but I think the way to do it is not to say that no antitrust case shall be settled without a public hearing, but to say which ones you are worried about and say as to those, yes, we will have a public hearing.

Mr. DENNIS. Then we would have to make or set forth, or get a statutory definition, I suppose, which would cover that.

Mr. REYCRAFT. I would think a statutory definition could be drafted, and it even could be appealed. For example, the district court also should not be allowed to say that the IBM case is not of general public importance, and should be appealed on that if somebody wants to do it.

Mr. DENNIS. Well, I think that might be a valuable suggestion.

Mr. KRAMER, do you want to comment on this?

Mr. KRAMER. No; Mr. Dennis. I have nothing to add to my statement and the discussions. I am a little bit, Mr. Dennis, in a position of saying that if cases of public importance could be settled only after getting full airing, then I would be content. I am afraid just saying that, just using that phrase, may not be enough.

Mr. DENNIS. Let me ask one more slightly specific question that has been called to my attention by counsel here.

In the Freund Commission report on the Supreme Court with regard to the expediting part of this business, makes the point that there is no appeal in these cases in general, and that the result of the Expediting Act is that a lot of people who may be out to get an appeal do not get one at all, and that that is a ground for the amendment.

Would any of you like to comment on that?

Mr. KRAMER. Yes. My statement, Mr. Dennis, was very careful in talking only about the appeal from the final judgment, and this bill has in it more than one provision about the Expediting Act. I do not oppose the provision which amends the Expediting Act permitting interlocutory appeals under certain circumstances to the appropriate circuit.

My objection is solely to the repeal of that portion of the Expediting Act which says that appeals from final judgments shall go only to the Supreme Court.

Mr. DENNIS. Yes. But as I understand it now, the Attorney General, for instance, thinks that the direct appeals should be confined only to important cases again, and that in the other cases, people should have a right to take their appeals more or less like they would in any other field.

Mr. KRAMER. Only the cases that he or the court says are important, yes.

Mr. DENNIS. Right. And that that would give a more wide review, actually, to most litigants, and you would still have the important ones go direct. That is the argument.

Mr. KRAMER. That is the argument, and I am going to be so bold as to say he is simply wrong on one point, and that is the notion that he will get a more careful review if you go to the court of appeals than you do to the Supreme Court. That also puts me in the unpleasant position of saying to Mr. Kirkpatrick, whom I respect, that he is wrong because he made that statement.

Mr. DENNIS. But as I understand it, if you get a final judgment against you in may of these cases now, you cannot go to the court of appeals with them.

Mr. KRAMER. Well, perhaps I have confused the situation. Let me summarize.

There are two separate issues here. The first, should there be any appeal at all from interlocutory orders in the antitrust field in Government Sherman Act cases. Under existing law, there cannot be; under your proposed bill, there can be. I do not oppose that change, and, in fact, I think it might be a good idea.

The second question is whether or not, when there is a final judgment, the appeal should lie only to the Supreme Court, or whether it should go to the courts of appeals unless certified by the judge or the Attorney General. Since I believe all antitrust appeals in Government Sherman Act cases are of vital importance to this Nation, transcending those in any other regulatory cases, I favor the existing system of sending them all to the Supreme Court.

Mr. DENNIS. OK.

That clarifies your position, and I appreciate it. Thank you.

Mr. SEIBERLING [presiding]. Well, thank you, gentlemen. I apologize that I was not able to be here at the start of your testimony, and if I ask you some questions which are repetitious of those which others have asked, I hope that you will forgive me.

I wish I could call myself a country lawyer, particularly nowadays, but I guess I cannot. Having spent approximately 21 years in the private practice, including most of that time in the antitrust practice, I have some appreciation of the problems that we are dealing with.

I would like to ask Mr. Reycraft and Mr. Kirkpatrick, both of whom have experienced serious reservations about the impact on the process of settling cases that this legislation would have, whether really we are not better off on the whole to have a procedure for getting this out before the public, before rather than after the court has put its final stamp on a consent decree?

You know, it has to be approved by the judge now, and, therefore, it seems to me the fears expressed by Mr. Kirkpatrick in particular that somehow the judge might make an extensive inquiry are fears that could exist under the present practice. But the fact is, as you know, that the judge is not likely to do that unless someone raises some questions in his mind. And are we not better off in terms of public support for our judicial process if the questions are raised and disposed of by the judge before he puts his final stamp on the decree, instead of floating around afterwards with all kinds of innuendoes that never are quite settled?

Of course, the ITT case is one of the most grievous examples. I wonder if you could comment on that?

Mr. KIRKPATRICK. Yes. I do not know exactly where I come out on the answer to that, sir. I think that what you suggest is very important, obviously, that there be a judicial scrutiny that would confirm, if you like, the public interest nature of the consent judgment and that is, I think, an important matter.

And as my statement indicated, I am not opposing that. I am simply raising some questions that I think are serious ones concerning this particular way of getting at it before the court. It may well be that the interest that you have suggested of the public and of the conferees in the integrity of the consent decree process warrants the interference, as I would look at it, that the court must almost inevitably make in the consent process by reason of the procedures suggested in this bill. I do not really dispute that. I am simply not, I think, entirely decided in my own mind on that point and that aspect.

Mr. SEIBERLING. I wonder, Mr. Reycraft, if you would like to expand?

Mr. REYCRRAFT. Yes, sir. I am very seriously concerned about the settlement of antitrust cases in such a manner that they do not protect the public interest. And I think that I agree that the ITT case is an excellent example of that.

What concerns me is what I perceive to be a possibility of breaking down the old consent decree procedure in order to take care of those few cases which are generally recognized to have been the product of the wrong kind of negotiations. I am just sitting here and being stimulated by the discussion.

It seems to me that some sort of a certification procedure which would identify those cases by their importance to the economy would be a way of protecting the public, and at the same time not allowing people whose motives are not as good as the public interest groups, such as those Mr. Kramer represents, to come in and engage in what amounts to a strike suit on behalf of stockholders, or supplier-customers, to hold up the consent decree.

Mr. SEIBERLING. But is this not one way of keeping the game honest?

Mr. REYCRAFT. Well, yes. Mr. Kramer was in the antitrust division for 20 years, and I was in it for 10 years, and Mr. Kirkpatrick was in the Federal Trade Commission, and I think the game is pretty honest, and there are only those grievous exceptions, such as the ITT-Hartford Fire, where the question is raised. I do not think in general—I think affirmatively in general, that the procedures are honest.

Mr. SEIBERLING. Well, I never have been on the Government side in any of these antitrust cases, and have always been on the defendant's side, so I have some feelings about the desires of defendants in antitrust cases that if they are going to enter into a settlement, to get it over with with the minimum of publicity. That is obviously a consideration. I guess what most corporations are concerned about is the fact that the antitrust bar is going to be sitting there, from the defendant's viewpoint, like vultures waiting to pick the bones of someone who is unfortunate enough to be on the losing side of an antitrust case.

I guess that my principal concern would be that lawyers who make a speciality in prosecuting treble damage actions following antitrust judgments would be in there trying to not just tighten up the decree, which probably is in the public interest, but trying to sabotage it in some cases.

Would you have that kind of concern?

Mr. REYCRAFT. I certainly do, and I did not say it as well in my statement, but that is a concern. And in fact, one that I have experienced in defending an antitrust suit where I felt the motives of the attempted intervener, which I was satisfied, had nothing to do with the public interest but was his own personal interest.

Mr. SEIBERLING. On the other hand, if there is merit to the Government's case, then one of the great deterrents we have toward antitrust violations is the treble damage aspect. And I guess what we are trying to do is evaluate the competing considerations of avoiding unnecessary and protracted and somewhat chancy litigation, and at the same time see that the antitrust laws are respected.

How would you evaluate it from a percentage standpoint or from any other standpoint as to the number of settlements that would be inhibited by this procedure?

Would you say 10 percent, or some percentage? I guess it is impossible, but what would be your feel, just from the standpoint of getting a handle on this as to the price we are paying in terms of having more trials and fewer settlements?

Mr. REYCRAFT. I do not think that I could really give you anything useful. I think it would be substantially more, substantially more would not be settled than are now settled. I just cannot do any better than that, I am afraid.

Mr. SEIBERLING. All right.

To pursue this in another aspect, I notice that Mr. Kirkpatrick also expressed some concern, and I am not sure I understand it, about the undesirability of allowing individuals to be parties to the hearing if the judge decides to have one. And I guess that relates to the question that we have just finished kicking around here. But that is in the judge's discretion, as I recall from reading the House bill.

Mr. KIRKPATRICK. My apprehension, I think, Mr. Seiberling, was with respect to 2(e) 2 as to whether or not the language there might not reopen what I regard as pretty well settled law, to the effect that the courts will not require an admission of liability as the price of the agreement or consent judgment.

Mr. SEIBERLING. I see.

Mr. KIRKPATRICK. If that is not the intention of that sentence, a sentence in the report could easily dispose, I think, of that matter. I simply flag it, and it is not very important, but it would be very, very important indeed should that be the effect of that language. But I think it can be easily cured if it is not intended.

Mr. SEIBERLING. Well, of course, it does put some pressure on the court, but it really says the court may consider, not that it is required.

Mr. KIRKPATRICK. Argument could be that the Congress, with full knowledge of settled law, nonetheless has brought back to the court the consideration of the impact on individuals as that which should be considered in the intervening consent decree, and I could construct an argument either way. But I think it is going to make a battleground of an issue which I think has now been settled and in my own view should be settled in the way it has been settled.

Mr. SEIBERLING. In other words, you foresee this procedure turning into a trial of the case in certain respects?

Mr. KIRKPATRICK. It may very well, as to whether or not there should be admission in the particular facts of the case before the court of liability, yes, sir. And I think that would be very undesirable from the point of view of the overall consent procedure.

Mr. SEIBERLING. Well, what do you other gentlemen say about it?

Mr. REYCRAFT. It could be broader than a trial of the case, Mr. Seiberling, in that if I go to trial, all I have to worry about is the Government. If I go into one of these hearings, any interested party may participate in the proceedings, and that includes not only one of the many very legitimate public interest groups, but includes the trouble damage lawyers, of whom I am one on occasion, stockholder suits, any kind of an attempted intervention. And I think I would rather go to trial.

Mr. SEIBERLING. Well, if you are definitely going to have a trial anyway, I suppose you might as well have it with all of the normal procedures.

Mr. REYCRAFT. I might win, but under this procedure I cannot win. If I go to trial on the merits, maybe I will win.

Mr. SEIBERLING. I wonder if you have some comment on that, Mr. Kramer?

MR. KRAMER. Yes, Mr. Seiberling. As I understand it, we are now discussing solely the phrase on page 5, lines 2 and 3, reading "and the individuals alleging specific injury from the violation set forth in the complaint."

From my point of view, which I hope is not jaded, the bill would not substantially suffer if those words were removed. I say that because treble damage plaintiffs have been remarkably successful without that clause, and while I can project an argument favoring it, if that is all we are talking about, I think it would be a small price, if any, to pay, for getting this legislation through, which has such excellent objectives.

MR. SEIBERLING. Well, thank you very much.

I can see the possible ramifications of this now that we have had this dialogue, and I must say I tend to share some of the misgivings that have been expressed.

I would like to turn to one other subject with respect to the Senate bill and ask your comments. The Senate bill contains a provision, or a proviso, to section 2(g) that is not contained in the House bill. And the proviso is that:

Provided that communications made by or in the presence of counsel of record with the Attorney General or the employees of the Department of Justice shall be excluded from the requirements of this subsection.

I wonder if this proviso, with its very broad language which goes well beyond the protection of Government attorneys' work products, if enacted, would not create a new legislative privilege for employees of the Department of Justice that would be quite unique and well beyond any existing privilege for attorneys' work product?

And I would like to get your views as to whether there is a need to protect work done for Government attorneys investigating anti-trust violations that is performed by economists within the Department or outside, or nonattorney employees of the department, from public disclosure, scrutiny, and accountability?

What would your reaction be to this Senate language or to the whole concept?

MR. REYCRAFT. It does not sound to me like it is creating a whole new work product privilege area, but only excluding it from that particular subsection which requires that the communications be summarized and filed with the court. I do not think it creates, I do not think it creates any new privileges.

MR. SEIBERLING. Well, we have two categories of people mentioned here, though. We have the counsel, and then employees.

MR. KIRKPATRICK. If I may comment on that, it is quite a normal procedure in my experience in settlement negotiations between the counsel of record and the Antitrust Division staff to have principals present; that is, principals being the defendant's officers present. I think it may be inhibiting of the free exchange of views to attempt to describe the conversations that take place, simply because those principals are present with their counsel.

My own suggestion would be that better than that—and it is perfectly proper that the principals be present under those circumstances and, in fact, desirable frequently, and I would think that a middle ground might be desirable; that is to say, the principals present could

be identified, but I would shy away from requiring any kind of elaborate description of what those principals said and to have that placed in the public record.

Mr. SEIBERLING. Well, this proviso really goes beyond just describing or permitting the principals to be present and not have their communications covered.

Mr. KIRKPATRICK. That is correct.

Mr. SEIBERLING. It also categorizes the people who can be present from the Government side. And what I am wondering is whether we should include within the scope of this "employees," or define them more carefully, or whether we ought to bring in outside consultants or other people.

It seems to me the word "employees" almost applies to any kind of an individual as long as he is somehow employed by the Justice Department in any capacity whatsoever. But I can see all kinds of political types being brought in under the guise of employees, for example.

Mr. REYCRAFT. If the communication is with reference to the proposed consent judgment—

Mr. SEIBERLING. Perhaps as long as we restrict it to the subject matter, we do not have a problem.

Mr. REYCRAFT. Personally, I would not have any objection to any conversations I have had with anybody about a consent judgment being summarized.

Mr. SEIBERLING. Well, I guess that is the real answer to the question, is it not?

One other question. Do any of you feel that since the district courts know that there is likely to be a review by the Supreme Court of litigated cases that there has been an incentive to the lower courts for being more responsible and accountable which incentive might be reduced if intermediate review is mandated for antitrust cases?

Mr. KRAMER. I do not know of any such reaction.

Mr. SEIBERLING. Do any of you have a comment?

Mr. KIRKPATRICK. My answer would be the same.

Mr. REYCRAFT. I would not think that would make a lot of difference.

Mr. SEIBERLING. Are you aware that S. 782, originally conferred on the Attorney General the power to certify antitrust cases for appeal directly to the Supreme Court in certain cases, and that by amendment, this power to certify has been removed from the bill?

Well, that really should be a statement of fact. And the question is whether you think the Attorney General ought to have this power in order to avoid the common defense bar practices such as, you know, resorting to prolonging or protracting the trials of appeals, and whether it would be unfair to expose the United States unnecessarily to such deleterious practices?

Would there be a middle ground?

Mr. KIRKPATRICK. It seems to me that your present bill, that is H.R. 9203, cuts pretty close to a middle ground, that at the request of either party, the Attorney General or the defendant, the court shall really have the certifying power. That occurs to me to be perhaps the middle ground.

But, on the other hand, I would believe that the Attorney General would exercise this certification power with good judgment and reason, and I certainly would, so long as there is not an automatic require-

ment, in every case, I think that is the part that gives me trouble. But if the Attorney General had the power to certify, yes, I would think that that would be gingerly exercised, and the Solicitor General, indeed, would use—and in my experience always has used—excellent good sense and judgment in his decisions in that regard. And I would have no objections to that.

Mr. SEIBERLING. Does anyone else have any comments on it?

Mr. KRAMER. Well, Mr. Seiberling, as you have heard today, I am opposed to any revision of the present law on appeals from final judgments; I feel they should go direct to the Supreme Court. But if we are going to abolish that, because the arguments I have made are felt not to be persuasive, I would favor the Senate version over the House version and give the Attorney General the power to certify a case as deserving of direct appeal to the Supreme Court.

Mr. REYCRAFT. I am in complete agreement with Mr. Kramer.

Mr. SEIBERLING. Well, are there not sometimes when, perhaps, justice is on the side of the defense where there might be some merit in giving the defendant that same option of going directly to the Supreme Court, or going through the appellant procedure?

Mr. KIRKPATRICK. I would think the judge of the public interest there, which is, after all, the point to be desired in the enforcement of the antitrust laws, lies really in the Attorney General and not in each defendant before the court.

Mr. SEIBERLING. Well, I think I am inclined in that direction, though I can hear some of the defense bar taking exception to that.

Mr. REYCRAFT. Well, I think as a practical matter, the defense bar, as you will undoubtedly recall, usually does not like to go directly to the Supreme Court if they can help it, so I do not think you are going to cut off too many defendants from going direct.

Mr. FALCO. Was it not only within the last 3 years that the courts have held that private parties may sue for injury resulting from Clayton Act violations, and is it not true that even now circuit courts are not in agreement on this point, so that possible recovery if you are injured by a merger depends upon a discriminatory geographic factor?

Mr. REYCRAFT. I think the Supreme Court ought to lay that to rest. I have always thought it clear beyond doubt, just from the language of the statute, that section 7 of the Clayton Act is one of the antitrust laws, and if you are injured in your business, your property, by a violation; then you are entitled to bring a treble damage suit. And I recognize that some of the circuits have seen it differently. But I think the Supreme Court ought to lay it to rest.

Mr. KRAMER. Mr. Falco, I think the example you have given is a good one of what will happen if you repeal the provision providing for direct appeals in the Expediting Act. Here is an example, to be sure, of a fairly narrow but important aspect of the antitrust law in which the outcome depends on what circuit you bring your case in. I fear that similar proliferation of different views on the antitrust laws will occur on more important issues if you repeal the Expediting Act and have the Government cases decided differently depending on the circuit.

Mr. KIRKPATRICK. Of course, I might point out that this case would not be subject to the Expediting Act, it being a private action, so that inevitably our system with the circuits that there may be different rules in the circuits, then the Expediting Act would not cure this.

MR. FALCO. But the developments in recent years, Mr. Kirkpatrick, of giving some opportunity to recover to private parties might have been aired a little bit more fully in some Government cases, would you not agree?

MR. KIRKPATRICK. Oh, I think that the Expediting Act is not without some public benefit. I happen to think that in the balance of other important matters before the Supreme Court there should not necessarily be priority to every antitrust case.

MR. RAYCRAFT. It could easily result in the fact that a merger was legal in Mississippi but would be illegal in New York, and I do not think that that is out of the realm of possibility at all. In fact, it is even likely.

MR. FALCO. Thank you, Mr. Chairman.

MR. SEIBERLING. The minority counsel has a question.

MR. POLK. Thank you.

I believe that under current practice the Department of Justice has the option of settling the case either by the consent decree procedure or by private contract, which would not be submitted to a court. If this is so, and if this bill burdens the consent decree procedure with additional safeguards, would the bill encourage the Department of Justice, in practice, to use the private settlement by contract route more often than it does today.

MR. REYCRAFT. Well, I think that you may be confusing some language in the Supreme Court's opinion in the *Swift* case which says that a consent decree is a contract between the Government and the parties. I am not familiar with any private contract procedure for settling antitrust cases. The only way I know of to get rid of it is that you try them, settle them by consent decree, or you dismiss them.

MR. POLK. Could not the Department of Justice today enter into a contract with the other party saying that it would not prosecute the case if the party were, in return, to perform certain acts, say, divesting itself of certain assets?

MR. REYCRAFT. Conditional clearance, I guess, maybe. Yes. If the parties would say, for example, we will sell off this part of our business, and the Justice Department says, if you do that, then we will not file a merger suit, yes, those kinds of things have happened. Yes.

MR. POLK. Would you expect that to happen more with the adoption of this bill than it does now?

MR. REYCRAFT. It might well.

MR. POLK. Do you feel that would be a good result?

MR. REYCRAFT. No, I do not.

MR. POLK. Then do you feel that we should anticipate that possibility? Is it possible somehow to preclude a situation like that?

MR. REYCRAFT. I think if you intend to get into the realm of prosecutorial discretion, which is really what you are doing, that you have got a long road.

MR. POLK. Right. I understand.

MR. KIRKPATRICK, you indicated I think in a comment to Mr. Dennis that perhaps it was not advisable for the court to be determining what is in the public interest, but that if we were going to open consent decrees to public comment that it would be better for this public comment to be directed to the law enforcer rather than to the court.

Mr. KIRKPATRICK. I think that is a possibility that should be considered.

Mr. POLK. If we were to take that approach, I was wondering how we could insure that the public comment that was being made was seriously considered by the law enforcer?

Mr. KIRKPATRICK. I do not know any way other than appointing law enforcers of integrity that will perform the function as laid down by the Congress.

Mr. SEIBERLING. Well, I understand that you gentlemen have some matters pending which require that you be released promptly.

I just would like to throw out one question and get a quick reaction from you. What effect do you think this procedure, if it were adopted, would have on the filing of antitrust complaints in the first place, in terms of whether the Department of Justice does a better or an inferior preliminary job of making sure they have got what they think is a good case before they file a complaint?

Would this have any effect on that one way or the other?

Mr. KIRKPATRICK. I would think it would, sir. I would think that when faced with these procedures, and when faced with the obvious problems created by differences between the relief claimed in the complaint, and the relief that is proffered in the consent judgment, that inevitably on the average cases would be scrutinized, I think, more carefully to be sure that such variations would not arise because those inevitably would be impediments to the consent procedure.

How much is difficult to estimate—it is a matter of degree only—but I think there would be a tightening up of that process.

Mr. SEIBERLING. Does anyone else have any thoughts on it?

Mr. KRAMER. I cannot add anything, Mr. Seiberling, because I agree with everything Mr. Kirkpatrick said on that point.

Mr. SEIBERLING. That would certainly be one desirable result, then, of this type of legislation.

Mr. KIRKPATRICK. But, it might or might not. There may be some cases that should be brought on principle where the facts are not necessarily as strong as one would like. That result is a mixed blessing, sir, in my judgment.

Mr. SEIBERLING. I see.

Mr. REYCRAFT?

Mr. REYCRAFT. Yes. I agree with Mr. Kramer and Mr. Kirkpatrick. I think an additional reason for fewer cases being brought would be a lot of antitrust division attorneys would be in court defending the judgments on cases they brought last year.

Mr. KRAMER. That, of course, is where I differ with the other two witnesses.

Mr. SEIBERLING. Well, gentlemen, on that note, I guess we will adjourn.

I want to thank you very much for coming and for giving us the benefit of your tremendous experience and knowledge and wisdom.

And I will now adjourn the hearings until Wednesday, October 3, at 10 a.m. The hearings are now adjourned.

[Whereupon, at 12:05 p.m., the subcommittee was adjourned, to reconvene on Wednesday, October 3, at 10 a.m.]

Blank Page

(178)

## CONSENT DECREE BILLS

WEDNESDAY, OCTOBER 3, 1973

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 10:05 a.m., pursuant to recess, in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. [chairman] presiding.

Present: Representatives Rodino, Flowers, Seiberling, Jordan, Mezvinsky, Hutchinson, McClory, and Dennis.

Also present: James F. Falco, counsel, and Franklin G. Polk, associate counsel.

Chairman RODINO. The committee will come to order, and we will resume our hearings on the Antitrust Procedures and Penalties Act in S. 782, H.R. 9203, and H.R. 9947.

Our first witness this morning is Mr. Basil Mezines. He is formerly the Executive Director of the Federal Trade Commission, and he certainly has distinguished himself in the field of public service in that capacity. I am delighted to welcome Mr. Mezines this morning, not only as a distinguished member of the bar, but as my good friend.

### TESTIMONY OF BASIL J. MEZINES, STEIN, MITCHELL & MEZINES, WASHINGTON, D.C.

Mr. MEZINES. Thank you, sir.

Mr. Chairman, if I may be permitted, I have a rather short statement, and I think it would be helpful if I would read it, sir.

Chairman RODINO. You may proceed.

Mr. MEZINES. Thank you, sir.

Mr. Chairman, it is an honor to appear before your committee, especially since you have recently assumed the chairmanship, and I really consider it an honor to be with you today. As you know, I am now a partner in the law firm of Stein, Mitchell & Mezines, practicing law here before the courts and the administrative agencies in the District of Columbia.

Until recently, I was on the staff of the Federal Trade Commission where I was employed for almost 24 years. While at the Federal Trade Commission I served in several different positions, including senior trial attorney, Director of the Commission's Bureau of Competition, Executive Assistant to the Chairman, and finally, Associate Executive Director and my final position was Executive Director for the last three or four years, where I had responsibility for the operations of the Commission, which included its legal caseloads and the budget of the Commission.

I am very active in the American Bar and the Federal Bar.

I appreciate your invitation to appear before this subcommittee and present my views on H.R. 9203. And I would like it understood that any comments I make today do not purport to reflect the views of the Federal Trade Commission. I understand they are going to comment on this bill, and my views, in no way, reflect the views of any of the associations that I am active with; the ABA or the Federal Bar. I do not represent anyone in connection with this legislation, either directly or indirectly. I have no financial interest. I am, very frankly, only here to be of some help to this committee. I want to give you my outlook as a trial lawyer who has been involved in the trial of cases and the settlement of cases.

Mr. Chairman, at the outset of my testimony, I want to inform you that when I first became familiar with the Tunney Bill, I was very much opposed to it. It was my initial reaction and I think that will be the initial reaction of any trial attorney in Government. They are not going to like it. As the committee knows, approximately 80 percent of all complaints filed by the Antitrust Division of the Department of Justice are settled prior to trial by entry of a Consent Decree. The Federal Trade Commission has a similar record in the settlement of matters arising from that agency.

Trial attorneys feel that it is important to settle cases, because of the large numbers they have and the shortage of manpower, and when they are handling a case, they feel that they are in the driver's seat and they know what is the best for the Government and for the country. They do not want anyone telling them that they cannot settle a case. They feel when they do not have the evidence, that they want to get out as easy and as fast as they can, and a settlement gives them this opportunity when they just cannot produce the evidence.

Another thing is, a trial attorney does not like to be second-guessed. He does not want anyone commenting on his settlement. These lawyers in Government today, in the Antitrust Division and the FTC, are very honest lawyers, they are very conscientious. They really do a remarkable job. I know of no instance in the 24 years I was at the Federal Trade Commission where any trial attorney settled any case for any personal gain or for any immoral purpose. I think this is a very unusual fact that we have never had this at the Federal Trade Commission. I am not speaking for the Commissioners, but I am talking about the staff of the Federal Trade Commission.

Now, why did I change my mind about this bill? Well, for one thing, it became very clear to me that a lot of people on the outside do not share the confidence that I have in the Government attorney. I think many people are very suspicious of some of the settlements by trial attorneys, and I felt that the time had come where something had to be done. It is not enough for a trial attorney simply to say that I know about this case and nobody can tell me how it should be settled. I mean, that is not enough. It is not enough for him to feel confident. The public has to feel confident.

With this drop in confidence by the public, something had to be done and I think that this legislation takes the necessary steps to inform the public in all segments and to encourage their comments and opinions on settlements. In essence, I view this bill as a full disclosure bill. Full disclosure, incidentally, is something that people working in

Government feel that advertising agencies should do. They feel that advertising agencies should fully disclose everything about a product. I think that the same thing should be expected from Government attorneys on settlements. They also should make a full disclosure.

Now, there are certain things about the bill that are very minor that I would like to comment upon, which I think will be very helpful.

First, the proposed legislation provides that the district court shall make an independent determination as to whether or not the entry of a proposed Consent Decree is in the public interest as expressed by the antitrust laws. The bill requires that certain procedures be followed in order to assist the court in making that determination. I think everyone will agree that the courts should not simply rubber-stamp antitrust decrees. I mean, if the court does not play a role in this, then you do not need a judge. There is no reason to ever even appear before him. He should do something more than just rubberstamp this decree.

At this time, the courts are required to examine the decree to see whether it is enforceable, whether it provides relief consistent with the prayer of the complaint and whether, on the whole, the Consent Decree is in the public interest.

I do not think the bill, itself, requires him to do that much more. The specific provisions of the bill, section 2, would also require that the Justice Department file and publish, along with the Consent Decree, a public impact statement, which explains the nature and the purpose of the proceedings; a description of the practices involved; an explanation of the relief to be obtained by the proposed decree and the anticipated effects on competition of that relief; the alternatives actually considered and the effects of such alternatives on deciding on such relief; and the procedures available for the modification of the proposed judgment. I believe that the requirements of the impact statement are similar in some respects to statements that have been issued by the Antitrust Division. That is something that is difficult for me to understand, because I think the Antitrust Division is doing a great deal of this. And why they would be opposed to it now is a mystery to me.

In many respects, this practice resembles what the Federal Trade Commission does today. They do much of the same. I cannot see any problem for any attorney to file a statement, explaining the nature of the proceedings, describing the practices involved and explaining the proposed judgment and relief to be obtained or the anticipated effects on competition of that relief.

Similarly, the staff in the Antitrust Division should not have any trouble listing remedies available to private plaintiffs and describing procedures available for modification of proposed judgments. That type of language is going to end up being boilerplate. There is no reason why they cannot put that in an impact statement.

I have some problems, though, with that part of the impact statement listing the alternatives considered and the anticipated effects on competition of such alternatives. I would propose to strike in lines 13 and 14, at page 3 of the bill, in subsection 2(b), that part which reads:

And the anticipated effects on competition of such alternatives.

I think when you put that in there, you are making the staff sort of carry on a running battle with themselves. I really think it should be

stricken because if it is retained, it will be necessary for the staff of the Antitrust Division to discuss various alternative remedies and their effect upon competition. Statements and discussions of this kind enter into an area of speculation, and the staff should not be required to make predictions as to the competitive effects of various alternatives, which it has considered. I think it is sufficient to require the staff to say why they have framed a decree and what they expect to accomplish and, if necessary, have them describe the alternatives.

The first provisions of the impact statement accomplish this objective.

With respect to the 60-day period for public consideration, there is no question that you have to have a 60-day period if you expect to get any comments. And this will assist the court in determining whether the decree is in the public interest.

This is going to delay the settlement of the case, and it will hold it up for 60 days. But, this is the price that has to be paid for the benefits that will accrue, and these antitrust cases have never been noted for being quickly processed. Many of them drag on for a long time. I do not see how this 60-day period will create any problem that would defeat the purposes of the bill.

The procedural and substantive factors, which the court must consider before making a finding that the decree is in the public interest, I think, are just and necessary, and they do not require the court to conduct the trial or engage in extended proceedings which might have the effect of delaying a settlement. I do not believe that the courts are any more anxious than the Government, or outside attorneys, to drag on cases, and I do not think the courts are going to use this as a basis to have another trial. These district court judges do not want any trials, they are loaded as it is.

To insure that there is no mistake about this, and this does not occur, I would suggest an amendment on page 5 of section 2(e)(2), in lines 2 to 5. I would strike the comma after the word "complaint" and strike the words "including consideration of the public benefit to be derived from a determination of the issues at trial." I think the committee will agree that it is not the purpose of the Government to go to trial for the benefit of potential private plaintiffs, but that such matters are tried because the general public will benefit. Inclusion of the language I have just recommended be stricken, seems to be an invitation for the court to require the Government to go to trial, or someone may think it is an invitation. And this is something I think that should be avoided. If the judge has to act in the public interest, I think he will do so. The language which would be retained in that provision in 2(e), to the effect that the court may consider the public impact of entry of the judgment upon the public, generally, and individuals alleging specific entry from the violations set forth in the complaint are fully adequate to protect the public interest.

It seems, therefore, that the only effect of the language which is proposed to be stricken from the bill, would be to induce the district court to consider whether requiring the Government to go to trial would aid private treble damage plaintiffs.

I would like to turn now to the penalties. As you know, one of the provisions of the bill in section 3, would increase the maximum penalties for violations of the Sherman Act from \$50,000 to \$100,000 for individuals, and to \$500,000 for corporations. The reason for this change,

I think, is very obvious. I think you will be given examples of situations where this could be a very, very heavy fine on some corporations, especially if there is more than one count in the indictment. But, I think this does give the judge the discretion to impose these large penalties where necessary. It does not mean they are going to be imposed in every case and, right now, the judge does not have the discretion to impose a large fine against a large corporation. And these fines, in some cases, are meaningless.

The last section of the bill would amend the Expediting Act to require antitrust cases to be appealed to the court of appeals rather than directly to the Supreme Court. This is long overdue. The original purpose of having cases go to the Supreme Court was because you have a new law, the country felt that something had to be done immediately to get fast action. I think with the court having the burden it has at this time, something has to be done. Civil cases in antitrust matters have thousands and thousands of pages in the record. I think it is impossible for the Supreme Court to examine those records unless they are going to give up a lot of their time where it could be spent on something else.

Having the initial appellate review in the court of appeals would help the Supreme Court as well as the litigant in refining the issues. In those situations where it is important for the Supreme Court to review the case, the bill provides for such situations, and cases of general public importance would be appealable directly to the Supreme Court after certification by a single district judge in lieu of the three-judge court, upon application of either party. I think this is sufficient safeguard and this is good.

Mr. Chairman, I am aware of the statements that have been made in opposition of this bill. I have read the statement of present Assistant Attorney General Kauper. I have read this statement of his deputy. They are greatly concerned that this bill would involve the district court to such a degree in the consent process that it is going to disrupt settlement proceedings, and weaken their ability to settle cases. I do not agree with this. I also understand that the board of governors of the American Bar Association, an organization in which I am very active, has just approved a resolution opposing the sections of this legislation affecting consent judgment proceedings. In short, the American Bar Association feels that the added procedures would encumber, and complicate the handling of cases, and have a chilling effect on the ability of the Government to negotiate orders. Further, according to the American Bar Association, the bill would create problems concerning the status of third persons attempting to intervene in anti-trust settlements.

While I do not agree with these conclusions, I feel that the concerns expressed are serious, and if the bill is enacted, it will require the close attention of this committee, as well as the court, to be sure that the purposes for which the bill is designed are realized.

If I may, Mr. Chairman, I would like to urge this committee to seriously consider establishing a committee to study the operations of this bill, as well as other statutes dealing with competition and antitrust. There has not been a full review of the antitrust laws which have a significant competitive impact since 1954; since that time there has been piecemeal legislation dealing with many subjects. There are a lot of changes taking place in the American economy.

We have price controls, we have deficit financing, we have got allocation of scarce materials. Our international trade deficit is in a very precarious state. We have consumer and environmental problems. Somebody has to take a look at these. Now, this committee—that is, your committee, sir—did an excellent job in studying the conglomerate merger movement. The report that was issued by this committee in June of 1971 was excellent and it provides a basis for further study of that area of competition.

I believe that an outside commission devoting a major portion of its time to these problems could focus on many individual issues and present to the committee the separate views of many diverse interests. Mr. Chairman, I feel that a commission would generate interest in the capitalistic system, and the antitrust laws which are presently under attack, and it would provide this committee with a wealth of information. Such a commission is needed at this time. I think it could augment the work of your committee, and permit minute examination into certain areas that the committee might not ordinarily take a look at. And I respectfully request that you give your consideration, sir.

Mr. Chairman, that ends my statement, and I would be very pleased to answer any questions that you might wish to address.

Chairman RODINO. Thank you very much, Mr. Mezines, for that very informative statement. I am delighted and pleased to hear you make the initial observation that when this first came to our attention, your reaction was really that of opposition to the legislation before us.

Mr. MEZINES. Yes, sir.

Chairman RODINO. But, you finally reached your conclusion that the matter, despite the fact that it may have some effects that would necessarily be delaying was nonetheless in the public interest. I feel that a vital and essential consideration, in looking at this bill, is how the public views it. Has the public lost confidence in the ability of the various agencies of Government whose primary responsibility is to oversee and protect the public? Whether this is something that appears to be the case or actually is the case, it is vital to insure that the public has such confidence and I think that anything that we can do to insure that is important. I am happy that you make this observation, and, frankly, I think that the public interest and the reaction of the public is tremendously essential in considering this bill.

Mr. MEZINES. Very frankly, Mr. Chairman, when I looked at the bill, at first, I was looking at it from the standpoint of a trial attorney at the FTC, and I said: "Oh, I do not want to have to write a statement as to why I am doing this. Why should I have to do this?" But, when you separate yourself from that function, and you look at what is happening it is not fair to the Government attorneys not to have the respect of the public, because they deserve it.

Chairman RODINO. Thank you very much, Mr. Mezines. Your testimony indicates, as has the testimony of many others who have come before us, that 80 percent of the complaints that are filed by both the Justice Department and the FTC are settled by consent decree. Now, do you believe that there would be a substantial reduction in the amount of consent decrees that may be forthcoming as a result of this legislation which might overburden the departments and create unnecessary delay and thus prejudice what we are really seeking to do and, that is, to handle these cases as expeditiously as possible?

Mr. MEZINES. I do not, and the reason for my statement is there was a time when the Federal Trade Commission settled cases by consent order, and then they changed their procedure and said that in the future we will require all consent decrees to be put on the public record for 30 days, and we will receive comments from the public. When the Federal Trade Commission took that step, many people said, this is going to slow down the settlement of cases. It has had absolutely no effect, and I think the fears that this will result in a slowing down of settlements have been grossly exaggerated. I do not anticipate that at all.

Chairman RODINO. Then might you say, as a followup, whether it is 80 percent or 70 percent, that the cases that result in settlement and in consent decrees, in no way represents the vigor with which a case has been settled or whether or not a case has been properly settled?

Mr. MEZINES. I do not think it will have any effect. It will not, in any way, discourage settlement and it will not, in any way, diminish the force of the antitrust laws. If anything, it will be very helpful because during this process they may get some comments that will show them that they made a mistake. And I mean, that is always possible. No one has suggested that. But it is possible that comments will come in and people in government will realize we have made a serious mistake here. And, in that way, the public interest will be protected.

Chairman RODINO. You mention, Mr. Mezines, on page 3, that you suggest the committee take effective steps to monitor the actual performance of the statute, as well as laws dealing with antitrust and competition. Do you feel that a continuing oversight of the performance is important? Do you feel that this sort of keeps the departments on their toes?

Mr. MEZINES. Well, Mr. Chairman, I know that you will regard as very serious some of the objections that have been made to this bill by members of the Department. And I would think that you would want this bill monitored for several reasons: (1) To see that it is being followed; and (2) to see just how it is working. This is one area that I think that the Commission could be of some help to you. There are many other areas, but this is just one portion of the work that they could do for this committee.

Chairman RODINO. Mr. Mezines, you made reference to the work of this committee in 1959. At that time the subcommittee reached the following conclusion, and stated in its report that "large scale use of the consent decree to conclude antitrust suits, instituted by the United States, therefore, amounts to an invitation to corporate officers to undertake programs that may violate the law."

Would you comment on that?

Mr. MEZINES. Well, I would have reservations about adopting that conclusion. I think that requires amplification. I do not think that I could agree with that, sir, very frankly.

Chairman RODINO. You suggest the committee consider the establishment of a commission in order to study both the effects of this legislation, should we adopt it, and other antitrust statutes. Are you suggesting that as a part of the overall consideration of this bill, or something separate and apart?

Mr. MEZINES. Well, Mr. Chairman, as I have indicated, my experience, my lifetime experience has been at the Federal Trade Commission and I am not familiar with the workings of legislation. I think

it is very important that there be a commission. I certainly would not want to tell this committee what order of business you should treat legislation or whether it should be a part of this bill or not. I think that is entirely in the discretion of the committee. But, it is something I think you should do, Mr. Chairman. Very frankly, Mr. Chairman, I observed you on "Face the Nation" Sunday, and you were talking about many problems that effect this Republic.

And, incidentally, if I may make a personal comment, I admire the way that you handled yourself and what you were saying, and what you were trying to tell people that you were dealing with, what problems this committee has. And, as I was listening to you, I said to myself, now, how is this committee going to sit down and take a look at section 2(c) of the brokerage clause of the Robinson-Patman Act or the Webb-Pomerene Act? I mean, I just think it is ridiculous at this time for this committee to get involved in a lot of research, and study, and listening to witnesses on some aspects of these antitrust laws that nobody even cares about any more. And I think you should get all of the help you can. There are a lot of experts who would like to serve you and there is no reason why you cannot get the help of these people. It is not going to cost the Government anything. The American Bar Association says that this legislation is going to have a bad effect. Get some of those people, as well as some of these "Nader" people to work. Put them to work for this committee.

What the priorities are on this or whether you make this part of the legislation or separate, I think that is something that you will know how to handle yourself, and I just could not give you advice on that.

Chairman RODINO. Well, I appreciate that and I certainly recognize that as one who has had such a considerable experience in dealing with these matters, you recognize how voluminous all of the information is, and how difficult it is to be able to absorb it. And I can appreciate why you make that suggestion. But, does it not ultimately come down to this: First of all, and appreciating your personal comment, that we have got to consider the priorities and that, at the same time, ultimately the responsibility is ours? Undoubtedly, what a commission may do is to be able to assemble, and then bring together that kind of information that may be more readily digestible. But, in the end, since we are a committee of the Congress, constituted in such a way as to assume a certain responsibility and a certain jurisdiction in certain areas, then it evolves upon us, and you are suggesting that the commission merely acts as an arm that might supply information and bring together the expertise and whatever it may in order to make the work of the committee that much easier?

Mr. MEZINES. There is no question about it. The responsibility is yours, and I respectfully suggest you should get all of the help you can.

Chairman RODINO. Well, I certainly appreciate what you have said in that connection, Mr. Mezines. It is valid and I am sure you, as one who recognizes what we are confronted with in everyday problems and with the number of items and subjects that come within the jurisdiction of this committee, certainly realize it is beyond the realm of reality to expect that we could deal with all of those matters and deal with them today. So, thank you very much, Mr. Mezines.

Mr. MEZINES. Thank you, sir.

Chairman RODINO. Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

From your statement, in response to the chairman, Mr. Mezines, I understand that you are not here recommending or urging the committee to amend the bill before it to include any commission for the study of antitrust laws, is that right? You are not asking us to incorporate that in this bill?

Mr. MEZINES. I said I would leave that to the discretion of the committee. I do not know what the mechanics are for doing such a thing. I did not know whether it would be even proper for me to make such a recommendation.

Mr. HUTCHINSON. So you are not making it?

Mr. MEZINES. No, sir. I think it is something that is very important and should be done and, as soon as possible. But, I am not making a recommendation as to what the legislative vehicle for doing so would be.

Mr. McCLORY. Would the gentleman yield?

Mr. HUTCHINSON. Yes, I yield.

Mr. McCLORY. The reason I ask you to yield is that I have to leave and testify before another committee, and I would like to ask a question on this subject, if I might.

Notwithstanding the fact that you are not recommending that we amend this bill to establish a commission, could you furnish the committee with your precise recommendations as to those parts, or those aspects, of the antitrust laws that you feel would be subject to review and recommendation by such a commission?

Mr. MEZINES. I would be very happy to, sir.

Mr. McCLORY. Thank you.

Mr. HUTCHINSON. Do you want to ask any further questions?

Mr. McCLORY. No. I just assume then, that you will furnish the members of the committee or the staff with such recommendations. Thank you very much for yielding.

Mr. HUTCHINSON. Surely. Yes. I think that in other respects the chairman has covered the same questioning that I wanted to pursue, and so I am not going to take up the time of the committee, or duplicate in the record, by going over it again. And so, I yield the floor. Mr. Chairman.

Chairman RODINO. Thank you.

Mr. Flowers?

Mr. FLOWERS. Mr. Chairman, I have no questions and I appreciate the gentleman's testimony.

Chairman RODINO. Mr. Dennis?

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. Mezines, as you know, the bill here, H.R. 9203, says that before entering any consent judgments, the court shall determine that entry of that judgment is in the public interest as defined by law. What does the phrase "public interest as defined by law" mean to you?

Mr. MEZINES. Well, I think the judge would have to look at the law, the particular statute, the violation charged. Then he would look at the consent decree to see if, assuming there is a violation of that statute, a consent decree would remedy the situation so that the public does benefit by what previously went wrong. And it gives him a wide discretion and wide latitude to do just that.

Mr. DENNIS. Well, basically, then, you think that the phrase "defined by law" would refer to the particular antitrust statute that was involved in the case; is that correct?

Mr. MEZINES. Yes. His public interest inquiry would be limited to that particular statute.

Mr. DENNIS. And would it be limited, then, entirely to that factor as to whether it complied with the statute involved?

Mr. MEZINES. It would be limited from the standpoint that if there were other violations of another statute, that judge would not be able to deal with them in that proceeding. It would be limited, in a sense, by the violation charged because is still is a responsibility of the Department of Justice to determine what charges will be made, and to bring them to court.

Mr. DENNIS. Of course, I agree with that. But what I am thinking of is this: I assume that in arriving at these consent decrees the government counsel and the other counsel would want them to be in accord with the statute. But, they would also consider the strength of the case, what its impact would be, what the chances were if they tried it, et cetera. Now, would you feel that the court also would either be entitled or required to consider such factors as those?

Mr. MEZINES. Yes. And, in addition, even though that statement is pinned down to the law, under the Supreme Court decision in the *Siegel* case and the *Mandel* case, the Supreme Court has ruled that in framing orders, the court has a wide latitude and can prevent and inhibit acts that were not unlawful under the statute. It gives them a little more room, in other words. The court can consider many other factors, so it is not an unreasonable restriction. It gives the court the latitude it needs to take other factors into consideration.

Mr. DENNIS. So then you feel that the court would not be bound simply to the question of whether the decree complied with the statutory requirements?

Mr. MEZINES. No, it would not be limited to that precise statute.

Mr. DENNIS. Well, then, you are going to get the court into these various factors that counsel customarily weigh in deciding whether to settle a lawsuit, are you not?

Mr. MEZINES. Well, you are going to get the court involved a little more than they have been. But, I really do not feel the court is going to abuse its authority and start asking questions in areas that they previously did not. I think they will be concerned with the public interest and because of the workload of the court, and the courts in the settlements that I have had experience with, if a district court judge at the present time, even without this bill, wanted to make a lot of inquiries and do a lot of things, I am not too sure that he could not do it, even under the present statutory authority. But, there has been no abuse of that.

Mr. DENNIS. Well, you may be right about that, Now, we would have a statute, however, which would suggest that he consider these additional factors.

Mr. MEZINES. And I think that is good.

Mr. DENNIS. And how much of that may be a judicial function, could be debated perhaps.

Mr. MEZINES. Well, I think that a little of that is good right now, because as long as it is understood that he has some responsibility, with

the limitation of the language I have changed, it will help restore confidence in the work of the division in the settlements that they have arrived at.

Mr. DENNIS. Of course. Speaking not as an antitrust lawyer, but from general experience. I think I can see how this could become a pretty pro forma business. Judges are busy, as you point out.

Mr. MEZINES. That is right.

Mr. DENNIS. He is going to listen to counsel on both sides, and run it through, unless he sees something pretty bad, is he not?

Mr. MEZINES. Yes, sir, I quite agree with you, sir.

Mr. DENNIS. On the other hand, if the judge really informs himself as this statute suggests, taking language on page 5 of H.R. 9203, section F, as to what he can do in making his determination under subsection E, the court may take testimony, appoint a special master, authorize fully limited participation in proceedings before the court by interested persons, including parents amicus curiae, intervention of a party pursuant to rule 24, examination of witnesses and so on. Now, if he gets into that, are you not going to practically have a trial anyway?

Mr. MEZINES. Well, if this happened in every case, you would have some real problems. But, that is not going to happen unless the court receives some comments that signal to the court that something is very wrong here and, therefore, I have to look into this. And the bill gives the judge the authority to take these steps. But, that is going to happen only in very unusual circumstances. But, there is no reason why a court, if the court has any questions, there is no reason why they should not be permitted to make an inquiry because the court is responsible when they sign an order.

Mr. DENNIS. Well, I agree that the court is responsible when an order is signed and I see the thrust of the bill here. Nevertheless, it seems to me a fair question can be raised as to why anybody should try to settle a suit or have a consent decree if he is going to go through the trial anyway. He might as well take his chances to begin with.

Mr. MEZINES. Sir, I would say to you that based on my experience with the FTC permitting people to comment on a consent order, our experience has revealed that in very, very few cases do we receive comments. And some of the people, the ones most interested in having that provision in our rules to permit them to make comments, when the rule was first enacted, made comments on every case. Now, we never hear from them. It is very rare that we receive comments.

Mr. DENNIS. Well, what would you think would be the standard which should guide a judge in trying this procedure, or in coming to the decision whether he should or should not pursue the matter?

Mr. MEZINES. Well, in the bill, itself, on page 5, right in the first line it says the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, will be considered. Now, I knocked out the word including consideration of the public benefit to be derived from a determination of the issues at trial. I think your line of questioning suggests, that is what a judge might do. He might start considering the public benefit, and that is why I thought that should be stricken from the bill, so it would be clear just how far a judge should go. Now, the way the bill is presently written with that amendment, I think is sufficient to properly apprise the judge of what his

responsibilities are. And I do not think it will result in any undue consideration of the consent settlement.

Mr. DENNIS. If the court can already do this, as you suggest, and if he is probably not ordinarily going to go through all of the proceedings spelled out on page 5 here, why do we need a statute on the subject at all?

Mr. MEZINES. Well, in my testimony to you I said it was my personal feeling that I thought that a court did have the authority to do this but, of course, this is a gray area. It is not clear. It was just my personal feeling. A judge may not agree with me. But, I think this bill makes it very clear what the judge's responsibilities are and also makes it clear to the public. And think in this way, it will help the settlement process. It will help restore the confidence that is required at this time.

Mr. DENNIS. Well, I appreciate your position and I have only one other question I want to ask. And that is on the matter of penalties.

Mr. MEZINES. Penalties?

Mr. DENNIS. Yes. I can see why we might want some increased penalties in some of these cases with the big corporations. It has been pointed out, however, that they are not all big corporations and that, under the statute, these same acts may be charged as a conspiracy, as a monopoly, and as a different kind of conspiracy. Do you think there may be some danger of excessive fine, if you punish the man maybe three times for the same act, and you put these maximum penalties on? What could we do about that?

Mr. MEZINES. Well, I think the best way to approach that is just to look at what judges have done ever since the Sherman Act was enacted. The fines, in my own personal opinion, have been extremely low. The judges have never, or in very, very rare cases, have they ever sentenced anyone to jail, for example, and there is a jail provision.

I think the judge will take into consideration the size of the company, just like he does when he sentences a defendant in a criminal case. He takes all things into consideration and the judge is going to take that into consideration. The lawyer, representing the company if this is a small company, and they do not have any money, is going to present those facts. But, right now, the judge could have a company, and I do not want to single out any large American corporation, but he could have one of these large companies before him, and he would not have the discretion to fine them more than some piddling sum that does not even represent their costs of Xeroxing the documents involved in the trial of the case. And here the Government has their attorney tied up for years trying these cases, and it costs the Government maybe \$100,000, \$200,000, to try a case, and they cannot even get a fine that is anywhere near what the cost of trial of the case is from a defendant that can afford it.

Mr. DENNIS. I see that point. But, I wonder if maybe we should not consider making some provision in the act, rather than leaving it to the untrammelled discretion of 400 or 500 Federal Judges that have various points of view. Do you have any suggestion along that line?

Mr. MEZINES. Well, I think the judge has a discretion in the act.

Mr. DENNIS. Well, he does, but is it left completely to the court's discretion?

Mr. MEZINES. I think you have to.

Mr. DENNIS. I thank you.

Thank you, Mr. Chairman.

Chairman RODINO. Before we proceed, I would just like to recognize the presence of our distinguished colleague and my colleague from New Jersey, Hon. Ed Patten, who I know represents Mr. Mezines as one of his very distinguished constituents, Mr. Patten?

Mr. PATTEN. Thank you, Mr. Chairman, and members of the committee.

Mr. MEZINES. Thank you, Mr. Chairman.

Chairman RODINO. Mr. Seiberling?

Mr. SEIBERLING. Mr. Chairman, since I have arrived late I would like to ask unanimous consent that I be allowed to pass on my time.

Chairman RODINO. Without objection.

Mr. SEIBERLING. And claim it later, after Mr. Mezvinsky and Ms. Jordan.

Chairman RODINO. I am sure there will be no objection.

Ms. Jordan?

Ms. JORDAN. Mr. Mezines, you made much in your testimony about restoring the confidence of the public through the public impact statement. We are going to receive testimony that if this bill were to become law, this would be tantamount to an official vote of no confidence in the attorneys in the Antitrust Division of the Justice Department. Would you comment on that?

Mr. MEZINES. I would be very concerned if you received comments like that, and in my prepared statement, I deliberately, and in speaking to the committee this morning, made reference to the dedicated people working in the Government, and the respect that they deserve. And I think this bill is necessary to help restore some of the confidence that has been lost. I think some of the public today do not feel as strongly as I do about the integrity of the attorneys on the staff, and that is why it is necessary to do this. I do not think that the trial attorneys in the division, themselves, will feel that this is in any way a repudiation of their work. I think they will understand what the committee is trying to do. When we considered this at the Federal Trade Commission, when I was a staff man, I did not sense that anyone felt that this was in any way a criticism of the work that they had done.

Ms. JORDAN. Do you think that the requirements for additions to staff in the Antitrust Division of the Justice Department, would be necessary under this bill? There is some testimony that the Department is inadequately staffed and that more attorneys and more funds would have to be put into the Department if this bill were to become law.

Mr. MEZINES. It has always been my experience in preparing budgets for Congress that the staff would always ask for more attorneys than I thought were necessary. And I think there is a tendency on the part of the staff to inform committees of the Congress of their budgetary problems, when in many instances, there are matters that they do not want handled. I do not think that their financial situation is in that precarious a state and if the Department of Justice does need additional funds, then I do not think it will be because of this bill. I do not think that this bill is going to discourage settlements, so, therefore, I do not think it will result in the need for additional funds.

Ms. JORDAN. Would I be correct in assuming then that it is your view that the public interest far outweighs the views of the organized professional bar as well as the agencies which would be affected by this legislation?

Mr. MEZINES. I think the bar, and the agency itself, is unduly alarmed with the requirements of this bill. And if I were to make a prediction, I do not think the bill will have any effect on the number of settlements that are made.

Ms. JORDAN. No further questions, Mr. Chairman.

Chairman RODINO. Mr. Mezvinsky?

Mr. MEZVINSKY. I have no questions, and I want to thank the witness for his testimony. Thank you.

Mr. MEZINES. Thank you, sir.

Chairman RODINO. Mr. Seiberling?

Mr. SEIBERLING. Well, thank you.

I just have one question, Mr. Chairman. I am a little puzzled by the suggestion, Mr. Mezines, on page 5 of your prepared statement as to striking the words "including consideration of the public benefit to be derived from the determination of the issues at trial," which you suggest should be stricken from the language on the ground that, as I understood it, you think that the court would consider this anyway. And I just wonder what harm there is in leaving that language in since that is really what the court ought to be considering, it seems to me.

Mr. MEZINES. Well, I think it is an invitation for the court to require the Government to go to trial for some unstated reason, even though the relief secured by the Government in the decree is fully adequate to protect the public interest.

Now, even though that would be stricken, the language which would be retained is to the effect that the court may consider the public impact of entry of the judgment upon the public, generally and individuals alleging specific injury from violations set forth in the complaint. I think that the court has to look at it from the standpoint of the public interest, and not make a determination that there might be some benefit, because one person would get enough evidence to bring a private damage suit. I do not think you would want something like that.

Mr. SEIBERLING. But is not that something the court should weigh with all of the other factors that enter into its consideration?

Mr. MEZINES. I do not think the court should consider the interests of any one individual.

Mr. SEIBERLING. Well, is not the purpose of the treble damage section of the Sherman Act, or the Clayton Act, rather to provide a supplement to governmental enforcement of the antitrust laws and, if so, is not that a public purpose and not merely a private purpose?

Mr. MEZINES. It should provide a supplement to the antitrust laws, and it does provide, and that is the purpose of private damage suits. So, therefore, the Government should not be put in the business of enforcing laws for one individual. It has to weigh its resources and utilize those resources for the public interest generally. But, to put the Government agency in the business of bringing suits on behalf of one individual would be a very bad thing.

Mr. SEIBERLING. Well, I would certainly agree. I simply suggest that the wiping out of a possible treble damage suit or a series of suits is something that the court would have to consider in terms of the public interest, as well as the interest of the individuals concerned. And I would have a question, therefore, about that particular suggestion.

Mr. MEZINES. Well, you see, sir, the word "public interest" is a word that has been defined by many courts, and there are many decisions on what is in the public interest. And when you start using words like the ones that I have just recommended be stricken, it confuses the issue, and it could cause problems that your colleague suggested with respect to the court conducting an inquiry, and, therefore, defeat the purposes of the bill.

Mr. SEIBERLING. Well, I would have the same problem you have, if it said, including consideration of the private benefit, but since it specifically says including consideration of the public benefit, I just have great difficulty seeing how that could be turned around and used as an argument that it requires a court to consider the benefit to public plaintiffs. However, I guess we have got your views pretty well on that point, and I want to say that I am very impressed with your statement, and except for this one minor question, I think you have made some excellent suggestions with respect to the drafting of this legislation.

Mr. MEZINES. Thank you, sir. I appreciate that.

Chairman RODINO. Well, thank you very much, Mr. Mezines, for having taken the time to come here and provide us with the information that I think is going to be of considerable use to the committee.

Mr. MEZINES. Thank you, sir.

Chairman RODINO. Thank you.

[The prepared statement of Mr. Mezines follows:]

#### STATEMENT OF BASIL J. MEZINES

Mr. Chairman and members of the subcommittee: My name is Basil J. Mezines and I am a partner in the law firm of Stein, Mitchell and Mezines practicing law before the courts and the administrative agencies in the District of Columbia.

Until recently, I was on the staff of the Federal Trade Commission where I was employed for almost twenty-four years. While at the Federal Trade Commission I served in several different positions, including senior trial attorney, director of the Commission's Bureau of Competition, Executive Assistant to the Chairman, and finally, Executive Director of the agency for the past three years.

I am presently active in the antitrust section of the American Bar Association and the Federal Bar Association.

I appreciate your kind invitation to appear before the subcommittee and present my views on H.R. 9203, a bill known as the "Antitrust Procedures and Penalties Act". I would like it understood that the comments and views that I will express do not purport to reflect the official views of my former employer, the Federal Trade Commission, or any of the organizations that I am presently active with as stated above. In connection with my testimony today, I do not represent either directly or indirectly any client having any interest in this legislation. I am only interested in being of some service to this committee in giving you the outlook of someone who has been responsible for the trial and settlement of antitrust cases for a number of years.

Mr. Chairman, at the outset I think that I should inform you that when I first became familiar with the requirements of S. 782 and similar legislation I was seriously concerned that the enactment of such legislation would interfere with the orderly process of settling antitrust matters. As the committee knows approximately 80% of all complaints filed by the antitrust division of the Department of Justice are settled prior to trial by the entry of a Consent Decree. The Federal Trade Commission has a similar track record in the settlement of matters arising before that Agency. Like many trial attorneys in Government I felt that it was vitally important that cases be settled as soon as possible so as to avoid the time and expense involved in protracted litigation. Moreover, the attorney handling the case is in the best position to know whether a case will stand up in actual trial. Sometimes, a good settlement will produce more for the public interest than a full trial. Trial attorneys do not like to be "second-guessed" and feel that only they know when a case should be settled and on what terms.

I feel that the dedicated and outstanding government attorneys in the antitrust field merit the full respect and admiration of the public. However, it became clear to me that in some cases the public and the press were suspicious about both the economic and legal equity of certain settlements. It seems that public confidence in our government institutions has diminished and steps should be taken to restore that confidence by making the government's business the public's business. I am now convinced that government agencies should take all necessary steps to fully inform the public on all settlements and encourage its remarks and opinions. H.R. 9203 is in essence a "full disclosure" bill and will do much to improve procedures that are presently being followed. I believe that the bill should be adopted with certain amendments which I will propose. I will also take the liberty to suggest to the Committee that effective steps be taken to monitor the actual performance of this statute as well as laws dealing with antitrust and competition.

The proposed legislation provides that the District Court shall make an independent determination as to whether or not the entry of a proposed Consent Decree is in the public interest as expressed by the antitrust laws. The bill requires that certain procedures be followed in order to assist the court in making that determination. I think everyone will agree that the courts should not simply rubber-stamp antitrust decrees and that they are called upon to perform a judicial act when they determine to adopt the decree as a court of equity. The courts at this time are required to examine the decree to see whether it is enforceable, whether it provides relief consistent with the prayer of the complaint, and whether on the whole the Consent Decree is in the public interest.

The specific provisions in the bill. Section 2 would require that the Justice Department file and publish, along with the Consent Decree, a "public impact" statement which explains the nature and purpose of the proceeding; a description of the practices involved; an explanation of the relief to be obtained by the proposed decree and the anticipated effects on competition of that relief; the alternatives actually considered and the effects of such alternatives in deciding on such relief; and the procedures available for the modification of the proposed judgment. I believe that the requirements of the impact statement are similar in some respects to statements that have been issued by the antitrust division in the past and the practice resembles somewhat the procedure followed by the Federal Trade Commission.

I foresee no problems in filing a statement explaining the nature of the proceeding; describing the practices involved; and explaining the proposed judgment and the relief to be obtained, and the anticipated effects on competition of that relief. Similarly, the staff can list remedies available to private plaintiffs and describe procedures available for modification of the proposed judgment. However, I do have problems with that part of the statement listing alternatives considered and the anticipated effects on competition of such alternatives.

I would propose to strike in H.R. 9203 in lines 13 and 14 of page 3, the language in subsection 2(b), which reads "and the anticipated effects on competition of such alternatives". I think this should be stricken because if it is retained it will be necessary for the staff of the antitrust division to discuss various alternative remedies and their effect upon competition. Statements and discussion of this kind enter into an area of speculation and the staff should not be required to make predictions as to the competitive effects of various alternatives which it has considered. I think it is sufficient to require the staff to state why they have framed a decree and what they expect it to accomplish and if necessary to have them describe the alternatives considered. The first five provisions of the impact statement accomplishes this objective.

The period of sixty days provided for public consideration of the decree together with the publication requirements, will assist the Antitrust Division and the court in determining whether the decree is in the public interest. Unquestionably, this time period delays the final date the matter will be terminated, but this is the price that must be paid for the benefits that will accrue.

The procedural and substantive factors which the court must consider before making a finding that the decree is in the public interest are just and necessary and do not require the court to conduct a trial or engage in extended proceedings which might have the effect of delaying a prompt settlement. I do not believe that the courts are any more anxious than those employed in government or in representing defendants, to become embroiled in lengthy hearings over the settlement of cases.

To insure that this does not occur, I would suggest that an amendment to H.R. 9203 be made on page 5, Section 2(e) (2), lines 3 to 5, striking the comma

after the word "complaint" and striking "including consideration of the public benefit to be derived from a determination of the issues at trial". I think the committee will agree that it is not the purpose of the government to go to trial for the benefit of potential private plaintiffs but that such matters are tried because of the general public benefits involved. Inclusion of the language that I have recommended be stricken seems to be an invitation for the court to require the government to go to trial, for some unstated reason, even though the relief secured by the government in a proposed Consent Decree is fully adequate to protect the public interest in competition.

The language which would be retained in 2(e) to the effect that the court may consider "the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint"—is fully adequate to protect the public interest. It seems, therefore, that the only effect of the language which is proposed to be stricken from the bill would be to induce a District Court to consider whether requiring the government to trial would aid private treble damage plaintiffs.

Turning to other major provisions of the bill, Section 3 of the bill would increase the maximum penalties for violations of the Sherman Act from \$50,000 to \$100,000 for individuals and to \$500,000 for corporations. The reason for this change is obvious and long needed.

The last section of the bill would amend the expediting act to require antitrust cases to be appealed to the Court of Appeals, rather than directly to the Supreme Court. I believe that the Supreme Court should be relieved of the burden of hearing the numerous cases coming to it under the expediting act. Many civil antitrust cases have records involving thousands and thousands of pages and it is impossible for the Supreme Court to review such records without devoting an inordinate amount of time to such cases. Having the initial appellate review in the Court of Appeals would help the Supreme Court as well as litigants in refining the issues that would be presented. In those situations where it is important for the Supreme Court to review a case without following the regular District Court practice of having cases appealed to the Court of Appeals, the bill provides for such unusual situations. Cases of "general public importance" would be appealable directly to the Supreme Court after certification by single district judges in lieu of a three-judge court upon application by either party.

Mr. Chairman, I am aware of statements that have been made to the Senate Committee and to your committee by various representatives of the Department of Justice who are greatly concerned that this bill would involve the District Courts to such a degree in the Consent Decree process that it may seriously disrupt settlement proceedings in the courts and would seriously weaken their ability to obtain Consent Decree settlements from defendants. I also understand that the Board of Governors of the American Bar Association approved a resolution opposing the sections of this legislation affecting the Consent Judgment procedures. In short, the American Bar Association feels that the added procedures would "encumber" and "complicate" the handling of cases and have a "chilling" effect on the ability of government to negotiate orders.

Further, according to the American Bar Association, the bill would create problems concerning the status of third persons attempting to intervene in antitrust settlements. While I do not agree with these conclusions, I feel that the concerns expressed are serious and if this bill is enacted it will require the close attention of this committee as well as the courts to be sure that the purposes for which the bill is designed are realized.

If I may, Mr. Chairman, I would like to urge this committee to seriously consider the establishment of a commission to study the operation of this bill if enacted into law, as well as other antitrust laws and statutes dealing with competition.

There has not been a full review of the antitrust and other laws which have a significant competitive impact since 1954. Since that time there has been piece-meal legislation dealing with a variety of subjects and profound changes have taken place in the American economy and the nature of competition within it. We have price controls, allocation of scarce materials, a trade deficit, consumer and environmental problems and changes in the role of government.

This Committee and its staff did undertake a thorough and penetrating study of the conglomerate merger movement in the United States and published an excellent report on June 1, 1971, which should be used as the basis for further study as suggested in the report. I believe that an outside Commission devoting

a major portion of its time to these problems could focus on many individual issues and present to the Committee the separate views of many diverse interests.

Mr. Chairman, I feel that a commission would generate interest in the capitalistic system and the antitrust laws and provide this committee with a wealth of material and information. Such a commission is needed at this time so that there can be one complete and unified study of all laws. In closing my testimony, I respectfully request that the Committee give this proposal serious consideration.

Thank you for permitting me to express my opinion.

STEIN, MITCHELL & MEZINES,  
Washington, D.C., October 9, 1973.

HON. PETER J. RODINO,  
Chairman, House Judiciary Committee, U.S. House of Representatives, Rayburn  
Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: It was a true honor to be invited to testify before your Antitrust Subcommittee.

I am sending this pursuant to your request and that of Congressman Hutchinson to elaborate upon my testimony regarding the establishment of a Competitive Policy Review Commission. I was reluctant to impose my personal opinion upon you and the Commission during the testimony, but now that you have specifically asked me to express it, I would respectfully suggest that you consider adding an amendment to the Consent Decree designed to establish the Commission. I have attached a proposed amendment for your consideration.

I favor the amendment as opposed to a separate piece of legislation for several reasons. First of all, time is of the essence. As I stated in my testimony, I feel there is in existence a strong public feeling that "something needs to be done" in the antitrust and related areas. This mood could spawn piecemeal attempts to change the existing law and result in a checkered, uneven policy. The Commission, if established at this time, could channel this mood. Secondly, the House has now heard testimony on the subject and appears very interested. The Senate, moreover, has been considering a similar, but not identical, bill for several years, and will, I've been advised, be holding additional hearings. Therefore, they would be able to knowledgeable discuss the amendment at conference committee should it be added to the Consent Decree Bill. Finally, it is my belief that the Commission is needed to update and act upon previous studies which have become out-of-date due to the substantial economic and financial changes domestically and internationally since their publication.

As I envision the Committee, it would be set up to represent all the varied interests: consumers, corporate, academic and government. The body should be large enough to reflect these diverse views, but also be workable. To this effect I suggest 22 members, bearing in mind that not all members will be able to attend each meeting. Additionally, I suggest that the Commission be given a two-year lifespan to enable it to study the area in depth. Furthermore, the scope of the Commission should be broad enough to review all aspects of competitive policy.

If you or any members of your subcommittee have any further questions, I would be pleased to assist you. I would appreciate your making this a part of the record.

Very truly yours,

BASIL J. MEZINES.

Enclosure.

A BILL TO AMEND H.R. 9203

The following shall be inserted at the end of H.R. 9203 to read as follows:

TITLE IV

To establish a United States Competitive Policy Review Commission

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established the United States Competitive Policy Review Commission (hereinafter referred to as the "Commission") constituted in the manner hereinafter provided.*

## PURPOSE OF THE COMMISSION

SEC. 2. The Commission shall study the laws of the United States which have a significant competitive impact including the antitrust laws, their application, and their consequences, and shall report to the President and the Congress the revision, if any, of said laws which it deems advisable on the basis of such study. The study shall include the effect of said laws upon:

- (a) concentration of economic power and financial control;
- (b) price levels, produce quality and service;
- (c) employment, productivity, output, investment, and profits;
- (d) foreign trade and international competition; and
- (e) economic growth.

## MEMBERSHIP OF THE COMMISSION

SEC. 3. (a) *Number and appointment.*—The Commission shall be composed of twenty-two members appointed as follows:

- (1) Four from the Senate appointed by the President of the Senate;
- (2) Four from the House of Representatives appointed by the Speaker of the House of Representatives;
- (3) Four from the executive branch of the Government appointed by the President;
- (4) Eight from private life appointed by the President.

(b) *Representation of varied interests.*—The membership of the Commission shall be selected in such manner as to be broadly representative of the various interests, needs, and concerns which may be affected by the study.

(c) *Political affiliation.*—Not more than one-half of the members of each class of members set forth in clauses (1), (2), and (4) of subsection (a) shall be from the same political party.

(d) *Vacancies.*—Vacancies in the Commission shall not affect its powers but shall be filled in the same manner in which the original appointment was made.

## ORGANIZATION OF THE COMMISSION

SEC. 4. The President shall designate the Chairman and Vice Chairman from among its members.

## QUORUM

SEC. 5. Twelve members of the Commission shall constitute a quorum, and a majority of the Commission members present and voting shall be able to conduct its business. The Commission shall meet at the call of the Chairman or at the call of a majority of the members thereof. The methods and means of obtaining the majority shall be determined by rules and regulations to be established by the Commission and its Chairman and Vice Chairman. The initial meeting of the Commission shall be not more than thirty days after the final Commission member has been duly appointed.

## COMPENSATION OF MEMBERS OF THE COMMISSION

SEC. 6. (a) *Members of Congress.*—Members of Congress, who are members of the Commission, shall serve without compensation in addition to that received for their services as Members of Congress, but they shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

(b) *Members from the executive branch.*—Members of the Commission who are in the executive branch of the Government shall serve without compensation in addition to that received for their services as members of the executive branch but they shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

(c) *Members from private life.*—The members from private life shall each receive not exceeding \$200 per diem when engaged in the performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred by them in the performance of such duties.

## POWERS OF THE COMMISSION

SEC. 7. (a) (1) *Hearings.*—The Commission or, on the authorization of the Commission, any subcommittee thereof, may for the purpose of carrying out its functions and duties, hold such hearings and sit and act at such times and

places, administer such oaths, and require, by subpoena or otherwise, the attendance and testimony of such witnesses, and the production of such books, records, correspondence, memoranda, papers, and documents as the Commission or such subcommittee may deem advisable. Subpoenas may be issued only under the signature of the Chairman or Vice Chairman, and be served by any person designated by the Chairman or Vice Chairman.

(2) In case of refusal to obey a subpoena issued under paragraph (1) of this subsection, any district court of the United States or the United States court of any possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is being carried on or within the jurisdiction of which the person refuses to obey is found or resides or transacts business, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee thereof, there to produce evidence if so ordered, or there to give testimony touching the matter under inquiry: and any failure to obey such order of the court may be punished by the court as a contempt thereof. All doctrines of immunity are available to a person or persons so subpoenaed.

(3) All data received voluntarily or by subpoena shall be kept in the strictest confidence, and it is prohibited for the Commission or any member or employee thereof to release or publish any confidential or trade secret information acquired throughout the course of the Commission review.

(b) *Official data.*—Each department, agency, and instrumentality of the executive branch of the Government, including independent agencies, is authorized and directed to furnish to the Commission, upon request made by the Chairman or Vice Chairman, such information as the Commission deems necessary to carry out its functions under this Act.

(c) Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to—

(1) appoint and fix the compensation of an executive director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title, and

(2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed \$200 a day for individuals.

(d) The Commission is authorized to enter into contracts with Federal or State agencies, private firms, profit and nonprofit institutions, and individuals for the conduct of research or surveys, the preparation of reports, and other activities necessary to the discharge of its duties.

SEC. 8. The Commission shall transmit to the President and to the Congress not later than two years after the first meeting of the Commission a final report containing a detailed statement of the findings and conclusions of the Commission, together with such recommendations as it deems advisable. The Commission may also submit interim reports prior to submission of its final report.

#### EXPIRATION OF THE COMMISSION

SEC. 9. Sixty days after the submission to Congress of the final report provided for in section 8, the Commission shall cease to exist.

#### FUNDING

SEC. 10. There is hereby authorized to be appropriated such funds as are necessary to carry out the purposes of this Act, to remain available until expended. In no event shall sums appropriated to the Commission be available after June 30, 1976.

Chairman RODINO. And now our next witness is Mr. Milton Handler, professor emeritus at Columbia University. Professor Handler, I have had the opportunity of glancing at your very fine and learned prepared statement, and in the interest of trying to expedite these pro-

ceedings. I would hope that you might be able to summarize the statement and give us the benefit of your views. In that manner, we might then proceed with some questions. The statement will, however, be inserted in the record in its entirety.

**TESTIMONY OF PROF. MILTON HANDLER, KAYE, SCHOLER,  
FIERMAN, HAYS & HANDLER, NEW YORK, N.Y.**

Professor HANDLER. I am very pleased to appear once again before this honorable body, after a lapse of some years. I would like to indicate to the committee that a good deal of planning went into the preparation of my prepared statement, and I am pleased to have it made a part of the record. [See p. 213.] I would hope that it would receive such attention from the members of the committee as it may merit, and I have every intention to limit myself to a few points that I think may be of importance.

I do not propose to review my credentials which are set forth at the beginning of my statement. I do want to make the point that I come here as your guest, on your invitation, and on my own behalf, and not on behalf of any organization, institution, or client. I am here for the sole purpose, as a citizen, to be of such help as I may to the committee.

It was my understanding when the invitation was extended to me that the committee was desirous not merely of having me comment on the pending bill, but to deal with some of the current complexities in antitrust administration, which confront this Nation, and which would enable the subcommittee to view the pending measure in proper perspective. I feel very much, having sat here during the testimony of the previous witness, as though I were walking into a lion's den. I cannot be unmindful of the fact that the bill under consideration, bears the name of the distinguished chairman of this committee. However, I feel it my duty to tell you that I am opposed to the enactment of the pending measure in two of its respects. And I would like to tell you very briefly why, and when I come to what I regard as most significant, I will ask the committee to bear with me as I turn to my prepared testimony.

I will say, with respect to the amendment of the Expediting Act, that this is a reform that is long overdue. It was requested by the Supreme Court. There is really no sound objection to it. It was delayed in the legislative processes because it was impossible to get agreement among the proponents. That happily has now been achieved, and I would hope that this necessary relief to a very overburdened Supreme Court of the United States could promptly be enacted.

I have made some observations in my prepared statement concerning the increased penalties. I urge the members of this committee to stop, look, and listen. Whenever we feel frustrated by crime, the answer, the legislative answer, is to increase the penalty, but the current problem does not respond to any such simplistic solutions. If it did, we could eliminate all crime by increasing penalties. We do this in the States and in the Federal Government all of the time. And what happens? Crime continues with its ups and downs, but, mainly, its ups.

Congressman Dennis anticipated by his questions much that I say, and I think I should say parenthetically, that although I have known Mr. Mezines for many years and have the highest regard for him,

he is everything that he said about the people that serve the people of this country by being on the Federal Trade Commission, its staff, or in the Department of Justice. They are all very high-minded people. But, that does not mean that they are always right. And I would take very serious reservation about many of the answers that he put to you gentlemen, and I would hope you will put the same questions to me so that you will get a divergent point of view which will enable you then to balance one against the other.

I happen not to be unduly vain, and I never believe that what I say is necessarily God-given truth. I do feel that, on the basis of spending a lifetime in this field, exclusively this has been my life, antitrust, and I have appeared before this and other committees many times. I have appeared in court countless number of times and, as I stated in my statement, there is not any phase of antitrust that I have not touched upon, either in litigation, in advice to government or in my writings and lecturing. Hence, all that I can ask of you is that you give some credence to what I say, and some consideration in making up your minds.

When people talk about increased penalties, they think of large cases like the *General Electric* case. I state in my statement, that I have represented both plaintiffs and defendants. I represented 44 utilities. I was lead counsel for plaintiffs in the *General Electric* case and I got vast sums of money by way of settlements for my clients and since I have the lead position, what I got for my clients benefited every utility in America. But, not all cases that come in the antitrust field in the courts are cases of that dimension.

I took three cases at random, which I mention in my paper. These were matters that were brought only in this past year. Last December, the Antitrust Division obtained indictments against two local fuel oil dealers in Hudson County, N.J., on charges of price fixing the bids to Union City, just two fuel dealers. And in February of this year, a San Francisco grand jury indicted two microscope manufacturers, a field in which there is an enormous market, you know, on charges they conspired to fix prices. In May 1973, the Government obtained price-fixing indictments against 10 gasoline service stations in Jackson, Wyo. This is the normal run-of-the-mill case. It is a spectrum of minor cases and moderate sized cases and major cases. And, as Congressman Dennis says, fines are put in the discretion of judges who are always attacked by the newspapers, if they are not unduly severe. A measure that enables the judge to impose a fine of \$1,500,000 in an industrywide case, seems to me to leave the matter entirely at large, and these severe penalties can be counterproductive or catastrophic to the small company or the individual, and eminently unfair.

Now, the Congressman made a point which I hope you have all apprehended. It is one of the points on which I was licked. In the *American Tobacco* case, which I argued before the U.S. Supreme Court in 1944 or 1945, the same identical conduct was attacked in an indictment as four crimes. The attempt to monopolize was merged in the monopolization count. There were three, therefore, crimes committed by the same essential acts, which meant multiple punishment. So, you multiply \$500,000 by three under the new bill, I argued that charging a person with three crimes, based on the same substantial acts violated the constitutional prohibition against multiple punishment, but I was licked, so that when you increase the crimes,

I think that you ought to consider that you should multiply everything you have in your bill by three.

Now, with respect to the main part of the bill, the procedure for consent decrees, I know my thinking runs counter to that of the chairman, and perhaps that of the committee, and certainly that of the U.S. Senate. I am not persuaded that numbers determine who is right and who is wrong. I have not yet reached the conclusion that commonsense has been eliminated from the legislative and the judicial process. I tell Your Honors, with all of the earnestness that I can muster, that the enactment of this bill will mean a total breakdown in the enforcement of the antitrust laws.

I say that in deference to Mr. Mezines and in deference to the chairman and in deference to Senator Tunney, and in deference to the changed opinion that has been taken by the Department of Justice in its testimony before you. Mr. Mezines, with all respects, compared apples and oranges. He tells you about the Federal Trade Commission procedure of obtaining comments. Well, the Department of Justice has the same procedure. Nobody objects to that. But, that is not what your bill provides for. It is not getting comments. It is substituting the judge for the Department of Justice in determining whether it is in the public interest to settle an antitrust case. Antitrust is only one of the responsibilities of the Department of Justice. It is only one of the laws that it enforces. Is this the wave of the future? Are you going to say that no Government case can be settled without this kind of a procedure of publishing an impact statement and having a hearing, with experts, with commentators, with special masters, to determine whether or not the case should be settled? How can a judge determine whether a case should be settled, an ordinary antitrust case, which is investigated by the Department of Justice, by the FBI, for months, if not years, and then there is a pretrial discovery, and the case wends its way, and then there is negotiation, and it is decided to settle the case. It is not the staff that settles the case. The staff never settled the case. You start your discussions with the staff, if you want to. It then goes up to the heads of the divisions and then it goes up to the head of the Antitrust Division, and then it goes to the Attorney General of the United States. And you can appeal to all of these stages.

When an antitrust case is settled, it bears the imprimatur of the Department of Justice, not a staff. It has been internally reviewed by dozens of people at times who have had an opportunity, and dozens of lawyers to consider the validity of the settlement.

Now, you come into a busy district judge, after you have spent a lot of money to publish a lot of documents in every case, and when it is admitted by the proponents that in most cases it is unnecessary, nobody is going to read it, and it goes to court, and then what is the court supposed to do? Well, the alternative is one or the other. It is either pro forma, you are going through a lot of redtape, a lot of rigamarole, and nobody objects, and the judge signs, and the Government pays the printing bills for something which nobody has read, or a lot of people come in and want to be heard. Now, who are the people who want to be heard?

I can tell from my actual experience. None of this is academic, none of this is theoretical. A company has entered into a consent

decree. Every company, every individual has dealings with other individuals, with other companies. Anyone who has had a dealing, an unsatisfactory dealing, from his point of view with the defendant, comes into court. He has got a God-given opportunity to use this proceeding as a means to blackmail, badger the defendant into settling his case. He is, maybe in this case, a distributor and the merchandise has been delivered to him. It was unsatisfactory. He claims a breach of warranty; he claims that he was overcharged. There was a mistake. He comes in and says, Your Honor, this is an absolute outrage to have this kind of a decree, and he gives testimony. He wants to be bought off.

Now, when it comes to the guts of the case, what is the Judge to do? The complaint asks for relief. The defendant comes in for reasons sufficient unto himself. He does not want to go through the expense of the lawsuit. He would like to get rid of the case. He gives the Government everything that it wants, so they have a decree. Oh, no, now you have got to go through the rigamarole and have a hearing. What is going to happen in the hearing? Well, people are going to come in and say, well, this relief is inadequate, why didn't you give the other relief. Why didn't you ask for it. And there has to be second guessing.

Who in his right mind, and I repeat this, who in his right mind representing a defendant would subject his client to this kind of a procedure, where every Tom, Dick and Harry can come in and be heard, second guess, and say that the decree was wrong.

Now, gentlemen, do not assume that the Government is always right, that it has the evidence cold. The Government makes mistakes. It files the wrong suits. It cannot prove them. It asks for the wrong relief. And like every other litigant, a half of a loaf is better than no loaf. It is willing to take a settlement. What is the Government supposed to do under these facts? Should he say, Your Honor, we do not have a case, and we are lucky to get this settlement? Is the Government going to say that, and then the case is going to go to trial?

I think I have said enough. I invite your attention to the statistics that are set forth in my presentation at page 11.

I read in the U.S. Law Week, that the chairman had expressed some misgivings about the fact that 80 percent of antitrust cases were settled. I say to you, Mr. Chairman, you should not entertain any misgivings. You should be very proud of that fact. The Federal judges in my district have an assignment of about 500 cases. The maximum number of cases that a trial judge can try is approximately 100 a year. Unless he settled 80 percent of the cases, he falls 4 years behind in his calendar. Eighty percent or more law cases that are filed of every kind of description, are settled, and antitrust is no greater or no less a percentage.

Now, the Department is able, if you take the average, the Department on the average tries 13 cases a year. It filed in 1972, 72 cases. If 80 percent of the cases were not settled, you would have a backlog of hundreds of antitrust cases.

A Federal judge in one of the smaller districts has said to me that an antitrust case is a calamity to a district judge. How can he keep up with his calendar and try a case that will run from 6 weeks to 3 months? If he has four antitrust cases, he can handle nothing else. If

you force antitrust cases to be tried, if you preclude or make more difficult their settlement, you are enacting a bill to bring about the breakdown of the Federal judicial system.

Now, if you think I am exaggerating, invite judges here who will tell you what it means to try an antitrust case, and how many antitrust cases they can try, and what kind of a burden you would be putting upon them to conduct minitrials every time a case is to be settled. I cannot think how you can distinguish settling a land case. The Government settles court of claims cases; the Government settles cases involving tens, hundreds of millions of dollars. If you are going to have judicial scrutiny of the antitrust settlements, why do you not have it in everything else, which is another way of saying that you just cannot have it and maintain the present judicial system. The more cases that are tried, the more lawyers you need, the larger appropriations and more judges.

I think that this is a misguided bill. I am speaking in greater heat because I am trying to save time, and I hope that you discount some of my hyperbole. My sober remarks are contained in my statement. I strongly urge that this bill not be approved. I make the prediction that if it is approved, you will be asked to repeal it within several years, if it has any effect. If it becomes pro forma and does not have any effect, you will not be asked to repeal it, but you will have been engaged in the task of a futilitarian. You will have been doing something that has no meaning whatsoever, a lot of sound and fury signifying nothing.

Now, the second part of my paper is really what I am interested in. I think that the world can survive even with grievous mistakes. You pass an ill-guided bill, you put a terrific burden on the courts. The judicial system is on the verge of collapse anyway, so an additional straw is not going to make so much difference.

Someday you are going to have to deal with the really important problems that confront this country, not this which only comes about because one company misbehaved. You are condemning all litigants. Contrary to what Mr. Mezines said, you are not enhancing trust in government, you are destroying trust in government. You are voting here a "no confidence" in the Department of Justice. You are saying that the Attorney General, the Deputy Attorney General, the head of the Antitrust Division, and the staff, cannot be trusted to determine what the public interest demands in the settlement of an antitrust case.

The court has to come in, a hearing has to be held, experts have to be retained, special masters have to be appointed, impact statements have to be drafted and published, in order to determine whether a case should be, and is properly being settled. I say to your honors, in the very rare case, where a case settlement is subject to criticism, this committee or its Senate counterpart can conduct an investigation. You do not need to saddle the courts with this enormous burden.

Now, for many years I had, for 25 years, I reviewed the output of the U.S. Supreme Court in the antitrust field, and I made a sober-objective view of what it was doing. This was published this year by Matthew Bender, and it is my pleasure to give it to the committee for its library.

Chairman ROYNO. Thank you very much, Professor, and we will accept it on behalf of the committee, and we know that it will be a very-useful study.

Professor HANDLER. And it is my suggestion to this committee that it is its duty to monitor what is going on in the courts in the areas in which you have legislative responsibility. The courts constantly are purporting to decide cases on the basis of what Congress intended. I read the debates and I read them differently from the courts. I think that you people have a duty to determine whether the courts are actually carrying out your wishes. They may be frustrating your wishes, and you are to follow, or ought to follow what they do, and if they mistake what your intention is, you should let them know in no uncertain terms. You frequently give a blank check to others to assume responsibilities which are yours.

Now, in the antitrust field, you naturally had to use rather broad guidelines that have been construed and implemented by the courts. But, you have a function also to see that this implementation and construction accords with your intentions and the intentions of your predecessors. I have developed in my prepared statement, and I only give you random examples, where the Supreme Court has taken views which I think are anathematical to antitrust, which subverts the goals of antitrust and creates an intolerable position for American business. Now, it is not to say that the Court does not also render a signal service, that it is one of our proudest possessions, that it is manned by extraordinarily talented people who are horribly overworked and the quality of their work is unequaled by any other branch of government or by any other courts in the land. Nevertheless, like Homer they nod. They do not have the time really to handle these antitrust cases, and they should be, and I believe that the time has come for this committee, as a continuous process, to monitor what is happening and to take a good hard look at our antitrust goals, at our antitrust statutes, at our antitrust decisions, to see whether we have the kind of jurisprudence which America needs today, for the balance of this century and the new century that is shortly to arrive.

I think that I endorse the views of those who would suggest that a commission be set up, but I draw one distinction. I am not interested in study commissions. I am interested in action commissions. I think that the commission should consist of four Members of the House, four Members of the Senate, who have experience in this field, four appointed by the President, four coming from the public at large, and that you should take a good hard look at all of the antitrust, and any other related topics which the proponents of this commission feel also are to be studied.

I am sorry that I took this much time. I will ask you, when you put your questions to me, to be kind enough to speak into the microphone, because I am a little hard of hearing.

Chairman RODINO. Well, thank you very much, Professor. And, again, let me thank you on behalf of the committee for your presentation of the work that you have developed. I am sure that the committee will endeavor to make good use of it.

Professor, you mentioned in your statement that you are opposed to public impact statements. And I ask of you, how can a judge adequately judge what the impact on competition will be, unless the judge does have the opportunity to review a public impact statement that is provided for him? Do you not think that the judge should have facts before him as a public impact statement might provide in order to better arrive at a just solution of the problem?

Professor HANDLER. I think that you are making—you are doing something that borders on the unconstitutional. You are making an administrator, an executive officer, out of a judge. If the judge is to do this in antitrust, you tell me why he should not do it in any other kind of litigation? The parties settle a case. The parties have the controversy. The judges are set up by the Constitution and by the statutes to adjudicate disputes. If the disputes are settled, there is nothing for the judge to adjudicate. The settlement takes the form of a decree. That is a judicial act. The judge in the exercise of his judicial discretion does and should ask questions, but he does not need to conduct a hearing. He finds out enough about the case to determine whether he conscientiously can affix his signature to the decree. He is not to substitute his judgment for the judgment of the executive branch of the Government, which is proposing this settlement. The judge is not the sole custodian of the public interest, and I do not believe that judges can determine the public interest, as well as the Department of Justice that has knowledge that the judge does not have. Give the judge that knowledge and the case has to be tried. It is no longer settled.

Chairman RODINO. Professor, are we not really saying, though, that in the public interest we are merely making available to the judge that material which would be within the public impact statement, which would make him better able to adjudicate the matter? Do you find any violation of any administrative act, or do you find any violation of a basic code that this is part of our system of justice?

Professor HANDLER. Well, what you are saying is that the judge should decide in the first instance whether there should be a prosecution. Why take that power away from the Department of Justice? The Department of Justice decides what cases they are going to bring. They cannot bring cases against everybody who violates the antitrust laws because they do not have enough staff. They have to have a series of priorities to bring cases that are the most meaningful. Now, what you are saying, why give them that discretion? The judge should have the discretion whether the suit is brought in the first place. And then having brought the suit, the Department changes its mind. The Department decides to withdraw the suit. It has no case. Do they have to go to court and tell the court all of the facts, and let him decide whether the case should be withdrawn?

You are confusing, in this bill, the role of the judge and the role of the prosecutor. If you have no confidence in the prosecutor, then you can forget about the enforcement of all laws. The judges, 400 or 500 Federal judges, cannot supervise all of the huge staff of the Department of Justice, all of the U.S. Attorneys in determining whether they are requiem to their oaths. That just is not a job judges can do, and you have today a litigation explosion where judges are going out of their minds trying to keep up with cases, and they have enough trouble deciding litigation, controversy, and they should not be saddled with deciding whether people are wise or unwise in settling.

Now, take a negligence case in which somebody has very serious injury, and the plaintiff wants \$300,000 and the insurance company is willing to give \$200,000 and the Judge makes his good offices available to settle for \$250,000. Does the judge call the doctors in to find out whether \$250,000 is an adequate settlement? Does he call in all of

the people that are dependent on the injured person? You have got to assume in this busy world that there are people other than judges who can perform their duties.

Chairman RODINO. Professor, I will not pursue that. You made mention in summarizing, that the Department presently has a policy of waiting 30 days, and you made reference to the fact that in the bill we are imposing a mandatory 60-day provision. You are aware first of all, that the 30-day policy is merely internal policy that was instituted some time ago by the then Attorney General Robert Kennedy. That it is not mandatory. It is not written into the law.

Professor HANDLER. I have no objection to a period of time during which the public is notified, as it is notified today, that a decree is in contemplation and is invited and given an opportunity of filing its comments with the Department, and no objection if those comments are filed with the court. I have no objection to running this thing in the open. And I think that Attorney General Richardson has done something which was long overdue. Anyone who sees any member of the Department on any matter that is pending there, should have his name listed in the log, and that is true of Congress as well as the public. Anyone who interferes, who has no right to interfere with the process of settlement, should have his name listed, and that name should be put in the book. And I have no objection to the requirement of the bill that there be an affidavit filed that the negotiations were conducted with the Department and with nobody else.

Chairman RODINO. Well, what would the purpose be in doing that, then, if not to assure that the public interest is being served and to make a public disclosure of this?

Professor HANDLER. I have no objection to a public disclosure. What I have objection to is locking the settlement to the point where you have endless hearings which will discourage settlement. I do not want masters, I do not want hearings. I want people to file their complaints and they should be processed by the Department and the Department will, or can publicly state why they are rejecting the objections. I have no objection to that. I think that is highly desirable. That is the present system. You do not need any legislation on that.

Chairman RODINO. Well, Professor, on that, what you are saying is that that is the present system, but there is no mandatory requirement, that that procedure be followed. It is merely a matter of policy.

Professor HANDLER. I think this committee has so much work to do, to busy itself about dealing with the possibility that a system which has been in effect for many years is going to be abandoned, that if it is about to be abandoned, you can step in and make it mandatory.

Chairman RODINO. Would you say, Professor—

Professor HANDLER. I am quite sure that if you called Mr. Kauper here or Attorney General Richardson, and tell them we want 6 months notice before this procedure is changed, or if you tell them we want certain disclosures to be made, there will be no problem. I do not understand why, in life, everything has to become a big conflict. I do not know why people in Government, cannot talk to one another the way they talk in life. I think that if the chairman of this committee tells the Attorney General that you want minor changes made, then I can see no reason why it cannot be done. I think that one of the tragedies of this country is that one would think that the members of the

three branches of Government are prohibited from talking to one another. I do not know why the President has to veto bills, why Congress has to enact bills that are going to be vetoed. I do not know why a compromise cannot occur somewhere in the legislative process, because you will never put any bill through unless there is some compromise. And the law of politics is the law of compromise, and the law of the possible. And I just do not think we ought to legislate on something when legislation is not necessary. There are many things where legislation is necessary. It is necessary for this committee to take a good hard look on where we stand today in the antitrust laws. That is important.

Chairman ROBINO. Professor, I liked the manner in which you expressed yourself on the hope and desire that that would be the way it is. I am one of those who would share your view that perhaps we would save ourselves a great deal of trial and a great deal of headaches if we do that. But, unfortunately, every day we are confronted with the tremendous violations that take place, not only in the ordinary everyday routine of things, by private citizens, but even public officials who do not understand what the standards are, and, therefore, if you say to me that we should just accept the premise that men should be able to get together, and reach a certain solution to a problem, I would say, fine, it could be done. But, unfortunately, that is not the case and this is why perhaps back some time ago, when the then Attorney General Robert Kennedy saw the need to increase the time to make more public what was happening, and these things were done, and you must agree that it is a beneficial effect.

I do not want to take up any more time. I will pass on to Mr. Hutchinson. I did want to say, initially, even before I began questioning you, Professor, that I welcome the opportunity to have you come before this committee, and I know of your expertise in this area, and I hope that you, when you considered it to be a lion's den, that certainly you found that this is certainly a very meek lion.

Professor HANDLER. Thank you very much, Your Honor.

Mr. HUTCHINSON. Thank you very much, Mr. Chairman.

Professor Handler, I do want to join the chairman in expressing our appreciation for your appearing here. We recognize you as a real authority in this field, and your views are extremely helpful. And I say to you, that I share in them to a very large extent.

You said, if I understood you, that you see nothing wrong at all in calling for public comments on these proposed consent decrees. And as I understand it, that is the present practice for a 30-day period. At the present time, are these public comments filed with the Department of Justice, or are they filed with the court?

Professor HANDLER. They are filed with the court, but I am not too conversant with this. My own personal experience has been that where the court requests it, the Department furnishes the comments and their responses to the court. There would be no problem, I believe, in seeing to it that those comments were made public.

Mr. HUTCHINSON. Well, it seems to me, Professor, that when the public is invited to file comments with the court, presumably for the purpose of influencing the court, that the court is asked to take into consideration something that really is not evidence before it, and that is something that troubles me. Why should the general public, without any standing at all, have power to influence the court in its decision?

I have no trouble, Professor, in seeing the concept that the Department should receive such comments.

Professor HANDLER. The courts are very impatient and they pay very little attention. But, the fact that they get a report on the comments does enable the judge to determine for himself, whether he is perhaps being asked to do anything more than a ministerial act. The judges, as a matter of courtesy, have heard people and listened to their gripes and if you read the Opinion of Judge Frankel in a case in which I was involved, you will find that he is very puzzled, as to what his role should be. And, certainly, I would hope that out of our discussion, and out of your consideration, whatever you do, whatever your ultimate decision should be, that I know that Judges would appreciate if this committee would tell them what it is that you expect them to do.

Mr. HUTCHINSON. Well, this bill before us as I read it, directs the judge to make a determination whether the proposed consent decree is in the public interest.

Professor HANDLER. That is right. He will need no instruction if the Tunney bill becomes law. He will know what he has to do.

Mr. HUTCHINSON. Yes. But, I conceive that what we are asking him to is to make a decision that is beyond his proper role as a judge.

Professor HANDLER. That is my view.

Mr. HUTCHINSON. The judge is not to determine public policy in our system. I never thought that the function of the court was to determine public policy.

Professor HANDLER. But, it is much more than determining public policy, sir, if I may say so. The judge, the narrow issue before the judge, is whether the settlement which is before him for signature, and it is only before him because you need a consent decree, will operate in the public interest, and that is a narrow question, and how can a judge who has not been a party to a settlement, determine whether it operates to the public interest or not? To really discharge that function, the judge has to do everything that the Attorney General does before he approves of the decree.

Mr. HUTCHINSON. Well, let me ask you this, and I will not pursue this any further because there are other members of the committee who want to question you. If the judge has a function here of determining whether the consent decree is in the public interest or not, does the judge have a similar responsibility in every settlement of every type of lawsuit that comes before him? I cannot see the distinction.

Professor HANDLER. The answer is no, that you are making an exception of one type of case without the slightest proof before you that such an exception is necessary. I must tell you that I have known, personally, for 50 years, each head of the Antitrust Division and this country can be proud of the kind of man that has been appointed by our various Presidents to head that important office. And I think we can be proud, with minor exceptions, of the men who were Attorneys General. And I think that it is very unfair to vote "no confidence" in that branch of the Government based on my 50 years of experience.

Mr. HUTCHINSON. Thank you, Mr. Chairman. I will yield the floor.

Chairman RODINO. Mr. Seiberling?

Mr. SEIBERLING. Thank you, Mr. Chairman.

Professor Handler, it is really a deep pleasure to hear you, as it always is. One of my principal regrets was that as a student at Columbia

Law School, I did not take your Antitrust Course, and I was particularly suffering from the failure to have done so, by virtue of the fact that I spent most of my time in private practice for about 20 years in antitrust. So, I had to sort of pick it up from you on the basis of what I could read of your many writings.

I do have a couple of questions about some of the points you made, and let me say, that as a defense lawyer for many years I fully appreciate the problems that defendants are under in terms of dealing with the Antitrust Division. But on the question of penalties, and whether we ought to increase penalties, you are aware, of course, that the European Common Market Treaty permits penalties of up to \$1 million a day, or 10 percent of the revenues of a particular business. And I wonder if you have any feeling about whether that has been unduly punitive, or whether it has been a successful experiment?

Professor HANDLER. To the best of my knowledge, the fines that have been filed have been very minor, and that this is merely a paper provision. I spent an entire day with the top echelon of the Common Market antitrust force when it first came into existence, and their philosophy is totally different from the philosophy of the United States. They are more pragmatic than we are. If they find that a company is misbehaving, they call the company in and through conference they arrange for a correction of the practice. Then that company is put on a list and it is watched. If the correction works, that is the end of the matter. We are never content to do that because we do not trust our fellow human beings. We do not trust the enforcement officials, we do not trust the businessman and we go through a rigamarole of lengthy investigation and then it goes up to a higher level, and a higher level and a higher level, and then there is a complaint, and then there is a formal hearing, and then there is settlement under rigid guidelines. And all that we are doing is making it worse. I cannot tell you from my experience, sir, that there is greater compliance on the part of Europeans with the mandates of the treaty, articles 85 and 96, than you have in this country. Indeed, this is highly speculative. There are many people who believe that there is less compliance and I trust you will permit me to make one point which you, as a lawyer, will appreciate. And, that is, that nowhere is credit ever given to the real army of enforcement officials which we have in this country; namely, the honored and honorable members of the bar who are advising corporations on how to comply with the antitrust laws. And without that army, antitrust would be unadministerable.

Mr. SEIBERLING. Well, thank you.

Having been one of that army for many years, I certainly agree with you that the corporate lawyer, and the corporation I was in, for example, were the biggest enforcers of the antitrust laws. But, I must say, that we had a lot stronger ability to do that after they put some corporate vice presidents in jail in the electrical cases, and I do think that penalties are a help. And I think that as long as the court has discretion as to the amount of penalty to impose, that that is a safeguard against excessive penalties.

Professor HANDLER. Yes, sir, in my prepared statement, I said I was not opposed to a moderate increase in penalties, and I suggested that your committee report indicate that all antitrust cases are not fungible, and that you expect discretion to be exercised. But, I did want you to

bear in mind that there is this threefold penalty. You are not calling for \$500,000.

Mr. SEIBERLING. I think that was a very good point.

Professor HANDLER. You are calling for \$1.5 million, and you could very well say when you get up into the stratosphere that the amount in this statement is not to be multiplied threefold.

Mr. SEIBERLING. If I may ask one other question, would you feel any better about this bill if we deleted the section which expressly authorizes the judge to take testimony, appoint a master and authorize outside involvement by amicus curiae and so forth, and just leave it to the ordinary discretion of the judge, which he has now, as a matter of fact, to decide how to handle it?

Professor HANDLER. That would be an improvement but I would not go beyond the present practice. And I really think that before you change the present practice, you ought to have your staff work with the Department of Justice and make a report to you on how that practice has worked. Take all of the consent decrees and let the Department tell you how they match up against the prayer for relief, and what was the thinking that went behind it, and was there any skulduggery, and have a report. And you are going to find, you will come to the conclusion that I have, that this is not an aspect of government for which you should have the slightest shame. It has been very well done.

Of course, my objection is this: That the people I deal with in the Department are unreasonable because they want too much, and it is only before this committee that I encounter people in Government who think that the Department of Justice consists of weaklings. Believe me, that is not a fair appraisal of what happens there.

Mr. SEIBERLING. Well, I am not going to ask any more questions, although I have a good many, because of the interest of other members of the committee.

Professor HANDLER. Thank you, sir.

Mr. SEIBERLING. Thank you.

Chairman RODINO. Mr. Dennis?

Mr. DENNIS. Professor, I, too, very much appreciate your remarks here as well as your written statement.

Do you feel that on this matter of penalties we could usefully prohibit penalizing a man two or three times for essentially the same act?

Professor HANDLER. Well, I would love to see you do it, but you might be walking into a hornet's nest there. I think that rather than trying to do it in the form of legislation, your committee report should say that you have raised the penalty, but in exercising the discretion where there are three counts, four counts, based on the same essential act, the committee would deem excessive multiplying the penalty by threefold. That one penalty would be enough. I think you would; again, I think it would be much simpler to do it in your report than to try to get legislation.

Mr. DENNIS. Of course, it is not binding if we do it in the report.

Professor HANDLER. I know, but I have had no difficulty with that and if you give me a good statement in a report, then I am in good shape in court.

Mr. DENNIS. I think that is a useful suggestion.

Now, one other thing that occurred to me. This bill has nothing to do with settlements out of court which I assume can and do take place between the Department and other people. If we adopt this bill, as to consent decrees, would there be a tendency toward more out-of-court settlements, rather than going through the procedure?

Professor HANDLER. I would doubt it, you see. I would doubt that, sir, because you have either criminal or civil injunctive cases. The only type of case that might be settled out of court would be the rare case where the Government sues for damages in its proprietary capacity, in that it may be a buyer, but if it is an injunctive case, you could not settle out of court except by withdrawing suit.

Mr. DENNIS. Of course, I am not very familiar with this practice at all, but does the situation arise where the Government sometimes intimates that if certain things are not done, there might be a suit filed, and if these things are done, nothing is ever filed?

Professor HANDLER. Not after the suit is filed, before.

Mr. DENNIS. No, but I mean prior.

Professor HANDLER. It could quite well be that the European practice of informal settlement might come about, in order to avoid all of this rigamarole.

Mr. DENNIS. We do not do much of that now, but it might grow up under this.

Professor HANDLER. That is correct.

Mr. DENNIS. Well, I thank you, sir.

Chairman RODINO. Thank you, Mr. Dennis.

Mr. Mezvinsky?

Mr. MEZVINSKY. Professor Handler, I was interested in your comments, and, basically, I sensed it was a defense of the defendants in view of the fact that this would be an unreasonable burden upon the defendants as well as upon, I guess, the business community. The argument has been given that in view of this lack of faith in government, this lack of faith of the private sector as well, that this bill could, in a sense, restore faith by opening up the process, and it is very hard for me to understand the argument that seems to be your thrust that by the passage of this bill, you argue we would have more lawyers, spend more money and have more judges, and that we are pushing, in that the system presently allows settlement. What is wrong with providing more adequate enforcement, more public exposure? I am really not totally convinced of the chaos and confusion that could happen as a result of the bill.

Professor HANDLER. Well, let me answer your question because I think there is some misapprehension on your part. No. 1, I did not confine my remarks on the impact of this bill on defendants. I think the bill is bad from the Government's point of view, as well as the defendant's point of view. Bear in mind, that the plaintiff under this bill is always the Government, never a private party, so that the persons to whom the bill applies will necessarily be those sued by the Government.

Second, I did not suggest that the antitrust laws should not be vigorously enforced. I believe they should be vigorously enforced. What I said was that if cases unnecessarily have to be tried, you have got to duplicate your staff and you have got to increase the number of judges. And I ask you why? The key word is unnecessarily try every case. Every important antitrust case should be tried, if it is not settled.

There should be enough enforcement officials, there should be enough judges, that goes without saying. But, you should not compel the trial of cases which can be settled on honorable terms. What more do you want than the defendant coming in and giving the decree that the Government sought when it brought suit? Why should that case be tried? The only reason it should be tried would be to get an adjudication of liability if you win, rather than a consent decree, which is not an adjudication. But, what is the Government's need for adjudication? It is the private treble damage man, who wants the adjudication so that he can use it. Now, actually, he does not need it.

There is a myth here that the adjudication is necessary, or a provision of the consent decree is necessary, or the provision in this statute which is designed to help the treble damage plaintiff. Let me tell you he does not need the help. He needed the help before 1914. He does not need the help because he has the Federal rules. All he has to do is to file the complaint and then he gets discovery. No experienced plaintiff's lawyer would ever try an antitrust case on the basis of a prima facie presumption, and have the Department come forward and defend. He comes forward, he takes discovery, he has all of the documents. The admission of liability in the decree or the adjudication, it is a little whipped cream or a little icing.

Mr. MEZVINSKY. Professor, I think what bothers me is how a judge can adequately judge the impact on competition, and what that impact will be unless he has some greater input in the form of a public impact statement?

Professor HANDLER. Let me ask you the question.

Mr. MEZVINSKY. And, frankly, the public, I think it is really the Senate's action and the ceiling, by which you feel like you are walking into a lion's den. I think the public is feeling this more today than they ever have.

Professor HANDLER. Sir, let me ask you to go back to your office and read 10 consent decrees that have been signed by judges, and see whether you do not agree with me, that no one, without a hearing, without knowing the industry, without hearing evidence, can determine what the impact of the decree on competition is. If you can find the impact of competition by reading a decree, you are finding something that no human being has ever found in human history. I have spent all of my lifetime, and I have read decrees, and I do not know what impact they have on competition. They tell me, generally, that price fixing has been ended. There is a decree ending price fixing. How do I know that the price fixing does not continue, notwithstanding the decree?

You have made my point for me dramatically. This bill imposes upon the judge an obligation which is humanly incapable of being discharged without trying the case in total.

Mr. MEZVINSKY. I can only ask, as my last point, Mr. Chairman, before we bring this to a close, do you not find that people are injured by antitrust violations and that they need to combine in the form of class actions, in order to finance the big cases, and obtain the recovery?

Professor HANDLER. I disagree with you entirely.

Mr. MEZVINSKY. You do?

Professor HANDLER. They are injured and they get—they get enormous recoveries and read the advance sheets. Plaintiff after plaintiff

recovers. There is nothing wrong with the law. And, so far as the class actions are concerned, I appeared before the Senate committee and opposed class actions and that would take a couple of hours for me to persuade you. But, I think that, again, it is the wrong approach.

Mr. DENNIS. Would my friend yield one moment?

Mr. MEZVINSKY. In just a minute. I might say, Professor Handler, I know you have spent a lifetime in this field and I respect that. I can only say that as the years go on, I think, as you point out, the field is changing, and I think the public is putting a pressure and has a concern as to the whole focus of antitrust and that is probably why we have the bill before us, and that is probably why we are discussing the commission on antitrust.

Professor HANDLER. My answer, sir, is that if you had a commission to study, or this joint committee, or whatever form it takes to study the adequacy of the antitrust laws and the present and future role, you would do a good deal to allay public concern. The public may be concerned about the wrong things.

Mr. MEZVINSKY. Thank you.

Professor HANDLER. And you may be doing the wrong thing.

Mr. MEZVINSKY. Well, we will certainly try to take that counsel.

Professor HANDLER. Thank you very much, sir.

Mr. MEZVINSKY. Thank you, Mr. Chairman.

Mr. DENNIS. You certainly mentioned certain departmental disclosure practices about which you have no objection and made the suggestion that our staff review these practices with the Department. If that were done, what would be your feeling as to incorporating these practices into this legislation without going beyond them?

Professor HANDLER. I have no objection to it. I just think it is unnecessary.

Mr. DENNIS. Thank you, sir.

Chairman RODINO. Thank you very much, Professor. We certainly appreciated your coming here and giving us the benefit of your views. [The prepared statement of Prof. Milton Handler follows:]

#### STATEMENT OF PROFESSOR MILTON HANDLER

##### I

My name is Milton Handler. I am professor emeritus at the Columbia Law School, where I have taught antitrust law for a period of 45 years. I am presently a senior partner in the firm of Kaye, Scholer, Fierman, Hays & Handler in New York City. I have specialized in antitrust law throughout my entire career at the bar. My introduction to antitrust came during the 1926 Supreme Court Term, when I served as law clerk to Mr. Justice Stone and assisted him in the preparation of his landmark opinion in *Trenton Potteries v. United States*,<sup>1</sup> a decision universally acknowledged as the foundation of modern antitrust law. I have written and lectured extensively on all phases of antitrust. For 25 years I presented an annual review of current antitrust developments before the Association of the Bar of the City of New York. Those lectures, together with other of my writings, have just been published by Matthew Bender & Company in a two-volume compilation entitled "Twenty-Five Years of Antitrust." It gives me great pleasure to present a copy of this work to the Committee.

I have been at all ends of the antitrust equation: I have advised Government departments on antitrust policy; I have testified from time to time before congressional committees; I served as a member of the Attorney General's Committee to Study the Antitrust Laws; and I have been actively engaged in a vast number

<sup>1</sup> 273 U.S. 392 (1927).

of antitrust litigations, representing both plaintiffs and defendants. There has hardly been any antitrust problem of significance that I have not touched upon in my practice, my writings or my lectures. I appear here at the invitation of the Subcommittee, in my own behalf and not on behalf of any client, institution or organization.

## II

As I understand it, the Subcommittee does not want me to confine my comments to the provisions of H.R. 9203 and S. 782 but rather would have me dwell on some of the current perplexities in antitrust administration which will enable the Subcommittee to view the pending measures in proper perspective. I propose, therefore, to make some observations about the House and Senate bills and then to turn to some broader aspects of the antitrust laws and their relevance in these turbulent and troubled times.

There are three aspects of H.R. 9203 and its Senate counterpart, S. 782, as its title plainly indicates. I should like to review them in reverse order.

The revision of the Expediting Act as it pertains to appellate review in government civil antitrust cases is long overdue. Direct review by the United States Supreme Court imposes an unduly heavy burden on that tribunal, depriving it of the benefits flowing from a review of the facts and the law by the intermediate courts of appeals. The Court, itself, has requested this reform. There have been conflicting notions as to how the Expediting Act should be revised. I think that the present bill provides a suitable compromise and that this part of the proposed legislation should be promptly enacted. As things now stand, there is no way of obtaining appellate consideration of interlocutory rulings from either the Supreme Court or the courts of appeals, and the required direct appeal from final judgments compels the Highest Court to implicate itself in the onerous task of reviewing and sifting the complex facts developed at the trial level. Through this reform there will be interlocutory review by the courts of appeals, and the litigants will have the advantage of a complete and unhurried examination of the controlling facts by courts less burdened than the United States Supreme Court.

The bills under consideration would increase the penalty for antitrust violations from the present \$50,000 to \$500,000 in the case of corporate defendants and to \$100,000 in the case of individuals. I wonder whether the members of this Committee are aware that the same conduct may be challenged in four separate counts of an indictment. The self-same acts may be alleged to constitute conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, as well as a conspiracy to monopolize, an attempt to monopolize and monopolization in violation of Section 2. The attempt charge is generally merged in the completed crime of monopolization. A defendant, however, may be convicted on three counts for essentially the same course of conduct. The Supreme Court has rejected the idea that tripling of the punishment in this fashion offends the constitutional guarantee against multiple punishment.<sup>3</sup> Hence, if the proposed increase of penalties is enacted, as a practical matter corporations in cases involving industry-wide violations could face fines of a million and a half dollars, with \$300,000 levies available against individuals. It is thus possible that the increase in penalties is greater than is intended.

It is not to be overlooked that criminal antitrust cases are brought against small businesses as well as corporate giants. I have not had the time to collate the indictments over the past ten years to segregate and quantify the numbers brought against small businessmen in comparison with those brought against major enterprises. A few examples, however, come readily to mind.

Thus, only last December the Antitrust Division obtained indictments against two local fuel oil dealers in Hudson County, New Jersey on charges of price fixing in bids to Union City.<sup>4</sup> Similarly, in February of this year, a San Francisco grand jury indicted two microscope manufacturers on charges that they conspired to fix the prices charged by their dealers.<sup>4</sup> And in May, 1973, the government obtained price fixing indictments against ten gasoline service stations in Jackson, Wyoming.<sup>5</sup> One must consider very carefully, it seems to me, whether the punishment

<sup>3</sup> *American Tobacco Co. v. United States*, 328 U.S. 721 (1946).

<sup>4</sup> *United States v. Eagle Fuel Co. et al.*, Cr. No. 748-72 (D. N.J. Dec. 22, 1962).

<sup>4</sup> *United States v. Swift Instruments, Inc.*, Cr. No. 73-0139-SC, (N.D. Calif. Feb. 26, 1973); *United States v. United Scientific Co., Inc.*, Cr. No. 73-0140-SAW (N.D. Calif. Feb. 26, 1973).

<sup>5</sup> *United States v. Jackson Hole Service Station Ass'n, et al.*, Cr. No. 8668 (D. Wyo. May 21, 1973).

may not be disproportionate to the offense as well as the catastrophic effect the new penalties may have on small businessmen or junior corporate employees.

In establishing appropriate penalties for criminal antitrust violations, we are seeking to achieve two objectives—punishment and deterrence. Even though the courts in their discretion may not assess against the defendants the maximum fine, there is a possibility that the punishment in particular cases, depending upon the trial judge, may be excessive and, if excessive, unfair. As for deterrence, manifestly, we have no empirical evidence demonstrating that the prospect of a \$500,000 fine will be a greater deterrent to corporate wrongdoing than a fine of \$50,000. But we do know from experience that greater punishment does not necessarily mean less violation. Both the states and the federal government have been consistently raising the penalties for criminal behavior without any discernible decline in the crime rate. It would be nice if we could solve the crime problem by multiplying the punishment, but the problem unfortunately does not lend itself to any such simplistic solution. In short, increasing the severity of punishments has not in our history proven to be a panacea by any means.

We must bear in mind that, while the Department of Justice has discretion to proceed either criminally or civilly, every violation of the Sherman Act is a criminal offense.<sup>9</sup> In many antitrust litigations the frontiers of antitrust law are extended, and conduct, which was thought to be legal before the litigation, turns out, after the Supreme Court review, to be unlawful. The Court has not hesitated to overturn prior cases; to alter its views of the scope and content of the antitrust laws; and to give our antitrust statutes an expansive reading which vastly extend their reach.

I personally do not know how increased punishments can deter people from entering into arrangements which were believed in good faith by them and experienced counsel to be lawful at the time they occurred and which subsequently become unlawful. And, when we deal with the more crude and blatant antitrust violations such as price fixing, I can't help but wonder whether the increased penalties will deter those who are determined to act contrary to the plain dictates of our law. Corporations act through agents and are held accountable for acts at lower levels of employment expressly forbidden by corporate policy. If the prospect of jail sentences does not deter such wrongdoing, what reason is there to believe the increased punishments will have that effect? What deters is not so much the severity of punishment as the high probability of being caught. Our emphasis should thus be not so much on increasing punishment as on improving and increasing the efficiency of our enforcement procedures. Blatant misconduct will decrease as the likelihood of detection increases.

I appreciate that my thinking runs counter to the views that seemingly prevail in the halls of government. Nevertheless, I believe it is my duty to give voice to my serious reservations regarding the wisdom of what the Congress is being asked to do. I respectfully urge the Committee to stop, look and listen in regard to this and the consent decree aspects of the bill which I discuss later on. I think a more modest increase might be more effective. We do not enhance the effectiveness of enforcement if we magnify the punishment to the point where many defendants have no alternative but to go to trial. Where there are three counts in an indictment and the prospective fine can be as much as a million and a half dollars, is it not likely, as a practical matter, that many defendants will take their chances with the jury and put the government to its proofs? I believe that it is a mistake to proceed on the assumption that the government is always right, that the defendants are always guilty, that the government, if it goes to trial, cannot lose and that juries will be quick to convict when they apprehend that the possible punishment is harsh and unjust.

I cannot help but believe that it is a mistake to increase penalties across the board without regard for the seriousness of the offense; the uncertain state of the law; the fact that the criminal sanction is, in many circumstances, ill suited to antitrust offenses; that the Sherman Act makes every violation a criminal offense; that the law is often invoked criminally against two-bit offenders; and that several hundred federal district judges, all with disparate views on sentencing, will ultimately determine how severe a fine is to be assessed. At the very least, the Committee should provide the courts in its report with guidance

<sup>9</sup> S. 1, introduced in the Senate by Senator McClellan on January 12, 1972, would make Clayton Act violations criminal as well. If enacted, this would have drastic consequences, rendering a corporation liable to criminal penalties for conduct (such as acquisitions) in circumstances where reasonable men could differ on whether the antitrust laws have been violated at all.

on the proper exercise of their discretion, distinguishing the exceptional case where large companies authorize industry-wide, blatant, hard core antitrust offenses from the normal, run-of-the-mill case where the present scale of penalties is more than sufficient and is entirely equitable.

I move on to the principal feature of the pending legislation—the revision of the consent judgment procedures.

I think everyone who has had any antitrust experience, whether on the prosecution or on the defense side, will agree that there would be a total breakdown of enforcement if every civil case that the government commences must be tried. In this respect antitrust is no different from other litigation. The courts could not cope with the current litigation explosion if cases were not settled. The delays are bad enough as they are, but one can envisage what the situation would be if settlements were discouraged or made impossible.

In this regard, the following statistics are most illuminating:

Fiscal year:	Civil antitrust cases commenced by Government	Cases terminated	Consent decrees filed	Percentage terminated on consent
1962.....	41	14	10	71.4
1963.....	39	64	51	79.7
1964.....	41	38	29	76.3
1965.....	33	30	21	70.0
1966.....	32	35	20	57.1
1967.....	36	52	25	48.1
1968.....	40	64	39	60.9
1969.....	39	31	17	54.8
1970.....	54	49	36	73.5
1971.....	52	44	39	88.6
1972.....	72	44	31	70.5
Total.....	479	465	318	68.4

It is plain to me that if the almost 70% of cases terminated by consent decree had to be tried, the Antitrust Division's appropriation (which has more than doubled in the past decade) would have to be substantially increased, or the number of cases it brings severely curtailed. And where are we to find enough judges to try all these complex actions?

Let us concretize these observations by looking at some statistics:

Fiscal year:	Antitrust Division expenditure	Number of attorneys in Antitrust Division
1962.....	\$5,889,115	274
1963.....	6,242,264	294
1964.....	6,623,715	289
1965.....	7,086,045	279
1966.....	7,175,000	265
1967.....	7,495,000	272
1968.....	7,820,000	321
1969.....	8,354,764	282
1970.....	10,027,410	306
1971.....	11,079,000	315
1972.....	12,271,000	325

If the figures on terminations by consent were reversed, that is, 30% of the cases settled and 70% tried, would not the staff and appropriations have to be at least doubled? That by itself may not be too serious, but what is the corresponding social gain?

I have no quarrel with the objectives underlying the proposed reform of consent decree procedures. No one wants the government of the United States to be sold down the river by improvident or corrupt settlements. But it is most pertinent to ask what evidence there is that the Antitrust Division has been guilty

of incompetence, bad judgment or dishonesty in utilizing over the years the consent decree as a means of terminating an antitrust civil case? Certainly everyone would admit that any impropriety which may have occurred is the exception rather than the rule. Yet the reforms proposed in this bill would be applicable to every case.

I believe one has to balance carefully the gains against the losses in determining whether these "reforms" are worth the candle. I cannot escape the feeling that the bill proceeds on the assumption that the Antitrust Division cannot be trusted to safeguard the public interest and that, therefore, its judgment must be judicially reviewed. The bill contemplates that the court will determine whether a consent judgment will operate in the public interest. It is the court rather than the Department of Justice which has the final say on whether the case should be settled and whether the provisions of the judgment are satisfactory. To this end the court may conduct a hearing or refer the matter to a special master. This may involve, according to the bill, the examination of witnesses or documentary materials. Isn't this going to require what amounts to the very trial on the merits which a consent settlement is designed to obviate or, at the very least, to a mini-trial?

Why should anyone enter into a settlement under these circumstances? If there is to be a trial on the issue as to whether the decree is satisfactory, why would it not be in the interests of a defendant to go to trial on the merits? Any time a settlement involves less than the relief called for by the complaint, a hearing will have to be held to justify the abandonment of any of the decretal provisions prayed for at the outset of the litigation. Consider the plight of the government if the decree is rejected by the court. The prosecutor may be amenable to a compromise because the evidence may be insufficient to justify the relief originally sought or indeed any substantial relief at all. When this disclosure is made, how can the case thereafter be tried? Why should any defendant put itself in a position where intervenors, *amici curiae*, experts, individual groups of people or other agencies of government are free to criticize the decree and ask that it be rejected or that additional relief be provided for? If the decree which emerges from this time consuming process is essentially no different from that which would be imposed after trial, why enter into a consent decree at all? Settlement inevitably involves a compromise. The government agrees to a settlement either because it is getting all the relief that it would obtain in litigation or because the facts and the law may be such as to warrant its taking less. A half loaf is sometimes better than no loaf at all. The defendant enters into a settlement because the issues may not warrant the expenditure of time, effort and money implicit in a full-fledged trial. Even though convinced it may ultimately win, a defendant may conclude that discretion is the better part of valor and make concessions to achieve a settlement which the government might not obtain through litigation. The trial can be a gamble for both sides. Reasonable men can differ as to the propriety of a particular result. A settlement involves some give and some take on both sides. How can all of this be evaluated in public hearings?

I respectfully dissent from the propositions that the government is not to be trusted; that the defendants typically are engaged in some kind of nefarious plot to fasten upon the Department of Justice, the court and the public a decree which runs counter to the public interest; that persons unfamiliar with the vast amount of work that goes into the preparation of a case for trial, to say nothing of the extensive investigation that precedes the filing of suit, are in a better position than the prosecutors to determine what is or what is not in the public interest; and that the substitution of the judgments of third parties and of the court for that of the government will promote the effective enforcement of the antitrust laws. In short, it is my sincere conviction that the proposed measure is based upon faulty premises and is repugnant to common experience.

I recognize the fact that S. 782 obtained the overwhelming approval of the Senate. That fact alone should give one pause. All I can say is that the members of this Committee, consisting as it does of practicing lawyers, are familiar with the process of settlement in litigation generally. It must be remembered that the settlement of antitrust litigation is no different from that of other types of government cases; and the policy of the law has long favored the resolution of litigated controversies by settlement. Are we to view this bill as embodying the wave of the future, where settlement of every kind of action will be subjected to severe judicial scrutiny? Or is antitrust being singled out for special treatment? If the latter be the case, one can properly ask why? Is it merely because of the unsavory acts of recent days on the part of a single company? Must all litigants suffer because of the misdeeds of one?

In the last analysis I believe that this bill essentially calls upon Congress to enact a vote of no confidence in the Antitrust Division of the Department of Justice. The mood of the country is one of distrust of all branches of government. This is to be deplored. But I ask: Do we breed respect for our institutions by legislatively affirming that an important enforcement body cannot be trusted to promote the public interest and that all of its acts must be judicially examined? To the contrary, in my considered opinion the way to obtain fair, just and effective antitrust enforcement is to insure that the Antitrust Division is headed, as indeed it has been in the past and is today, by public-spirited officials of impeccable integrity. The Senate, in the exercise of its constitutional mandate to advise and consent to the appointment of executive officials, should make certain that no one occupies that position—or the posts of Attorney General or Deputy Attorney General for that matter—who does not meet the highest standards of the office. If that is done, we can all sleep easily at night, safe in the knowledge that the antitrust laws will be honestly enforced without this burdensome, and I believe unworkable, reform. Should a questionable settlement occur, there is no reason why this committee or its Senate counterpart cannot conduct a thorough exploration into the relevant facts on an *ad hoc* basis responsive to demonstrated needs instead of the blanket, across-the-board judicial investigation envisaged by this proposal—investigations which will either become *pro forma* and thus meaningless or which will be a barrier to the very process of settlement which in the past has made antitrust administrable. I strongly urge that we approach this problem with the pragmatism and common sense which are the hallmarks of our profession.

### III

I now turn to some more general observations on the present state of antitrust. In the enactment of the Sherman, Clayton and Federal Trade Commission Acts, Congress wisely avoided the restrictive effect of specific but limited grants of authority to the courts and administrative agencies, and employed the broadest possible concepts in proscribing improper business behavior. The key principles in the Sherman Act of 1890 were restraint of trade and monopolization. The 1914 legislation adopted the standards of substantial lessening of competition and unfair methods of competition. The content of these intentionally vague and accordion-like prohibitions had to be developed by the courts and the F.T.C. through the historical process of inclusion and exclusion. An alternative approach would have been a series of specific prohibitions—what today we call a laundry list of offenses—which in a short period of time would have become obsolete and readily capable of evasion. As Justice Brandeis put it in his celebrated dissent in the *Gratz* case,<sup>7</sup> “an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed.”

History confirms that Congress should be commended for what it did. This is not an area where the legislators abdicated their responsibility by creating a vacuum through inaction into which the Executive and the Judicial departments, by filling the void, usurped authority vested in the Congress by the Constitution. Rather, Congress did what any sensible person of judgment would do—it granted a broad charter to the enforcement officials and the courts to work out the details by which the legislative goals could be achieved.

In the Clayton Act of 1914, Congress prohibited price discrimination under limited circumstances, exclusive dealing which had a reasonable probability of lessening competition and stock acquisitions resulting in the probable elimination of competition.

It took 22 long years for the inadequacies of Section 2's price discrimination provisions to be dealt with by the enactment of the Robinson-Patman Act. When Congress took action, it substituted a law which has been universally regarded as one of the most ineptly drafted pieces of legislation on the books and which, while correcting the defects of the original measure, contains a wealth of new deficiencies that have engendered the greatest difficulties for the enforcement officials. The courts and, most importantly, those subject to its restrictive requirements. Yet, Congress has done nothing since 1936 about correcting the Robinson-Patman Act or monitoring the course of administrative and judicial construction which, if anything, has made a bad situation worse.

<sup>7</sup> 253 U.S. 421 at 437 (1920).

Section 3's prohibition of anticompetitive exclusive dealing arrangements has had a history of varying judicial constructions culminating in the *Tampa Electric* decision of 1961<sup>8</sup> which established that legality must be determined in the full context of the economic factors at work in the relevant market. But five years later, in *FTC v. Brown Shoe Co.*,<sup>9</sup> the Supreme Court suggested that, in an exclusive dealing case brought under Section 5 of the FTC Act, the Commission need not apply the standards applicable under Section 3 and in a sense adopted a rule of *per se* illegality condemning all exclusives. Is this what Congress intended and wants? In my view, it makes no sense at all to have the legality of an exclusive dealing contract turn upon whether it is challenged in the courts or by an administrative agency or, stated differently, to have different standards of legality applied by the F.T.C. and the courts. As a matter of common sense and policy, if all exclusives operate against the public interest, they should be banned by the courts as well as by the Commission; conversely, if only those that may substantially lessen competition are socially and economically undesirable, exclusives not having any anticompetitive effect should be upheld by the Commission as well as the courts. Here is an area where legislative monitoring will serve a useful purpose.

Where I believe Congress has done less than its best is its failure adequately to monitor the way in which the courts and administrative agencies have implemented the congressional objectives. Let's take a few examples.

Turning to the antitrust treatment of industrial mergers, it was clear from the earliest decisions construing old Section 7 that it was being emasculated by the courts, that a serious loophole existed, and that corrective action was needed. This was recommended by the Federal Trade Commission for many years until, in 1950, the statute was at long last amended by the Celler-Kefauver Act. Now, however, let us consider what has happened under that statute.

We have swung from one extreme to another. Old Section 7 was a dead letter. The Sherman Act merger cases were a shambles, hopelessly inconsistent and incapable of reconciliation; a court could do with the precedents whatever it wanted since there were some cases that upheld combinations creating a company with a market share of up to 64%, while there were other cases condemning combinations with relatively modest percentages. The theories of liability were so diverse that one could find in the case law, as in Scripture, quotations for both devils and angels.

The legislative history of the 1950 act made it clear that Congress intended to go beyond the Sherman law in plugging the loophole, but that it had no intention to condemn any and all property acquisitions.

The statutory standard was, and is, probable substantial lessening of competition and tendency to monopoly. The congressional committees and the floor debates made it clear that mere possibilities of anticompetitive effect—as distinguished from substantial probabilities—were not to be the test of illegality. There was to be a functional analysis of the probable effects of each challenged acquisition on competition.

The expectations based on statutory history have not been realized. As Justice Stewart has put it, the only thing that is consistent in the Supreme Court's interpretation of Section 7 is that the government always wins. The law has been reduced to the level of a numbers game with the numbers always declining.

Vertical acquisitions have been condemned where the volume of commerce conceivably foreclosed has been less than 2%. Horizontal combinations producing a company with only a 4.5% market share have been declared illegal. Market extensions have been forbidden on a theory that potential competition is being suppressed. Product extensions have likewise been looked at with a jaundiced eye by both the enforcement officials, the Federal Trade Commission and the courts.

Perhaps this course of construction is what Congress intended and is something which Congress approves. That is not my reading of the committee reports and debates. Is it not desirable in a democracy for the legislative body that enacted a new law to take a hard look from time to time to see whether it is being construed as was intended when enacted? Why should the matter be left entirely at large?

I have grave doubts as to what is being accomplished by the conversion of new Section 7 into a rule of virtual *per se* illegality. Take *Brown Shoe*, for example. How has competition been enriched and the cause of competition advanced by a law suit whose net result is that the Kinney chain, which Brown was held unlawfully to have acquired, was sold to Woolworth? Or take *Von's Grocery*, where

<sup>8</sup> 365 U.S. 320 (1961).

<sup>9</sup> 384 U.S. 316 (1966).

a chain of 27 stores was held to violate Section 7 by acquiring a chain of 34 stores in a notoriously competitive market. Indeed, Los Angeles is an area where most chains have been unable to operate profitably because of the intensity of competition. Even the prosecutors have admitted that the merger did not diminish competition or have any reasonable likelihood of so doing. They justify the result on doctrinaire grounds—a factual inquiry is difficult and leads to uncertainty.

The area where antitrust probably had its most signal failure is in the delineation of markets. By either magnifying or shrinking markets, in a merger or monopolization case, one can transform virtually any company into an industrial giant. In the *Pabst* case, Justice Black substituted for the delineation of a meaningful geographical market, any spot in the United States where competition might be adversely effected. This means that a geographic market inquiry becomes entirely irrelevant. If there is any place in the United States where the "market" shares of the acquiring and acquired companies rise to a prohibited amount—which under the case law can be a few percentage points—illegality follows.

The industrial landscape is dotted with country stores standing alone at the cross-roads which draw their patronage from the neighboring regions, or with shopping centers where there may be a single shoe repair shop, or small towns where there may be one small motion picture theatre. As we permit the geographic market to be defined in terms of the cross-roads, the intersection of a city, a shopping center or a village, a great many small businessmen can find themselves to be monopolists. I think it's time for us to call a halt to confusing a minnow in a glass of water with a whale in the limitless seas.

With respect to product markets, the process of gerrymandering has reached the point where, in Justice Fortas' much quoted words in *Grinnel*, the United States Supreme Court approves of a "strange, red-haired, bearded, one-eyed man-with-a-limp classification." We can break down the components of our industrial society with its rich output of products of all kinds and refine the market to the point where anyone who produces anything which is at all different from the products of his competitors in style, quality, appearance, brand, or materials, can by any unrealistic definition of the market be deemed a monopolist. Striving to do something that takes one off the beaten path should be applauded and not punished.

I ask this question then: Have the pertinent committees of Congress adequately monitored the way in which its most important recent amendment to antitrust legislation has been handled? I am not asking you at this time to overturn what the Court has wrought—my query to you is whether the branch of government entrusted by the Constitution with the policy making function ought not to scrutinize how its handiwork is treated by the courts to determine whether the judiciary is going beyond interpretation and is itself making social and economic policy for the country?

Let me turn to some other examples.

In 1968 the Supreme Court decided the *Albrecht* case.<sup>10</sup> There, a St. Louis newspaper, to facilitate distribution, granted its carriers exclusive territories. In order to guarantee that the public was not gouged as a result of the exclusive, the paper established a maximum suggested retail price and informed the independent carriers that their franchises would be terminated if they charged more than the suggested ceiling. The Court on doctrinaire grounds held that the Sherman Act had been violated and that the paper was liable for treble damages. Of course, since the Sherman Act is a criminal statute, the Herald could also have been indicted, convicted and (under the bill now before the Committee) fined \$500,000 for attempting to protect its readers from being gouged by its routemen. Does it make sense, I ask you, in these times of rampant inflation, to penalize a seller for trying to keep a lid on consumer prices? What meaning does the rule of reason have if it does not validate an arrangement of this kind which is a boon to the consumer? Don't we make a fetish of competition when we strike down agreements that promote the consumer interest merely because vertical price agreements may in theory adversely affect competition?

Take as another example the Supreme Court's decision in *Topco*<sup>11</sup> last year. The facts were these: Defendant was a cooperative association of approximately 25 small and medium-size supermarket chains. It was founded in the 1940's to

<sup>10</sup> 390 U.S. 145.

<sup>11</sup> 405 U.S. 596.

allow these smaller businesses to obtain and sell high quality merchandise under private labels and thus compete more effectively with the large national and regional chains. Since it requires an annual sales volume of between 250- and 500-million dollars to maintain private label programs, only by banding together in some way can small enterprises compete with the larger outlets that promote their own private brands of merchandise. By using private label products, Topco's members were able to achieve significant economies in purchasing, transportation, warehousing, promotion and advertising.

The antitrust difficulty with Topco's program was its exclusivity. Without it, Topco claimed a private label would not be private. A large chain, when it creates its own brands, automatically has the exclusive right to their use. The only feasible method, according to Topco, by which its members could achieve the same result was through exclusive trademark licenses specifying the territory in which each member might sell Topco brand products.

The district court, in a comprehensive opinion supported by exhaustive findings of fact, found that the anticompetitive effect of the territorial restrictions on intrabrand competition was far outweighed by increased interbrand competition, and therefore concluded that Topco's program was overall procompetitive.

The Supreme Court reversed in a 6-1 decision. The majority saw the Topco agreement as simply a *per se* illegal horizontal combination to divide markets. To Justice Marshall, who spoke for the Court, this fact was decisive. "[N]aked restraints of trade," writes the Court, are not "to be tolerated because they are well intended or because they are allegedly developed to increase competition." "Competition," continues the Court, "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." According to Justice Marshall, "courts are of limited utility in examining difficult economic problems." They are unable to weigh, in any meaningful sense, the "destruction of competition in one sector of the economy against promotion of competition in another sector." They, therefore, should not be free "to ramble through the wilds of economic theory in order to maintain a flexible approach." In sum, the fact that the arrangement might promote competition in the market as a whole, and that without exclusive territories the economic fruits of a cooperative private brand program might be unattainable, was deemed immaterial. Market division, like price fixing, cannot be justified. On the basis of precedent, fortified by this reasoning, the Court branded the Topco arrangement as *per se* unlawful.

In a scholarly dissent, the Chief Justice insisted that the Court was not following prior precedents but rather was establishing a new *per se* rule without regard to the impact that the condemned arrangement might have on competition. He found lacking the twofold conditions necessary for the formulation of a *per se* prohibition: (a) a pernicious effect on competition, and (b) the lack of any redeeming virtue. There was no such effect on competition and there was a redeeming virtue in the Topco arrangement. As the Chief Justice stated, the economic effect of the Court's decision is that "grocery staples marketed under private-label brands with their lower consumer prices will soon be available only to those who patronize the large national chains."

One looks in vain in the majority opinion for any meaningful consideration of the facts peculiar to retail distribution of food, the history of the Topco arrangement, the nature of the restraint and its effects. This was precisely what the district court did, and for doing so and not invoking a rule of *per se* invalidity is was reversed.

Is there any area of the economy in which price competition is more intense than the marketing of food at the retail level? One can theorize about the effects of horizontality and the putative advantage of the *per se* philosophy, but what about facts that are matters of common knowledge? There was no dispute that the big chains have a competitive advantage in their promotion of private brands. The district court found that the independent supermarket and the small and medium-sized chains cannot compete on this basis unless they join forces with one another. Private brands represent a small part of the business done by a food store. There was no cartel agreement among the Topco members with respect to all the products they sell. The agreement was limited to private brands, representing about 10 percent of the business done by the cooperative's members. There was, to be sure, a division of territories within which the private brand could be used, but to a major extent the Topco members were dispersed throughout the country and were primarily potential rather than actual competitors of one another. The condemnation of the Topco program thus

hurts Topco, benefits the larger chains, and does not improve the lot of the consumer.

Again I ask this Committee with its responsibility for our antitrust jurisprudence and administration whether this rigid application of *per se* principles of illegality by the Court advances the general welfare and is consonant with this nation's commitment to small business? Did Congress in enacting the antitrust laws intend small business to be fettered this way?

One other illustration will, I think, underscore the point. In the celebrated *Schwinn* case,<sup>12</sup> the Court branded as *per se* illegal vertical agreements whereby a seller of goods limits the territories in which or the customers to whom the seller's products may be resold. Such orderly marketing arrangements were not novel. They had been extensively utilized throughout the economy as a means of inhibiting intrabrand competition in order to foster and strengthen interbrand competition. For years these ancillary restraints had been treated under a rule of reason and upheld, both at common law and under the Sherman Act, when reasonable in the circumstances. But the Supreme Court—without even considering the economic effect of the restraint—held it unlawful under an assumed "ancient" rule against restraints on alienation which in actuality never existed at common law.

So I ask, since the Supreme Court is not interested in the economic effects of arrangements which can be desirable, shouldn't Congress consider whether the *pros* exceed the *cons* insofar as the economic effects of vertical territorial arrangements are concerned?

I could go on to belabor the point with additional examples which would unduly burden this busy Committee. I have not tried to be comprehensive. I have given you some examples only, taken at random. The short of the matter is that antitrust has become so encrusted with *per se* rules that it is fast losing the historic flexibility which should govern its application.

I am well acquainted with the very useful work that this Subcommittee has done over the past several decades under the distinguished chairmanship of my good friend and fellow New Yorker, Congressman Celler. I also know of the substantial contributions made by the Senate Antitrust and Monopoly Subcommittee. What I find lacking is a systematic monitoring of the administration of the antitrust laws by the congressional committees responsible for overseeing antitrust enforcement. Just as I have over the years presented an annual review of judicial antitrust decisions, it seems to me that this Committee ought to study each year the enforcement record of the Antitrust Division and the Federal Trade Commission, as well as the judicial decisions, to see whether the purposes underlining the antitrust laws are being carried out. This, I submit, would serve a salutary purpose.

In addition, there are a number of people (notably Senator Javits) who believe that there should be a broader inquiry into whether the antitrust laws as now constructed are suited to the economic problems the nation will face in the remainder of this century and in the new century which will soon be upon us. What was good for America in the 1890's may not be desirable in the changing world of tomorrow. I don't know. I regard antitrust as part of our unwritten Constitution, the economic counterpart of the Bill of Rights, and thus like our personal freedoms, embodying eternal verities. Nevertheless, we should keep our minds open and test our policies against changing and emerging needs. Among the items the proponents of the new Antitrust Review and Revision Commission would have studied are:

1. What the proper objectives of the antitrust laws should be.
2. The proper use of *per se* rules and the relevance of economic evidence.
3. The proper relationship between antitrust and the jurisdiction of the various regulatory agencies.
4. The effect of antitrust on American foreign trade.
5. How antitrust considerations should be balanced with other national priorities in particular areas of national dimension.
6. The need for special exemptive legislation.
7. The relationship between the antitrust laws and the labor laws.
8. The delineation of relevant markets.
9. Proper methods of measuring competition.

<sup>12</sup> 388 U.S. 365 (1967).

I'm sure the proponents of a broader type of inquiry have no fixed agenda and are not wedded to any of these topics. Certainly I am not. I personally would be most flexible as to the subjects to be investigated. My own focus, since I subscribe wholeheartedly to our antitrust philosophy and goals, would be on how the laws have been construed, applied and administered. I am primarily concerned with congressional corrections of the aberrations which in my view are not faithful to our antitrust traditions. That correction need not necessarily take the form of legislation. The fact that the courts' decisions were reviewed objectively and in a scholarly fashion by this Committee would go a long way in uprooting many of the misconceptions that now mar our antitrust doctrines. In short, my emphasis is on the watch-dog function of a congressional committee—not to intrude itself or interfere with the administrative and judicial course of interpretations and decisions—but rather, after the event, to consider whether the doctrinal developments accord with the legislative purpose.

I would suggest the appointment of a commission consisting of four representatives each from this Committee and its Senate counterpart; four representatives of the Executive Branch with experience in antitrust and related fields; and four public members. I repeat that I have no strong personal feelings on what precise topics should be covered. What we need is not merely another study but a program of action. The last thing we should want is another commission whose report will be pigeonholed and placed on library shelves only to attract dust. What I suggest is a study of modest scope that could be completed with dispatch; that would propose means of strengthening, clarifying and correcting the aberrant interpretations of our antitrust laws. Above all, I believe that this commission, along with the appropriate congressional committees, should undertake the ongoing task of reviewing the administrative and judicial enforcement of the antitrust laws to see to it that antitrust continues to be what Congress intended for it—a flexible means of preserving competition and invigorating our free enterprise economy rather than a device for stifling incentive and shackling the business system by petrifying *per se* prohibitions.

Chairman RODINO. That will conclude this series of our hearings on the bills before us, and the record will be open for 2 more weeks, until October 17, to receive any further statements or any other material that may relate to the hearings before us.

Thank you very much, the committee is adjourned.

[Whereupon, at 12:12 p.m., the hearing in the above-entitled matter was concluded.]

Blank Page

(224)

## ADDITIONAL STATEMENTS AND CORRESPONDENCE

WASHINGTON, October 16, 1973.

HON. PETER W. RODINO, JR.  
*Chairman, Committee on Judiciary,  
U.S. House of Representatives,  
Washington, D.C.*

DEAR MR. CHAIRMAN: Without repeating the earlier testimony of Ralph Nader and Mark Green on S. 782, we would like to comment briefly in this letter on the existing provisions of H.R. 9203. We respectfully request that both this letter and the text of our earlier testimony, a copy of which is enclosed, be included in the printed record of hearings on H.R. 9203.

Section 2(b-f) makes a valuable contribution to the openness and fairness of the consent decree process, but it could be strengthened in a number of ways. Its reforms all come into play *after* the government and defendants have initially agreed on the terms of a decree; but "initially", given disinclination to undo a past settlement, usually comes to mean "permanently." One efficient remedy would be for the government to announce, in the Federal Register or otherwise, that it has entered into serious negotiations with a defendant or prospective defendant which may shortly (within 30 days, but no shorter) culminate in a consent decree; interested parties could then submit their ideas for settlement in ways to vitiate the damage of any alleged anticompetitive activity. The Antitrust Division, to be sure, possesses impressive experience in the area of negotiating conclusions to antitrust cases. But they do not monopolize creativity or ingenuity, as outside counsel and economists often understand a particular industry better than the government attorney on the case. Also, there is the inevitable pressure to settle a case quickly, perhaps slighting some good ideas in the rush, in order to conserve limited resources. Therefore, allowing interested outsiders an opportunity to suggest consent decree provisions before a consent decree realistically hardens into largely final provisions prior to court submission can only aid the Antitrust Division in the pursuit of its declared objective: a competitive economy through law.

More specifically, line 20, page 4 of H.R. 9203 says that a court "may consider" certain things when assessing the Justice Department's "public impact" statement. This language should be more mandatory than permissive. Recall that we are dealing with federal district court judges, whose heavy caseload and casualness to antitrust have posed historic problems to effective antitrust enforcement. (A poll of all district court judges by the writer, 43 or 13 percent replying, found that 66.2 percent lacked "any background in economics before . . . appointment to the bench" and that 42.9 percent said yes to the following: "Given the complexity and size of some antitrust cases, do you ever find yourself ill-equipped to deal with a large antitrust case?") Thus can judges shy away from grappling with difficult antitrust cases, or consent decrees for that matter. Section 2e allows judges to continue to be cavalier with such issues. But, if the language here removed this judicial discretion by *requiring* the consideration of Section 2(e) (1-2), then H.R. 9203 would do more than exhort judges to be diligent toward the way more than four-fifths of all antitrust civil cases end. It would require them to do so by stating in line 20, page 4, "shall consider."

Section 2(b) (3) suffers somewhat from the ambiguity of language in requiring "an explanation of any unusual circumstances . . ." This phrase can be clarified by elaborating what "unusual circumstances" can mean, but without unnecessarily limiting its meaning; for example: "when financial considerations led to a result contrary to what pure antitrust considerations would have provided" or "when a judgment seeks a result dissimilar to the precedent of prior and similar cases." Without this added specificity, a protective Justice Department could try to claim that hardly anything was really unusual.

Section 2(g) legislates what the current Richardson Justice Department has partly achieved by edict: the "logging" of outside contacts. But there appears to be a glaring loophole: the meetings by "counsel of record" with government

officials need not be noted. If this provision remains intact, it will simply encourage "counsel of record" to engage in all the secret *ex parte* contacts that this bill aims at and that named defendants would otherwise engage in. There is no valid reason to except counsel of record from this provision. It is no threat to the lawyer-client confidence nor to the Code of Professional Responsibility. If the lawyers' contacts are ethical and on the merits then there need to be nothing to hide. Contacts with public officials should be made public, and it is irrelevant if the agent involved is a lawyer or a businessman.

Section 3, concerning criminal penalties, is identical to the comparable provision in S. 782. Yet there is no real evidence that the Senate Antitrust Subcommittee seriously considered alternatives before settling on Section 3. Earlier legislation proposing these changes almost passed the Senate Judiciary Committee four years ago, and that near miss was simply inserted here. Thus, the House Subcommittee can now make a signal contribution by considering alternatives to the incremental increase of maximum fines when already courts rarely impose the existing maximums. (See enclosed testimony, concluding four pages.) As our earlier testimony showed, existing antitrust penalties seriously fail to deter antitrust crime. Perhaps once in a generation comes the opportunity to revise antitrust penalties to fit antitrust crime; Section 3, however, ruins that opportunity by looking to the sanction of an absolute maximum fine. This has failed before and it will fail again, both because the maximums are not imposed and because, for many firms, whatever fine is imposed becomes so much a cost of doing business when compared to the potential benefits. An absolute fine can break a small firm but be insignificant to a giant corporation. If Congress were seriously interested in deterring such corporate crime, it would scale the penalty to fit the crime by providing for a *percentage* fine, not an absolute fine. These could be, say, a minimum fine of 10 percent of the profits of the price-fixed product, or firm, to be increased for repeated offenses.

Also, to aid bilked customers obtain compensation from violating firms, antitrust *nolo contendere* pleas should be admissible as prima facie evidence of legal liability in later civil proceedings. This may encourage some criminal defendants to try their luck with a criminal trial instead of pleading *nolo*, but this possibility should not discourage this proposal. Most of the work on a criminal case is done well before trial anyway, so the actual trial would involve a relatively small additional investment of resources. Also, most defendants who know they are guilty will be likely to plead *nolo* anyway to avoid the expense and embarrassment of a full-blown trial. It is the publicity of a court battle that white-collar defendants fear. (For other suggested criminal provisions, see our prior testimony.)

Section 4, altering the Expediting Act, seems to be scotch-taped onto this conglomerate of a bill. More importantly, it hurts antitrust enforcement more than helps it. The major problem with federal antitrust enforcement today is delay. The average Antitrust Division case takes about three and a half years from start to finish; the average *merger* case takes 63.8 months from illegal merger to final decree and the average monopolization suit is eight years (see M. Green, *The Closed Enterprise System 136-7 (1972)*). A proposal to have antitrust cases go to the Courts of Appeals before possible Supreme Court review can add a year or more to delays which already sap the limited energies and resources of the Antitrust Division and which can moot the issue at hand. Burdens on the Supreme Court are not an impressive counterargument; between 1944 and 1968, the Court handled 3.56 antitrust cases per year, 30 percent of those being *per curiam*. It is true that antitrust enforcement will substantially benefit from the ability to seek interlocutory appeals from the denial of temporary injunctions as Section 5 now provides. Yet this can be independently established without also eliminating the ability of the Justice Department to get expeditiously to the Supreme Court, our national court, economic cases of national importance.

If these provisions, however, are to remain, their most debilitating effects can be mitigated. In addition to Section 5(b)(1), the Attorney General on his own could certify that the case is of general public importance and seek immediate review by the Supreme Court. As the legal representative of all the people, he should not tolerate the slow meanderings through the federal court system of antitrust cases of great economic importance—meanderings which corporate defendants all too often intentionally engineer. "Delay—that's what they get paid for," said one antitrust counsel (*id.* at 133). It is a goal which the Congress should not facilitate.

We appreciate this opportunity to put our views on the record, and we would be delighted to discuss any of our comments with you or the other members of the Committee.

Sincerely,

MARK J. GREEN,  
*Corporate Accountability Research Group.*  
 MARK H. LYNCH,  
*Congress Watch.*

TESTIMONY OF RALPH NADER AND MARK J. GREEN BEFORE THE SENATE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY ON S. 782—APRIL 5, 1973

We appreciate the invitation to comment on the legislative dividends of last year's ITT hearings. While the media's attention was then riveted on the personalities and *realpolitik* of ITT's maneuverings, it is well that this subcommittee is now seeking to reform the process those conglomerates sought to pervert. But at least let us give ITT its due, for it has exposed for all to see the weaknesses and failings inherent in the antitrust consent decree process.

Eighty-three percent of all civil antitrust cases brought in the 1960s were settled by consent decrees, and this rate, if anything, has been increasing. Yet despite the statistical fact that consent decrees form a cornerstone of antitrust enforcement, the process had until recently been little examined and little understood. Perhaps as a consequence, it has suffered from procedural and substantive debilitations.

Procedurally, it has been a secret process, as bargaining sessions with powerful corporations took place far from public view. Often, only the top officials of the Antitrust Division would be in attendance, without the staff who had developed the case. Since fungus germinates in unlit places, it was not unreasonable to question whether the results of the consent decree process were always in the public interest. These anxieties led a 1959 House Antitrust Subcommittee<sup>1</sup>, presaging the proposal we consider today, to recommend that every consent decree be accompanied by an Antitrust Division statement articulating (a) its views of the facts of the case, (b) the goal the decree seeks to achieve, and (c) a detailed interpretation of the key provisions.<sup>2</sup> The 1961 reform of a 30 day "waiting period" was a nice gesture toward public accountability, but little more than a gesture. The comments were received after the government and defendant had agreed, not before; they were not made public, were often not replied to, and rarely had any impact on the judicial affirmation of proposed consent decrees.

Since little had changed by 1967, eight years later, Chairman Emanuel Celler wrote to remind Donald Turner, then head of the Antitrust Division, of his Subcommittee's recommendations. In reply, Turner conceded that "it may well be we could and should supply more information than we have been accustomed to do, particularly in explaining the purposes of the decree and the expected impact of the relief obtained."<sup>3</sup> But he did not change his agency's policy because, like Mr. Kauper, he enjoyed the unfettered discretion of settling antitrust cases. "The reason they like consent decrees is that they can run those operations," a former Division attorney complained to us.<sup>4</sup>

Substantially, however, they did not always "run those operations" so well. Although the 1941 case, *United States v. Atlantic Refining Co.*, charged 22 major vertically integrated oil companies, 379 of their subsidiaries and the American Petroleum Institute with a vast array of antitrust violations, and although the original complaint sought sweeping divestitures in the oil industry, the eventual consent decree contained no antitrust relief whatsoever.<sup>5</sup> The 1956 consent decree in the *ATT-Western Electric* case, which permitted the telephone *communications* monopoly to retain its telephone *manufacturing* monopoly, is a demonstrable sell out, as commentators agree. The negotiated relief decree following the heralded *Von's Grocery Co.* case showed how to snatch defeat from the jaws of

<sup>1</sup> *Consent Decree Program of the Department of Justice*, H.R. Rep. (H. Res. 27), 86th Cong., 1st Sess. (1959).

<sup>2</sup> That proposal was neither new nor radical then, and it should not be so considered now. In 1938 Thurman Arnold announced he would regularly issue public statements explaining the basis of a proposed action and its expected economic results.

<sup>3</sup> 297 *BNA Antitrust & Trade Regulation Report* X-2 (March 21, 1967).

<sup>4</sup> M. Green, B. Moore and B. Wasserstein, *The Closed Enterprise System* 201 (1972).

<sup>5</sup> For an expanded discussion of these cases, see *id.* at 194-201.

victory; it ordered Von's to divest a certain number of acquired stores, but failed to specify *which* stores, so Von's happily unloaded its 40 least profitable outlets. Relief in the *El Paso* merger case was attacked by the Supreme Court, which in language unique for that body accused the Antitrust Division of "knuckling under" to *El Paso Natural Gas*.<sup>6</sup> And the 1969 consent decree in the "*Smog Case*" contained no affirmative provision requiring the auto industry to undo its past damage; e.g., by retrofitting anti-emission exhaust devices on cars in the California market, where the conspiracy had been primarily aimed.

Students of the consent decree process have concluded that its problems are more endemic than episodic. Economist Kenneth Elzinga analyzed the relief obtained in Antitrust Division and FTC merger cases in the 1955-1964 period, breaking them down into four categories: successful relief, sufficient relief, deficient relief, and unsuccessful relief.<sup>7</sup> Of the 39 cases in his sample, Elzinga found that 21 relief orders were unsuccessful and 8 deficient. Approximately three-fourths of all the cases, including 7 of 12 Antitrust Division cases, fell within the combined unsuccessful-deficient categories. Available data indicated that government complaints in his sample were brought against acquisitions worth \$1.13 billion; \$327.9 million worth of assets were eventually divested—a combined "batting average" of .290. A second major study of merger relief—by Pfunder, Plaine and Whittemore, who surveyed 114 of 137 Section 7 cases between 1950 and 1970—came to very similar conclusions.<sup>8</sup> The authors add further that:

. . . Government attorneys appear particularly cautious about insisting upon any kind of relief which would appear to impose a hardship on a defendant, even when such relief is appropriate to dissipate the anticompetitive impact of an illegal acquisition.

Enforcement personnel seem to have lost sight of the teaching of the Supreme Court in the *duPont-GM* Remedy case. The court there stated the policy that although the relief is to be remedial rather than punitive, it must be effective notwithstanding any necessary hardship upon defendant.

Finally, Carl Kaysen, the noted economist and former consultant to Judge Wyzanski in the *United Shoe Machinery* case, called the government's relief plan in that case "sketchy, poorly prepared, and [it] failed to come to grips with any of the problems involved. . . . [What was needed was] a fairly detailed plan, well-supported by evidence, not ten pages of generalizations and citations from legal authorities, supported by ten minutes of oral presentation."<sup>9</sup> And who should be surprised at this, since the Antitrust Division often fails to exert itself as much on the terms of a consent decree as on prosecuting and winning the case in the first instance; in fact, usually the lawyers and economists who developed the case do not participate in the formulation of the consent decree. It is not then entirely surprising that cases resolved by consent decrees can be pyrrhic victories, and it is apparent that the reform of the consent decree process is a necessary and legitimate goal.

The Justice Department, however, seems to disagree. Thomas Kauper's previous testimony reflects the historical Department view that the less outside participation for interference as they see it) the better. But the reasons offered to justify this view are unimpressive. Upon close inspection, they turn out to be hypothetical horrors unconnected to reality.

Mr. Kauper fears that the bill would disrupt the usual settlement proceedings by requiring "full-blown litigation in virtually every case which the government brings." Yet Sec. 2(e), employing the word "may," not "shall," does not *require* "full-blown litigation;" it is explicitly suggestive, not mandatory. And given the extreme infrequency with which judges have closely scrutinized proffered consent decrees—only once in history has a judge refused to sign a consent decree;<sup>10</sup> on three other occasions judges have forced modification making the decree *weaker*<sup>11</sup>—it is highly unlikely that district court judges will often hold

<sup>6</sup> *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129, 141 (1967).

<sup>7</sup> Elzinga, "The Antimerger Law: Pyrrhic Victories?" 12 *J. Law & Econ.* 43 (1969), condensed from Elzinga, "The Effectiveness of Relief Decrees in Antimerger Cases," unpublished doctoral thesis, Michigan State University, 1967; see also, Elzinga, "Mergers: Their Causes and Cures," 2 *Antitrust L. & Econ. Rev.* 53 (1968).

<sup>8</sup> Pfunder, Plaine and Whittemore, "Compliance with Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained," 17 *Antitrust Bulletin* 19 (1972).

<sup>9</sup> C. Kaysen, *United States v. United Shoe Machinery Corp.* (Harvard Economic Studies No. 99) 343 (1956).

<sup>10</sup> *United States v. Pan Am. World Airlines, Inc.*, 1959 Trade Cas. ¶ 75,138 (S.D.N.Y.).

<sup>11</sup> *United States v. Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis. 1962); *United States v. Ward Baking Co.*, 1963 Trade Cas. ¶ 70,609 (M.D. Fla.), *rev'd* 376 U.S. 327 (1964); *United States v. Blue Chip Stamp Co.*, 1967 Trade Cas. ¶ 72,239 (N.D. Cal.), *aff'd mem.* 389

extensive proceedings. By way of analogy, in bankruptcy cases, the trustees must come forward to tell the court why they think the settlement is adequate given the original cause of action and why it is in the interest of the true beneficiary that this is expeditiously done. Also, all settlements in class actions must be approved by the court,<sup>12</sup> with opportunity for class members to object or opt out; yet this procedure, other than for notice provisions and the final distribution of damages, has not proven overly burdensome or protracted.

To the extent they occur, will delays disrupt the filing and implementation of the decree and exhaust the limited resources of the Antitrust Division? If the Supreme Court imposes a half hour limitation on oral argument, this statute could impose a permissible time period within which a proceeding must be completed. When our antitrust study, *The Closed Enterprise System*, made a proposal similar to S. 782, the authors observed that "It is possible that these relief proceedings could turn into the very trial that a consent decree seeks to avoid. However, a combination of strict deadlines and various 'preliminary' burdens of proof could prevent any protracted proceedings."<sup>13</sup>

When such proceedings do occur—while they will be limited in number, of course this bill projects that such proceedings *will* take place—the Justice Department will have to expend some additional Antitrust Division resources. Yet the bulk of man hours goes into the preparation of an antitrust case, not its trying; any additional resources expended would be marginal as compared to the work already done. And if these additional resources did somehow overtax the Antitrust Division's operations solution should be obvious: *request more resources*. Right now, the Antitrust Division has a \$12½ million budget—one fifth that of the Bureau of Commercial Fisheries, one-fifth the cost of one C-5A cargo plane, and about equal to what Procter & Gamble spent advertising just Crest toothpaste. It should not prove impossible to increase the budget of this unit of government, which when compared to the economy it must monitor takes on the appearance of an ant contemplating a moving mastodon.

Thus, if delays and resources are problems concerning the Justice Department, the solutions are embarrassingly apparent: impose deadlines; increase resources.

Mr. Kauper made a series of lesser objections, and we would like to comment briefly on some of them:

"[S]peculation by the government and the defendant on the anticipated effects of the relief could lead to each side claiming 'victory', which could be highly disruptive at a time when termination of the lawsuit is in the public interest." Yet nowhere in the bill are the *defendants* required to give their version of the anticipated effects of the decree or of the government's public impact statement. And that defendants may publicly claim "victory" or something contrary to the Department's stated view is typical puffery involved in business enforcement, hardly of sufficient importance to discourage the Government.

For a public impact statement to discuss the long-term effects of a consent decree would allegedly involve both "a great deal of 'crystal ball gazing'" and a disagreement over the facts at issue, which could lead to a trial. One wonders why the Antitrust Division is in the business of antitrust prosecution and consent decrees at all if it cannot predict the probable results of its action. "Crystal ball gazing" surely exaggerates the inability of economists and lawyers to predict the impact of successful antitrust enforcement. Nor would the "facts" involved be contested in time-consuming proceedings, for the government is required only to allege, not prove, the facts underlying the effects on competition of the proposed relief.

Mr. Kauper responds to the "*unusual circumstances*" wording of Sec. 2(b) (3) by producing a list of *always present* circumstances, like "the strengths and weaknesses of the government's theory," "the deficiencies in factual proof," etc. To relieve his concern, the statute could attempt to define "*unusual circumstances*" more precisely, by listing all the things it is not (which could be similar

<sup>12</sup> E.g., *See West Virginia v. Chas. Pfizer & Co.*, 440 F. 2d 1079 (2d Cir. 1971).

<sup>13</sup> *Green*, *supra* note 4, at 204. If a week, or even a month's deadline were imposed on these consent decree proceedings, it is hard to see how this would greatly delay the antitrust process since the *average* antitrust case takes three years from start to finish, the average merger case (from date of merger to final order) takes 63.8 months, and the average monopolization suit takes about eight years. *See id.* at 136; Elzinga, *supra* note 6; Posner, "A Statistical Study of Antitrust Enforcement," 13 *J. L. & Econ.* 365 (1970). The Antitrust Division understands time deadlines. In a policy inaugurated by Richard McLaren, negotiations toward a consent decree are conducted *before* the complaint is issued. But since there was a problem of defendants' delaying, in order to put off the complaint, a 1970 directive required that "pre-filing negotiations in all future civil antitrust cases must be considered within 60 days [later reduced to 30 days] from the start of such negotiations."

to Mr. Kauper's list) or by describing what unusual means in these circumstances: e.g. *inter se*, "matters relating to purely financial, rather than antitrust, considerations." This would at least candidly reflect the origin of this clause, which presumably was the "hardship" rationale justifying ITT's retention of Hartford Fire Insurance. Since the Nixon Administration persists in its defense of the ITT decree, it has apparently abandoned the long standing Antitrust Division rule, as recently confirmed by Donald Turner and Richard McLaren, that consent decrees generally obtain all the relief that could be obtained at trial. Since "hardship" considerations are irrelevant at trial (*duPont-GM*)<sup>14</sup> but now in consent decrees, one is led to this conclusion. But a strong argument can be made here that the public should be apprised of such lawless and unprincipled exercise of prosecutorial discretion whenever it occurs.

The Justice Department appears concerned that the obligations of S. 782 may make it telegraph its thinking and strategy to antitrust defendants. Yet due to full discovery and deposition, defendants in civil cases already know the essential strength, weaknesses and strategies of the Antitrust Division. And the defense antitrust bar is stocked with former Antitrust Division lawyers, who are familiar with the Division's *modus operandi* regardless of the revelations in a consent decree's public impact statement.

"[A] court could require the Department to go to full trial, simply to satisfy the claims of private parties. . . ." It is odd for the Department to oppose this stance, since it purports to follow the same policy. For it has long been Antitrust Division policy to consider how its actions would affect potential private litigation. Thus the Division may condition a consent decree by requiring that certain documents be impounded. This rarely, if ever, has meant that you go to trial.<sup>15</sup>

S. 782, in aim and approach, is a valuable reform of the consent decree process. Just to avoid possible judicial rebuke or the airing of incompetence, it should stimulate the Antitrust Division to be far more serious and thoughtful about its consent decrees. Since consent decree negotiations are more similar to administrative than judicial proceedings, it is appropriate to open up the process so that interested parties may more readily participate in the formal proceedings. The bill's provisions will educate both the public and the courts about economic competition and the antitrust process. An informed public is a *sine qua non* to successful antitrust enforcement, for without it, necessary new laws go unpassed, anti-antitrust laws are passed, Antitrust Division budgets stay low, and enforcement remains unresponsive and uninspired.

And an informed judiciary is also necessary to improve the consent decree process. The historic judicial role in this process, observed Professor John Flynn, can at best "be analogized to the performance of a symbolic religious rite by a high priest, or, at worst, as the performance of an important public function with the machine-like logic of a chilet dispenser."<sup>16</sup> True, occasionally a judge may balk at a decree's contents, but as we have indicated this is exceedingly rare. Also, it is true that some judges will *sua sponte* conduct extensive proceedings before approving a consent decree, as Judge Rosenberg did in *United States v. Ling-Temco-Vought*.<sup>17</sup> But again, this is far more the exception than the norm. Usually judges expeditiously defer to the Department's recommendations, and have made it clear that only in extraordinary circumstances would they consider repudiating the proposed decree.<sup>18</sup> Intervention by outside parties is discouraged by courts; in fact, the very process discourages intervenors since they cannot incisively petition judges without knowing the basis of and discussions behind the proposed consent judgment. Thus, this legislation can resuscitate judicial review by provid-

<sup>14</sup> *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316 (1961).

<sup>15</sup> It should be noted that the Federal Trade Commission, also an antitrust enforcer, does not take such a hard-line against and dismal view of public hearings into consent settlements. On Dec. 18, 1972, the FTC held a hearing to listen to the complaints of competitors and others to the proposed settlement of the Georgia Pacific merger case. *In the Matter of Georgia Pacific Corporation*, Dkt. No. 8843.

<sup>16</sup> Flynn, "Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals," 53 *Iowa L. Rev.* 983, 989-90 (1968).

<sup>17</sup> 315 F. Supp. 1301 (W.D. Pa. 1970). Judge Rosenberg said: An agreement or stipulation filed by the United States and those whom it prosecutes becomes a judicial act only when it is so decreed by the court in which the action is brought. But it should not be effected without judicial inquiry. . . . Thus, while an agreement between parties can facilitate and advance a judicial determination which would, otherwise, be arrived at in an adversary proceeding, I am nevertheless not relieved from examining the same and inquiring into any matter which in equity should have been considered had the matter proceeded in adversary fashion.

<sup>18</sup> See, e.g., *United States v. CIBA Corp.*, 1970 Trade Cases ¶ 73,319 (S.D.N.Y.); *United States v. International Telephone and Telegraph*, 349 F. Supp. 22 (D. Conn. 1972), aff'm sub. nom., *Nader v. United States*, 41 U.S.L.W. 3441 (Dkt. No. 72-823, Feb. 20, 1973).

ing it with the requisite information and by prodding it to more independently scrutinize Justice Department settlements."

While, we support the purpose of S. 782, there are a number of suggestions which we think could improve it:

One could read the first two requirements of the public impact statement, Sec. 2(b) (1) & (2)—"the nature and purpose of the proceeding; . . . a description of the practices or events giving rise to the alleged violation of the antitrust laws"—as being satisfied by excerpts from the government's complaint. To avoid the legislation from being a nullity—and we should remember that if the act passes it will be dealing with a dissenting and reluctant Justice Department—the following language, or something of similar intent and specificity, could replace (b) (2):

(2) a statement of facts describing practices or events giving rise to the alleged violation of the antitrust laws, rendered with sufficient specificity and describing material evidence and testimony which, together with a reasoned legal analysis of the application of law to those facts, would withstand defendant's motion for a directed verdict of acquittal if the government's complaint proceeded to trial.

The bill empowers the court to "authorize full or limited participation . . . by interested persons . . ., including . . . intervention as a party pursuant to rule 24." It is not clear whether this is merely a restatement of decisional law, which is very restrictive toward intervenors,<sup>20</sup> or whether it overrules these decisions and expands the scope of rule 24. If Congress does intend to amend rule 24, it should do so more explicitly than contained in S. 782.

To insure that S. 782 succeeds in its purpose of increasing public participation in the consent decree process, two additions to this proposal have merit. First, Harold Kohn has suggested that the bill's "permissive intervention" be replaced by something closer to intervention by right. He would accomplish this by permitting intervention once a group can show that a judgment will have a "not insubstantial" impact on them. (Such a group should also have standing later to argue that the decree is not being complied with.) Second, S. 1088 says that a court "shall order that a hearing be held . . . unless . . . there is no substantial controversy concerning the proposed consent judgment. . . ." This language would make it more likely than the language of S. 782 that some kind of public hearing would in fact be held. S. 1088 says a hearing *will* be held *unless*; S. 782 says a hearing *may* be held *if*. On its face this may seem a slight difference in emphasis; but since we are dealing here with district court judges who have shown great reluctance to inquire into proposed consent decrees, S. 1088's more stringent language may be necessary to convince judges actually to hold hearings.

Sec. 2(f) is a precedential breakthrough in letting the public understand how its government works. It does not inspire confidence to fortuitously find out months after the event that ITT, by meeting privately and frequently with the Attorney General, Secretary of Commerce, Secretary of Treasury, Vice President, scores of Senators and Congressmen and who yet knows who else, successfully exhausted the Government into a favorable consent settlement.<sup>20</sup> But subsection (f) could be improved. "Counsel of record," presently exempted from its coverage in entirety, should disclose their contacts with at least officials other than those in the Antitrust Division, such contacts would be sufficiently unusual and outside an attorney's normal and private work procedure to warrant as much publication as the defendant's lobbyings. If they lobby a public official it should be made public. Consequently, there should be some provision requiring the court to make this public, perhaps by making it a permanent part of the consent decree or by filing at a particular place at the Justice Department. In addition, the Government should disclose its own records as a reference to insure against any incomplete and self-serving non-reporting by business. Since the officials involved would be likely to maintain written records of such contracts formally

<sup>20</sup> That courts in the past haven't done so does not mean that they can't or won't do so. A questionnaire sent out under my auspices to all federal district court judges asked the following: "Judges rarely reject proffered consent decrees. Do you think it possible for judges to exercise a more independent role toward acceptance of consent decrees?" Of the 10.4% responding, 85.7% said yes and 14.3% said no. When asked further, "Do you think it desirable?", 77.8% said yes and 22.2% said no. *Supra* note 4, at 474-5.

<sup>21</sup> In response to those ITT actions, even a *Business Week* editorial urged that government-business contacts be made more public. "President Nixon could go a long way toward preventing future scandals if he simply ordered his government to do business in a fish-bowl—open its files, publish its appointment lists and throw away the rubber stamps that say 'secret.'" "Heading off the Fixers," *Business Week*, March 18, 1972, at 86.

logging them for the purposes of this legislation should not prove additionally burdensome.

Sec. 2(b)(6) of the public impact statement, requiring "a description and evaluation of alternatives to the proposed judgment . . ." is unnecessarily vague. It could be reworded to read: "a description and evaluation of alternatives to the proposed judgment which provide stronger relief—with respect to restoring and promoting the benefits of competition to consumers generally, deterring like offenses, and compensating persons injured by violations of the antitrust laws—including the maximum possible relief obtainable from a determination of the issues at trial." The objective here is to force disclosure of "maximum" relief, the contents of which can be compared with (a) actual relief and (b) outsiders' legal interpretations as to how much further courts might go in granting relief than the Attorney General wants them to go.

While the Antitrust Division seems to think that the language in (b)(3), seeking "an explanation of the . . . anticipated effects on competition of that relief," would lead to mere speculation, we think this section should be made even more demanding. It should require some estimate, with supporting evidence, of the effect of the alleged violations on competition. This could include the amount of commerce involved, a description of the classes of competitors, suppliers, or customers adversely affected and the aggregate economic impact of such competitive injury in terms of output restrictions and price overcharges. This quantification of injury could clarify what might otherwise appear as arcane abstraction, helping educate the public and alerting potential plaintiffs.

Comments received within the proposed 60 day time period should be made public by the government and should be answered by the government.

As part of every consent decree, the defendant should be obligated to assume all costs of guaranteeing that the decree is being complied with. This relatively minor expense for a business firm will not discourage settlements; it will place the expense of continued compliance where it belongs and may encourage the kind of compliance mechanism which traditionally has been absent in the Antitrust Division. Judgments are usually obtained and filed away. Occasionally they may be reviewed or occasionally some attempt may be made to encourage compliance (e.g., the "Smog" decree depended on a generally uninterested Environmental Protection Agency to uncover any violations of its terms).

If improved and passed, S. 782 could focus a little sunshine on a formerly private preserve of business and government. In so doing, the Justice Department is concerned that the ease and frequency with which it obtains consent decrees may be impeded. According to Baddia Rashid, the Antitrust Division's director of operations, "Since our consent decree program is a most useful part of our enforcement activities, it would be unfortunate if this proposal for expanded public statements were to result in a substantial curtailment of the consent decree process."<sup>21</sup> To the extent that a defendant (or the Department) refused to settle a case because it could not withstand public scrutiny, we should endorse this bill, not condemn it. Settlements before trial, no-contest pleas, consent decrees filed simultaneously with complaints, "business review letters" which secretly give advisory opinions to inquiring firms, voluntary requests for information rather than subpoenas (CID's)—the entire antitrust process tilts toward secrecy and deference to defendants. "Ventilating" consent decrees is a start toward more accountable and vigorous enforcement.

---

TESTIMONY OF MARK GREEN, DIRECTOR, CORPORATE ACCOUNTABILITY RESEARCH GROUP, ON SEC. 3 OF S. 782

"PENALTIES"

It is difficult to think of another area of law enforcement where there is so much crime without punishment. Yet antitrust criminality—or "crime in the suites"—is treated with a solicitude usually only accorded White House aides. This is true despite the massive amount of theft involved,<sup>22</sup> despite the fact that many business firms can be statistically categorized as recidivists or "habitual criminals,"<sup>23</sup> and despite the prevalence of antitrust crime: a survey

<sup>21</sup> Speech by Baddia J. Rashid, "The Consent Decree Process in Proper Focus," delivered before Federal Bar Association (June 12, 1972).

<sup>22</sup> See Green *et al.*, *supra* note 4, at 2-4, 154-162.

<sup>23</sup> *Id.* Also see the pioneering work of sociologist Edwin Sutherland, *White Collar Crime* (1949).

we conducted asked the presidents of *Fortune's* top 1000 firms whether they agreed with the contention of a GE executive, no doubt bitter over his recent criminal conviction, that "many . . . price fix"; of the 110 responding, 60% concurred.

Nevertheless, in the 83 year history of the antitrust laws, there have been only four occasions when businessmen went to jail for an antitrust crime. As District Court Judge John Lord said upon giving a suspended sentence to convicted *school* textbook suppliers a decade ago: "All are God-fearing men, highly civic-minded, who have spent lifetimes of sincere and honest dedication and services to their families, their churches, their country and their communities. . . I could never send Mr. Kurtz to jail." [At least he judiciously excluded "their schools" from this list.] The maximum Sherman Act fine of \$50,000 per count can be considered a cost of doing business, and is itself something of a fiction: between 1955 and 1965, corporate fines average only \$13,420 and individual fines \$3,365.<sup>24</sup> As a percentage of all cases filed, criminal antitrust prosecutions show a declining trend: in 1940-49, 58% of cases were criminal; in 1950-59, 48% were; and in 1960-69, it was 31%. "No contest" pleas, which resolve some 80% of all indictments, lead to reduced sentences, lesser publicity and the defendant's claim that a mere technical violation of the law has been settled. The sanction of treble damages is somewhat mythical, as hardly any adjudicated damage claims have been trebled since some of the electrical cases were.

In sum, the network of sanctions that aim to deter antitrust criminality does not outweigh the possible benefits to the violator. Based on six case studies, including offending firms who had their damage payments trebled, a study by the Law Department of New York City concluded: "Indictment by a federal grand jury, punishment inflicted through criminal action, payment of trebled damages resulting from civil trials, all legal costs incurred in the process, none of these nor any combination of them succeeds today in denying the price fixer a profit realization at least double a normal level." (emphasis supplied)<sup>25</sup>

Corporate crime pays.

It is perhaps superfluous to belabor the extent, cost and unpunishment of antitrust crime. It is documentable and undeniable. As Senator Hart said at a 1970 hearing on a similar measure, "The fact is no longer contested that antitrust violations cost the public billions of dollars each year in the prices they pay." What to do about it is another question. S. 782 would increase the maximum Sherman Act fine from \$50,000 to "five hundred thousand dollars if a corporation, or, if any other person, one hundred thousand dollars." This proposal has won wide bi-partisan support, the approval of the Justice Department, the American Bar Association, and many businessmen and judges.

We strongly oppose it. If passed it would not substantially increase the sanction for antitrust crime but *would* stymie all other reforms in this area for another generation—as did its ancestor in 1955, which increased penalties from \$5,000 to \$50,000. The \$500,000 and \$100,000 are still insignificant when compared to the bill involved or when compared to other penalties: two months ago Ford was fined \$7 million for violating the Clean Air Amendments. And the \$500,000 and \$100,000 fines are maximums; given judicial timidity toward imposing maximum fines in the past, it is extremely unlikely they would be commonly assessed. Just as the \$50,000 maximum led to an average \$13,420 corporate fine, a \$500,000 one might result in, say, a \$100,000 average fine. This at the same time can either be inconsequential to a giant firm (*Fortune's* 500 last year averaged a \$47 million net profit) or can bankrupt a small local firm. An absolute fine of this level is a clumsy way toward a good goal; based on its predecessors, it repeats the old saw that nothing succeeds like failure.

To adequately deter antitrust crime means that we should go beyond mere incremental improvements in schemes that have patently failed. The following alternatives should be considered:

A percentage fine is superior to an absolute fine. Then the penalty would fit the crime. For the period of the illegality there should be a mandatory fine of 10% of the profits of the price-fixed product (to be increased for repeaters). If a firm made \$10 million on a product, \$2 million of which is due to a successful conspiracy, a \$1 million fine does not seem excessive. For the firm which had

<sup>24</sup> Clabault and Burton, *Sherman Act Indictments* 40 (Supp. 1967).

<sup>25</sup> H. N. McMenimen, Jr., *High Profitability—The Reward for Price Fixing* (1969).

a \$10,000 profit on a product, \$2,000 of which is the result of its crimes, a \$1,000 fine seems more appropriate. With such serious variable financial penalties built into the fabric of enforcement, the profit motive itself should help self-regulate the system into compliance.

The maximum possible jail sentence should increase at least one day. This admittedly symbolic move would make antitrust crime a felony, as it deserves to be given its cost to the community, and not merely a misdemeanor. Even so knowledgeable an observer as Nicholas Katzenbach said, in a discussion of antitrust illegality while Attorney General, "antitrust fraud is, after all, only a misdemeanor." Such benign neglect must be purged for price-fixing to be treated with the disrespect it is due.

Given the historic unwillingness of judges to sentence and incarcerate white collar offenders, there should be a mandatory minimum jail sentence of four months. Antitrust crime is premeditated and planned by sophisticated and knowledgeable people for illegal profit; these are precisely the sort of culprits who can be successfully deterred by a threat of imprisonment. As a consequence, antitrust crime should dwindle, and articulate advocates for prison reform should increase.

*Nolo contendere* pleas have led to leniency for the guilty parties and the unavailability of *prima facie* evidence for the innocent victims. As proposed seven years ago in S. 2512, no-contest pleas should be *prima facie* evidence of legal liability (if causation and damage can be shown) in later private actions. What Woodrow Wilson said in 1914 still applies today. "It is not fair that the private litigant should be obliged to set out and establish again the facts which the government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the government has command of."

There should be a prohibition on corporate indemnification for the fines and attorney's fees of its officers convicted of an antitrust crime. Because states are in a competition to develop the most "liberal" corporation laws in order to encourage local incorporation, some state codes permit firms to underwrite the criminal conduct of its agents. Since the very purpose of an individual fine is to make the guilty party feel the sting of personal punishments, such reimbursements are agreements against public policy—not to mention the fact that they usurp stockholders' wealth for less than meritorious activity.

As a substitute measure to those proposed above, antitrust crime could be brought within the purview of the proposed revisions of the Federal Criminal Code, now pending as S. 1. Given the prevalence and costs of antitrust illegality, it should be a Class C felony, thereby invoking related sections of the code—regarding probation, the "parole component," imprisonment, fines, and disqualification from exercising organization functions. For those who presently scoff at antitrust crime as merely a misdemeanor this incorporation would properly stress the seriousness of such offenses. A Class C felony would treat antitrust crime as S. 1 treats securities violations (§ 2-8F4), an analogous business violation. The mechanism of incorporation can be simply accomplished:

§ 2-8F8. Antitrust Violations.

A person is guilty of a Class C Felony if he knowingly engages in any conduct declared *per se* unlawful in 15 U.S.C. 1.

Only the so-called *per se* Sherman Act offenses are included, those which have been so clearly held criminal by courts that potential violators have adequate forewarning; price-fixing, territorial division of markets, certain tying arrangements, and certain group boycotts.

Surely the \$500,000/\$100,000 proposal does not exhaust the ingenuity of this panel to cope with the problem of antitrust crime. Before repeating past failures by trotting out this well-worn and well-meaning reform, serious consideration should be given to new sanctions which would do something that has never been done before: seriously deter antitrust crime. "The antitrust law sanctions are little better than absurd when applied to huge corporations engaged in great enterprise." This was true when written in 1944 by Justice Robert Jackson.<sup>26</sup> It was true when quoted by Sen. Hart at the 1970 hearings. It is true today. We hope it won't be true at hearings in 1983 when you consider a proposal to increase the "maximum" fine from \$500,000 to \$750,000.

<sup>26</sup> *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 591 n. 11 (1944).

## THE NEW YORK STOCK EXCHANGE,

October 3, 1973.

Re Hearings on Antitrust Procedures and Penalties Act, H.R. 9203 and S. 782

Hon. PETER W. RODINO, Jr.,

*Chairman, Subcommittee on Monopolies and Commercial Law, House Judiciary Committee, Rayburn House Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: The comments of the New York Stock Exchange are directed only to Section 5 of the proposed Act which would amend Section 2 of the Expediting Act to eliminate the authority for direct appeal to the Supreme Court from a final judgment of a district court in any civil antitrust action brought by the United States.

Section 5 of H.R. 9203 and Section 5 of S. 782 would amend Section 2 of the Expediting Act to provide that (a) except as otherwise expressly provided by that section, an appeal from a final judgment in every civil action brought in any district court of the United States under the Sherman Antitrust Act (or any other acts having like purpose) in which the United States is the complainant and equitable relief is sought, shall be taken to the Court of Appeals but (b) an appeal from a final judgment in the district court shall lie directly to the Supreme Court if, upon application of a party, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

The report of the Senate Judiciary Committee on S. 782 (Senate Report 93-298) gave as the principal reasons for eliminating the right of direct appeal from the district court to the Supreme Court (a) that this provision had been adopted in 1903 when there was apprehension that the newly created system of courts of appeals might be unfamiliar with the new law and require additional time in their procedures which would delay and frustrate efforts to control monopolies and (b) that the proposal would relieve the Supreme Court of the burden of hearing the numerous cases coming to it under the Expediting Act.

The New York Stock Exchange urges that the authority for direct appeal to the Supreme Court from a final judgment of a district court in any civil antitrust action brought by the United States be preserved for 30 days following the final judgment by a district court in any case in which trial of the action has been completed in a district court at the time of adoption of the amendment. This would avoid prejudicing the rights of any party to a direct appeal to the Supreme Court in cases which had been tried prior to adoption of the proposed amendment.

We are not recommending that the basic proposals in Section 5 of H.R. 9203 and S. 782 to eliminate the authority for direct appeal be adopted or rejected, but we urge that if they are adopted the right of direct appeal to the Supreme Court should be preserved for any case in which trial of the action has been completed at the time of adoption of the amendment.

We respectfully request that this letter be included in the record of hearings by your Subcommittee on H.R. 9203 and S. 782.

Sincerely yours,

GORDON L. CALVERT.

○