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THE ANTITRUST IMPROVEMENTS ACT OF 1976

PART II—MINORITY VIEWS

OF THE

REPORT

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

TO ACCOMPANY

S. 1284

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X. MINORITY VIEWS OF SENATORS JAMES O. EASTLAND, JOHN L. McCLELLAN, ROMAN L. HRUSKA, STROM THURMOND, AND WILLIAM L. SCOTT

SUMMARY OF MINORITY POSITION

S. 1284, the so-called "Hart-Scott Antitrust Improvements Act of 1976," is a deceptive lawyers' bill.

Wrapped in this pious "antitrust improvements" package are bones for the Antitrust Division civil investigations and antimerger powers from legislation which died years ago (titles II, V), spiced with "miscellaneous" tidbits unsupported by any showing (title III)— *and the "parens patriae" time bomb (title IV) which could explode in a litigation disaster far messier and costlier to the public than the medical malpractice fiasco.*[1]

S. 1284 will greatly benefit the lawyers, at a heavy cost to the public, and at great risk to the smaller business firms and professional or service groups, such as the real estate brokers, who may become its leading victims.

It is unneeded for effective antitrust enforcement, which was fortified by the Congress in 1974 with the stiff deterrence of 3-year jail terms and $1 million penalties for violators, and with historic high 1976 appropriations of $70 million for the Antitrust Division of the Justice Department and the Federal Trade Commission.

It will aggravate the judicial "crisis" of the overloaded Federal court system.

It ignores the alarms by the American Bar Association and by many eminent antitrust scholars and experts, all deploring its destruction of long-established safeguards for fairness and due process of law in antitrust investigations, antimerger enforcement, and private treble damage actions.

Title IV (*parens patriae*), S. 1284's most obnoxious feature:

Ignores the serious reservations expressed by President Ford against federalizing the *parens patriae* concept to support State antitrust actions.

Disregards the Judicial Conference warnings of impairment of efficient criminal case handling in overburdened Federal courts.

Legislates constitutional defects exposed by former U.S. Solicitor General and Harvard Law School Dean Erwin N. Griswold.

Enhances the power of politically ambitious State attorneys general to pillory corporations in highly publicized actions of dubious merit.

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[1] As of preinflation 1973, *Fortune* estimated $3 billion total litigation costs for business, and ultimately the public, attributable to the "litigation explosion." Carruth, The "Legal Explosion" Has Left Business Shell-Shocked, *Fortune,* April 1973, pp. 65–66.

Opens vast opportunities for enterprising antitrust lawyers, working hand in glove with State officials, to extort "blackmail settlements" from business firms faced with huge contingent liabilities from massive multimillion dollar antitrust litigation brought in the name of unidentified State residents.

While lawyers will thrive for decades on the endless antitrust litigation and lucrative settlements generated by title IV's ill-conceived antitrust "improvements," a consumer "beneficiary" may get a crumb off the counsel table. But the public will foot the bill and pay the piper—

Through higher prices reflecting the heavy costs of antitrust litigation or settlements;

Through impeded business growth due to impaired access to financing when exposed to huge contingent liabilities by massive antitrust litigation; and

Through a slowdown in criminal trials by understaffed and overburdened Federal courts unable to meet their responsibilities under the Speedy Trials Act of 1974.

In sum, S. 1284's antitrust "improvements" will *not* benefit legitimate antitrust enforcement or the public interest, but *will* greatly benefit the enterprising lawyers and ambitious State officials who are its most zealous and vociferous proponents.

We vigorously oppose its passage—as unnecessary, unjustified, unfair, unconstitutional, and unworthy.

Minority Overview of S. 1284

The so-called Hart-Scott Antitrust Improvements Act of 1976 is a hodge-podge of unrelated, complex, and highly technical provisions, which collectively would enact the most revolutionary revisions of the antitrust laws since the Clayton Act of 1914.

Notwithstanding its far-reaching impact, S. 1284 is the defective product of hasty and ill-considered action by the Judiciary Committee's Subcommittee on Antitrust and Monopoly. The majority of this subcommittee is embarked on an ambitious program to restructure the economic system of the United States in this bicentennial year of 1976, precluding essential consideration and analysis of the contents and implications of S. 1284 and other revolutionary legislative proposals.

As a result, particularly due to the subcommittee's failure to afford adequate deliberation and the subcommittee's disregard of the evidence in the hearing record, S. 1284 is unjustified, unnecessary, unfair, and unconstitutional in critical respects—for the reasons to be detailed in this minority report.

Inadequate committee consideration of S. 1284's provisions and their far-reaching implications

Over the objection of Senators to the packaging of important, diverse, and complex provisions into a confusing 35 page legislative proposal thwarting careful analysis in the subcommittee hearings, the subcommittee held just 5 hearing days in May and June, 1975. Extensive statements of key Government officials became available to Senators only on the very day of their testimony, preventing meaningful study and examination of the witnesses.

Despite the aim of key provisions to reorder court priorities, and to change established practice under the Federal Rules of Civil Procedure, and notwithstanding the bill's foreseeably substantial impact upon the judicial system, the judiciary branch was not consulted or invited by the subcommittee to contribute recommendations and views from the standpoint of judicial resources or judicial administration.

Without any explanatory report by the majority, a substantially revised version of the bill, containing many complicated and broadening revisions, was published on July 28, 1975 as a committee print. These July 28, 1975 changes were never analyzed or explained to subcommittee members. Important and unexplained revisions included extensions of the so-called *parens patriae* provisions in title IV to permit State-retained *private* attorneys to bring large antitrust actions on behalf of State residents, and provisions to facilitate large money recoveries by overturning established indicial safeguards in *private* antitrust class actions even *without* State participation.

These subcommittee actions were deplored in a resolution by the American Bar Association on October 16 and 17, 1975, as follows:

> * * * the American Bar Association expresses its profound concern over the apparent departure from established legislative procedures for the consideration of matters of such importance as S. 1284, in that a number of the provisions within the conglomeration of substantive and procedural changes to the antitrust laws which the bill would make, including the findings and declaration of policy: (i) have not been the subject of full legislative hearings or any meaningful analysis as to their potential consequences upon the free enterprise system (title I, sections 701, 704); (ii) have been offered for serious legislative consideration despite the absence of any showing of compelling need which would justify such significant changes (portions of titles II, III, and VII).

On subsequent request by Senators, 3 more days of hearings were held in February and March, 1976, to hear nine witnesses expressing opposition to the bill as modified by the committee print. Neither the chairman nor any member of the subcommittee majority attended.

Accepting some minor or cosmetic modifications, and dropping some provisions, the majority voted on April 6 to recommend enactment of the entire S. 1284 package.

Significantly, the 135-page majority report, which purports to explain and justify the 77-page fine print of this complex legislation, fails to quote or refer to any of the 1976 testimony or statements filed subsequently in opposition to the revised S. 1284. The majority report likewise ignores the testimony and statements by the American College of Trial Lawyers, the American Bar Association, Prof. Milton Handler, the United States Chamber of Commerce, and others opposing the bill in most respects in the 1975 hearings.

Surprisingly, the majority report purports to claim the support of the President and the administration for S. 1284, notwithstanding the President's expressed opposition on March 17, 1976, to key provisions of title IV as contained in companion House proposals.[1] The report also ignores major modifications, partially responsive to the administration's concerns, adopted by the House prior to its passage on March 18 of H.R. 8532, a substantially modified "*parens patriae*" proposal which eliminates some of the most objectionable features of S. 1284's title IV. For example, the House bill expressly bans *parens patriae* actions by State-employed private lawyers on contingency fees, applies important provisions only to State-filed *parens patriae* actions rather than in private antitrust class actions generally, and authorizes "aggregated" damage recoveries only in willful price-fixing cases rather than all possible "restraints of trade." (Appdendix 3.)

In our view, therefore, the deficient legislative procedures followed by the subcommittee produced a thoroughly defective and objectionable bill, to be detailed in the textual discussion under the following captions:

Fundamental defects make S. 1284 unfair, unjustified, unconstitutional, and unworthy of enactment

Each of S. 1284's four substantive titles is built on the defective foundation of title I, and contains additional substantive, procedural, and constitutional infirmities demonstrated in the subcommittee's hearing record.

Title IV's *parens patriae* concept politicizes antitrust enforcement by giving "White Horse" State attorneys general the power to bankrupt business firms with multimillion dollar antitrust claims.

A. Private attorneys bringing antitrust damage actions for millions of State residents will reap huge fees by fomenting litigation and "blackmail settlements."

B. Title IV penalizes far more than price fixing and extends to the entire Sherman Act, thereby creating huge exposures for unforeseeable violations particularly by smaller firms and professional or service groups, and even media or labor unions, under recent court interpretations.

C. Title IV unconstitutionally awards heavy recoveries without proof of injury, not only in actions by the State, but in all private class actions, and destroys essential safeguards against class action abuses.

D. The constitutional defects of title IV are aggravated by its blatantly unconstitutional retroactive forfeitures penalizing business conduct long predating enactment.

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[1] The majority's repeated invocations of President Ford and the administration is as specious as its parade of ostensible S. 1284 supporters. President Ford on March 17, 1976, seriously questioned the whole "*parens patriae* concept" (letter to Rep. John J. Rhodes); and the administration on Feb. 19, 1976, opposed enactment of any premerger stay provision (letter, Deputy Attorney General Tyler to Senator Hart).

S. 1284 is opposed *in toto* by the 200.000 member American Bar Association, the United States Chamber of Commerce, the Business Roundtable, the National Association of Manufacturers, the Grocery Manfacturers of America, Inc., and in important part by the New York State Bar Association, the American College of Trial Lawyers, the New York State Consumer Protection Board, and even the Federal Trade Commission, and other groups.

Of the "majority of the antitrust section of the Federal Bar Association responding to a questionnaire," a majority did *not* support the basic *parens patriae* authorization in title IV, and rejected the automatic stay and hold separate provisions in title V. (Hearings on S. 1284 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., pt. 2, at 580–581 (1975.)

E. The heavy contingent liabilities of business firms subject to huge *parens patriae* actions will inevitably hurt business financing, threatening expansion and employment, while the lawyers collect large fees and the public foots the bill through higher prices.

F. Further proliferation of large antitrust actions stirred up by title IV will overwhelm already overloaded court dockets, draining judicial resources, and thwarting speedy criminal trials.

G. Since the 1974 stiffened criminal antitrust penalties now provide effective deterrence for willful antitrust violators, all antitrust remedies should be reassessed in an objective study by experts who are removed from the self-serving pressures of ambitious State officials and enterprising antitrust lawyers advocating title IV.

Title II confers powers of secret inquisition on the Justice Department that Congress rejected just 14 years ago, in the face of evidence that refutes any legitimate need for their adoption now, and arbitrarily destroys the historic secrecy of grand jury proceedings to facilitate private antitrust treble damage suits.

A. As Congress recognized 14 years ago, granting the investigatory powers of the FTC and other independent regulatory agencies to the prosecutorial arm of the Federal Government is alien to our traditions and susceptible to abuse.

B. The Department of Justice has not demonstrated sufficient need for title II to justify its burdens and potential for abuse.

C. Title II dilutes even the 1962 act's existing safeguards, which thus become wholly inadequate to protect against abuse of the new powers.

D. Title II arbitrarily abolishes traditional grand jury secrecy, in order to facilitate private antitrust treble damage actions, and for no public purpose.

Title V would give the Government arbitrary fiat powers to prevent any business acquisition regardless of size or competitive impact, and runs counter to basic antitrust policies by inhibiting the competitive, efficient formation and allocation of capital resources.

A. The automatic stay provisions, permitting the Government to stop and kill *any* acquisition, are contrary to fundamental concepts of fairness and due process.

B. The Bank Merger Act, involving a totally regulated industry is no precedent for automatic stays of acquisitions in free and competitive sectors of the economy.

C. Title V's premerger notification provisions are unjustifiably broad, reaching too many transactions and delaying them too long.

D. Since the so-called "merger problem" is a myth, and the Government already has adequate powers to prevent anticompetitive mergers, title V is a *deadly* cure for an imaginary disease.

Lacking any justification or showing of need, title III is an ill-conceived mish-mash of unrelated amendments which unwisely expose local business transactions to Federal antitrust sanctions, inflict shocking new antitrust forfeitures, change court procedures in disregard of the judiciary's views, and authorize more antitrust lawyers' fees.

A. Extension of the Clayton Act to local transactions is unjustified and unnecessary, and the ill-conceived Sherman Act amendments would create shocking forfeitures.

B. No justification exists for legislative reordering of court priorities and procedures, without the judiciary's advice and without providing required appropriations.

C. The provision to compel information protected by foreign laws was universally opposed before the committee, by the Justice Department, by the State Department, by the Federal Trade Commission, by the American Bar Association and others.

D. Provision of mandatory legal fees in private injunction actions can only foment more antitrust litigation.

Title I's declaration of policy underlying S. 1284's substantive titles is based on myths and misconceptions about concentration, which expose the faulty foundation upon which the entire edifice is built.

"Parens Patriae" Amendments (Title IV)

Huge parens patriae antitrust actions by State officials and State-retained private lawyers will benefit mainly ambitious attorneys general and enterprising lawyers, to the serious detriment of the public paying for such costly litigation

We vigorously oppose the so-called *parens patriae* amendments of title IV, as the most obnoxious part of S. 1284's so-called antitrust "improvements" package.

What is *parens patriae*? The *parens patriae* concept comes from the English constitutional system, under which the King exercised certain powers as "father of the country." [1]

But the U.S. Supreme Court has ruled that *parens patriae* is ***not*** a proper vehicle for money recoveries by States under the antitrust laws. In 1972, the Supreme Court held that Hawaii could *not* recover treble damages under the antitrust laws for injury to the State's "general economy." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). Like other parties, the State could recover only for injuries to its own commercial interests.

The Supreme Court stressed that State *parens patriae* actions were no substitute for the right of injured individuals to recover for antitrust violations. The Court noted specifically that "Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation pos-

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[1] As the Supreme Court wrote, "Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to that sovereign or his *representative* as 'the general guardian of all infants, idiots, and lunatics,' and as the superintendent of 'all charitable uses in the kingdom.' In the United States, the 'royal prerogative' and the 'parens patriae' function of the King passed to the States." 405 U.S. 251, 257 (1972).

ture. * * * The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits." 405 U.S. at 266.

The *Hawaii* case was followed by the *Frito-Lay* decision, holding that California could *not* sue as *parens patriae* to recover antitrust treble damages as a representative of its citizens consumers. 474 F.2d 774 (9th Cir. 1973). Instead, such claims were to be asserted by *private* treble damage actions, by individuals or through class actions under the "so carefully worked out" safeguards of the Federal Rules of Civil Procedure.

The purpose of title IV (parens patriae) is to overturn these landmark court decisions, and to wipe out the safeguards which were "so carefully worked out" by the courts to preserve traditional requirements of fairness and due process of law. The very type of oppressive, abusive, or unmanageble antitrust case previously thrown out of court for violating the safeguards of the Federal rules would be brought back to life by title IV. The worst abuses of the class action device, which the courts sought to ban from the judicial system, would come back in the guise of a title IV *parens patriae* action by a State attorney general or by a State-retained private attorney.

In our view, title IV will not achieve its professed purpose of compensating consumers victimized by price fixing conspiracies of large corporations, for which no adequate redress is said to exist, thus permitting antitrust malefactors to retain their "ill-gotten gains."

On the contrary, Clayton Act section 4 *now* provides treble damage recoveries for all meritorious claimants actually injured by antitrust violations. And "class actions" under Rule 23 of the Federal Rules of Civil Procedure *now* authorize just recoveries by multiple claimants, subject to safeguards to prevent abuse and unfairness.

Nor will title IV satisfy any demonstrated need for additional deterrents to antitrust violations. The 1974 Penalties and Procedures Act greatly increases antitrust penalties with stiffened jail terms of 3 years and $1 million fines, and although it is technically effective only as of 1976, its impact has already been felt in steeper fines by the courts.[1]

While thus unnecessary for deterrence or redress to injured parties, title IV's *parens patriae* proposals open a Pandora's box of evils far outweighing any possible benefits to consumers, for which the public will pay a heavy price.

A. TITLE IV'S PARENS PATRIAE CONCEPT POLITICIZES ANTITRUST ENFORCEMENT BY GIVING "WHITE HORSE" STATE ATTORNEYS GENERAL THE POWER TO BANKRUPT BUSINESS FIRMS WITH MULTIMILLION-DOLLAR ANTITRUST CLAIMS

Overshadowing any conceivable title IV benefits is the evil of authorizing 50 State attorneys general to file huge damage claims against

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[1] Thus, the 1975 antitrust fines won by the Antitrust Division were *double* those in 1974. Antitrust Chief Kauper recently testified that "judges are more sympathetic in terms of fines at higher levels. Now, we are not really operating under the new provisions of the [1974 act], which, of course, would greatly increase the maximum fines, but I think it is true that judges are aware of congressional action with respect to that and have been in essence setting fines higher than in the past." Hearings before a subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., pt. 4, at 341.

business firms in the name of millions of State residents, with its consequent potential for punitive or political abuse of power.

As summarized by Professor Richard A. Posner, a noted antitrust scholar and former Federal Trade Commission and Justice Department official, who criticized S. 1284 as "a serious mistake" and "among the worst" ways to secure consumer redress:

> State attorneys general might file groundless antitrust suits designed for purposes of political self-aggrandizement. We must be realistic and recognize that attorneys general are politicians who have been known to use their office to advantage a political career. The temptation to file a multibillion-dollar suit for pubicity purposes would in some cases, I fear, prove overwhelming. * * * I fear, in short, that S. 1284 would turn the antitrust laws into a political football. (Letter to Senator Philip Hart, March 3, 1976). (Attached hereto as appendix 9)

Comparable concerns were expressed in the testimony of Representative Charles Wiggins, an experienced litigation attorney and Member of the House Committee on the Judiciary, who appeared before this committee:

> [T]he individual State attorneys general might see some advantage for them in getting on a white horse and leading the charge in their State against an oil company, for example, and if one succeeds in New York, it will spread like wildfire, in my opinion, around the country as each attorney general jumps on the bandwagon and attempts to extract a settlement for the benefit of the consumer. (Hearings, pt. 3 at 109–110.)

In his opinion, under title IV, "every manufacturer in this country engaged in commerce is looking at, at least, the threat of a club in the hands of a politically elected can drive that business completely out of business." (Hearings, pt. 3 at 101.)

The "political self-aggrandizement" by "white horse" State attorneys general is documented by the history of past antitrust activities by State officials bringing highly publicized antitrust actions. A snack-food manufacturer was sued by the attorney general of California; sugar companies have faced claims by the attorneys general of California, Oregon, Washington and other States; drug companies faced claims of several billion dollars by nearly every State in the Union, and the oil companies, always popular political targets, have been sued by Hawaii, Kansas, Connecticut, California and Florida.

For example, the Fifth Circuit Court of Appeals recently wrote that—

> In July of 1973, the State of Florida through its attorney general commenced an *ambitious and highly publicized* antitrust action against 17 major oil companies in federal district court.

The Florida attorney general charged "a worldwide scheme of anticompetitive activities in the production, transportation, refining, and marketing of petroleum and petroleum products," and asked the court to award treble damages, divestiture, and injunctive and declaratory relief.[2] Within a short time, such actions to break up the oil companies were also brought by the attorneys general of Connecticut, Kansas, and California, claiming similar relief and damages.[3]

The potential is plain for "ambitious and highly publicized antitrust action" against not only big oil companies but all other business firms, claiming huge damage recoveries on claims of questionable merit.

Abuse of *parens patriae* treble damage actions is not limited to State officials' tilting at the corporate giants. Oil companies or other large business firms may be tempting targets in one State. Other ambitious State attorneys general may attack the media for price or advertising rate collusion, or other antitrust infractions, on behalf of millions of newspaper or magazine readers or television viewers. As noted in our hearings, labor unions, which have only a partial and diminishing antitrust exemption, may be sued or named as antitrust co-conspirators by a "white horse" State attorney general riding to battle.

Under the much more limited existing authorizations of State antitrust law, ambitious State attorneys general have already filed highly publicized anitrust claims against groups of dentists,[4] contractors,[5] and real estate brokers.[6]

Far greater opportunities exist under title IV to file politically tempting antitrust cases against doctors, brokers, accountants, and other service groups, whose advertising and rate practices have come into recent antitrust exposure under changing antitrust interpretations.

In our view, no justification exists for the Congress to endow politically ambitious State officials with such vast powers to destroy business firms. The Antitrust Division of the U.S. Department of Justice has a long tradition of nonpolitical professionalism, which constrains its enforcement activities. But, as Professor Posner points out:

> It is a salutary limitation on the powers of the attorney general of the United States that he is not empowered to bring money actions under the antitrust laws (other than for actual damages to the United States in its proprietary capacity). (Letter to Senator Hart, March 3, 1976). (Attached hereto as appendix 9).

Since the Justice Department is limited to recovering single damages and only for monetary injury actually sustained by the United States in its proprietary capacity, there is no rational basis for title IV's investiture of 50 politically-oriented State Attorneys General with powers far beyond those of the U.S. Department of Justice to destroy business firms with astronomical treble damage claims on behalf of millions of State residents.

The Senate should heed President Ford's expressed concerns as to such far-reaching federalization of the "*parens patriae*" concept. The President, expressing his "serious reservations concerning the *parens*

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[2] Florida ex rel. *Shevin* v. *Exxon Corp.*, 525 F. 2d 1377 (5th Cir. 1976). (Emphasis supplied)

[3] *See In re Petroleum Products Antitrust Litigation,* Docket 150, J.P.M.L.

[4] Ohio ex rel. *Brown* v. *Alliance Dental Society* (Ohio Court of Common Pleas, No. 76–96, filed January 27, 1976).

[5] *New Jersey* v. *Bergen Asphalt Co.*, filed May 20, 1975, No. 75–861, D. N.J. (claims Federal and State violations).

[6] E.g., *Washington* v. *Multiple Listing Service of Spokane, Inc.* (Superior Ct., Spokane, Wash., No. 221806); *California* v. *San Diego Board of Realtors,* et al. (Superior Ct., San Diego, Calif., No. 375827).

patriae concept" of the counterpart House proposal, on March 17, 1976, wrote to Minority Leader Rhodes:

> I question whether Federal legislation is desirable which authorizes a State attorney general to sue on behalf of the State's citizens to recover treble damages that result from violations of the Federal antitrust laws. The States have the ability to amend their own antitrust laws to authorize parens patriae suits in their own courts. If a State legislature, acting for its own citizens, is not convinced the parens patriae concept is sound policy, the administration questions whether the Congress should bypass the State legislatures and provide State attorneys general with access to the Federal courts to enforce it.[7] (Attached hereto as appendix 1)

B. PRIVATE ATTORNEYS BRINGING ANTITRUST DAMAGE ACTIONS FOR MILLIONS OF STATE RESIDENTS WILL REAP HUGE FEES BY FOMENTING LITIGATION AND "BLACKMAIL SETTLEMENTS"

The destructive potential of irresponsible assaults by State officials is magnified by title IV's contemplation that private lawyers may be deputized by the States to bring large *parens patriae* actions. The wisdom of the ages is reflected in the Italian proverb that "A lawsuit is a fruit tree planted in a lawyer's garden."[8] Plaintiffs' and defendants' lawyers alike will long feast in title IV's orchards, at the public's expense.

Title IV contemplates that private attorneys may become qualified by State implementing legislation to bring Federal *parens patriae* antitrust cases. Thus, section 4F(1) provides that:

> The term "State attorney general" means the chief legal officer of a State, *or any other person authorized by State law to bring actions under section 4C of this act*, and shall include the corporation counsel of the District of Columbia.

Such deputization of private counsel as States attorney general, by State enactment of implementing legislation under title IV to enforce the new section 4F(1) Federal/State antitrust cause of action, aggravates the vast abuse potential of title IV.

The history of private attorneys' abuse of *existing* antitrust class action procedures, deplored by many courts, is a bad omen for the future.

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[7] No satisfactory resolution has been made of the constitutional question raised by the proposed enforcement of Federal forfeitures by State officials. The Supreme Court has held that the enforcement functions of the Federal Elections Commission are unconstitutional under article II, sec. 2, cl. 2, because "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" is a function which "may be discharged only by 'officers of the United States.' " duly appointed pursuant to article II, sec. 2. cl. 2. *Buckley* v. *Valeo*, —— U.S. ——, 44 U.S.L.W. at 4164 (Jan. 30, 1976). For example, the Federal Food, Drug, and Cosmetics Act authorizes State level investigations only by State employees "commissioned by the Secretary as an officer of the Department" of HEW under article II. Section 702(a), 21 U.S.C. 372(a) (1970 ed.).

By contrast, title IV would authorize 50 State attorneys general, and the corporation counsel of the District of Columbia, who are *not* appointed by the President, or in any other fashion under article II, to collect forfeitures in excess of any "compensatory basis" for violations of *Federal* antitrust laws. Obviously no precedent for such enforcement of Federal penalties by State officials exists in *Georgia* v. *Pennsylvania Railroad*, 324 U.S. 439 (1945), which recognized a State attorney general's right to seek Federal injunctions to halt antitrust violations injuring the State's economy.

[8] *Illinois* v. *Harper & Row Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. 1972).

Overpowering temptations for extortionate recoveries arise when the plaintiffs are a mass of unidentified individuals with miniscule claims, represented by private counsel whose legal fees are the largest piece of the action.

Will State officials turn away the private attorneys waiting in the wings to file massive *parens patriae* claims on behalf of State residents, at no cost to the State treasury, in the expectation of securing and dividing large recoveries?

Will not title IV generate irresistible incentives to enterprising lawyers to foment large antitrust litigation, with the lucrative lure of what Chief Judge Friendly deplored as "blackmail settlements"? [9]

Our record is replete with the lessons of the past abuses. These are exemplified by the California antitrust class action claiming $750 million in treble damages against 2,000 real estate brokers, *jointly and individually*. Judge Duniways opinion pointed up this clear and present danger:

> The real bonanza in a case like this, if it is won, will go to counsel. * * * I venture to suggest that none of the class action features of this case was dreamed up by the named plaintiffs, but that all of them are the brain children of their attorneys. * * * I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust. Most, though by no means all, real estate brokers are small business men. They cannot afford even to participate in such an action as this, much less to defend it effectively. *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 237–238 (9th Cir. 1974).

Illustrating another abuse where the lawyers filed suit on behalf of themselves as clients, the Ninth Circuit Court of Appeals condemned a similar class action for $80 million; that is, $2 per claimant, claiming a price-fixing conspiracy by 600 hotels raising room rates. As the court wrote:

> In view of the nonexistent, or miniscule, recoveries that are likely to accrue to the supposedly intended beneficiaries, it is not surprising that most of the named plaintiffs are attorneys acting as counsel for themselves. * * *
>
> [T]his action has been primarily generated and financially supported by the lawyers who possibly stand to realize astronomical fees, and not by the individuals whose potential claims in any event are de minimis. * * * *In re Hotel Telephone Charges*, 500 F.2d 86, 91 (9th Cir. 1974).

[9] Friendly, *Federal Jurisdiction: A General View* 120 (1973).
In one case, after a $16 million settlement, $2.3 million was paid to the lawyers, including nearly $1 million to the Attorney General and his assistant, personally; the court held that these officials were permitted to practice law while in public office. See *Washington* v. *O'Connell*, 523 P. 2d 872 (Wash. Sup. Ct. 1974).
The majority report cannot gainsay that "blackmail settlements" will be the ultimate result of title IV: the majority's report says the *parens patriae* action "is patterned after" a list of decisions, nearly all of which in fact were settled cases. (pp. 42–43 majority report).

In an action seeking to recover a $1 surcharge on automobile rentals for a class of 1.5 million persons, the court refused to certify the class, stating:

> The difficulty I have with this situation lies in the fact that the possible recovery of Mr. Cotchett as a member of the class is far exceeded by the financial interest Mr. Cotchett might have in the legal fees engendered by this lawsuit. *Cotchett* v. *Avis Rent-A-Car System, Inc.*, 56 F.R.D. 549, 554 (S.D.N.Y. 1972).

The real beneficiaries of such antitrust actions have been the lawyers. Contingent fee awards of $5 million in a $22 million settlement, and $2.2 million in a $26 million settlement are recorded.[10] Other courts have pointed to the "miniscule recoveries by [class actions'] intended beneficiaries while lawyers have reaped a golden harvest of fees."[11]

In our hearings former Mayor Alioto, a successful and experienced antitrust class action specialist, frankly told our committee that antitrust class actions have "become so lucrative to some lawyers they kind of leap into the thing; so lucrative that they will not take any other kind of actions."[12]

Prof. Milton Handler, a dean of the Nation's antitrust profession, warned against "encouraging a coterie of plaintiffs' lawyers from fomenting consumer class litigation for the purpose of generating gigantic legal fees, without regard to the interests of the consumers themselves." (Hearings pt. 3 at 141).

Also, virtually all massive antitrust class actions are settled, and never go to trial to decide their merits. For, how many business firms can withstand the pressure of a multimillion-dollar antitrust complaint, even when convinced of their innocence? How many companies can stand the crushing burdens and costs of massive antitrust pretrial discovery?[13] Who could afford *not* to settle, when faced with a huge title IV claim carrying the imprimatur of a sovereign State, in the antitrust field where litigation costs are uniquely heavy and the outcome is typically uncertain under shifting legal interpretations?

Even in private antitrust class actions without title IV's muscle of the State attorney general as plaintiff, according to the Second Circuit:

> There is reason to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure

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[10] *Lindy Bros. Buildings, Inc. of Philadelphia* v. *American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077 (E.D. Pa. 1972); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969), analyzed in Amicus Brief for American College of Trial Lawyers, p. 21, in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

[11] *Free World Foreign Cars, Inc.* v. *Alfa Romeo*, 55 F.R.D. 26, 30 (S.D.N.Y. 1972).

[12] Hearings pt. 1 at 359.

[13] In one big recent antitrust case, "hundreds of millions of documents will be produced." *In re IBM Antitrust Litigation*, 328 F. Supp. 509, 510 (J.P.M.L. 1971). The electrical equipment litigation involved 1.5 million documents. Peterson, Jr. & McDermott, Multidistrict Litigation: New Forms of Judicial Administration, 56 A.B.A.J. 737, 738 (1970).

The recently settled Western Liquid Asphalt Litigation (Civ. No. 50173, N.D. Cal.) involved several hundred thousand documents; some 290 depositions, taken in approximately 40 locations, totaling some 30,000 transcript pages.

In *Control Data Corp.* v. *IBM*, 248 depositions were taken totaling 126,000 transcript pages; in *Telex* v. *IBM*, 233 depositions, totaling 107,000 transcript pages, and in *United States* v. *IBM*, 1,265 depositions, totaling 144,000 transcript pages. See Kirkham, "Problems of Complex Civil Litigation" (National Conference on Causes of Popular Dissatisfaction with the Administration of Justice, Apr. 9, 1976).

on defendants to settle, even for millions of dollars, and in cases where the merits of the class representative's claim is to say the least doubtful, than did the old-fashioned strike suits made famous a generation or two ago by Clarence H. Venner. *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1019.

As former Deputy Solicitor General Philip Lacovara testified:

> Once a *parens patriae* complaint is filed, with possible recoveries reaching the hundreds of millions of dollars, how could a prudent businessman, still presumptively innocent of any wrongdoing, fail to reach an out-of-court settlement? The *parens patriae* concept is, in short, the mechanism for systemized injustice. (Hearings, pt. 3 at 123.)

And the American College of Trial Lawyers submitted that:

> * * * No large consumer class action [has] been litigated through trial to a determination of damages. The enormous litigation expenses and undefined but potentially massive damages awards, often in excess of the defendants' net worth, have forced defendants to seek the insurance policy of a "global" settlement of all potential claims, irrespective of the merits of the claims. (Hearings, pt. 1 at 523.)

Several drug companies, faced with claims potentially amounting to several billion dollars, settled with 49 States for over $200 million, even though the judge who approved the settlement involving 44 States believed the plaintiff's chances of recovery at trial should "realistically be called slight." *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F. 2d 1079 (2d Cir. 1971). The cases were litigated anyway, in a criminal prosecution and then in a civil suit by a State which refused to settle. Notably, each court found that there had been *no violation* of the antitrust laws at all. *United States* v. *Chas. Pfizer & Co., Inc. et al.*, 367 F. Supp. 91 (S.D.N.Y. 1973); *North Carolina* v. *Chas. Pfizer & Co., Inc.*, 384 F. Supp. 265 (E.D. N.C. 1974), *aff'd*, —— F. 2d —— (4th Cir. 1976).

Former Senator Sam Ervin, an astute jurist, aptly described the facts of life in antitrust litigation:

> In the antitrust field * * * many people agree to a settlement because it is cheaper to reach a settlement and pay certain sums of money than it is to litigate. * * * I know many cases that are settled because it is cheaper to settle them, cheaper to buy your peace, than it is to seek justice. I have recommended that to clients many times myself.[14]

Representative Wiggins, explaining in our hearings the House counterpart bill's prohibition on "contingency fee arrangements" with private lawyers pointedly testified:

> * * * [T]he plaintiffs' Bar, if this bill is passed, might well seek out States and seek to represent the States, commissioned as an Attorney General for the purposes of the suit, in class actions on a contingency basis.

[14] Hearings on S. 3201 before the Senate Committee on the Judiciary, 91st Cong., 2d sess. at 116, 118 (1970).

* * * The House adopted an amendment to the bill which prohibits State attorneys general from entering into a contingent fee arrangement with private counsel representing the State in these matters * * * The reality here is that the attorneys have the largest single economic stake in the recovery * * *

I do not care what the percentage is, it is clearly the largest sum to be paid out of the award. The promise of large fees provides an improper incentive for private counsel to seek out States, so as to be permitted to maintain actions on their behalf. It permits the opportunity for abuse by encouraging improper relationships between private counsel and State attorneys general. I think that the public interest will be served by discouraging that potential for abuse, by denying contingency relationships." (Hearings, pt. 3 at 101, 105.)[15]

Even the majority favoring title IV is obviously aware of these grave abuse potentials of private antitrust entrepreneurs working hand in glove with willing State officials. This awareness is reflected in several title IV "protective" provisions, whose inadequacy underscores the need to root out the evil at its source.

Thus, (1) section 4C(e) would require the court to determine the plaintiffs' attorneys' fees; (2) section 4C(f) would authorize payment of *defendants'* attorneys' fees if the suit is brought "in bad faith, vexatiously, wantonly, or for oppressive reasons"; and (3) section 4C(d) would require notice and court approval before a suit could be settled.

But section 4C(e)'s determination of plaintiffs' attorneys' fees by the court adds nothing to existing law, and the criteria for fee awards remain highly uncertain.[16] Section 4C(f)'s discretionary authorization for attorneys' fees awards to a prevailing defendant, upon a "finding that the State attorney general acted in bad faith, vexatiously, wantonly, or for oppressive reasons" is no match for the *mandatory* attorneys' fees to prevailing plaintiffs by section 4C(a)(2). Also, it creates a wholly unrealistic proof burden, impossible to meet except in extreme cases where criminal or disciplinary sanctions would apply anyway. Actually, the majority report assumes that the advice of "competent counsel," presumably including the private counsel handling the case, would nullify even this grudging chance for redress to the victim. (Majority report. p. 54.)

Finally, courts in the past *have* approved multimillion dollar attorneys' fees for plaintiffs' counsel obtaining large settlements from

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[15] Possible evasion of such an overly specific ban on "contingency fee" retainers, by private attorneys' participation on a volunteer or another nominal basis yet permitting them to share in the fruits of large settlements, warrants a total prohibition on participation by private counsel *in any part of the proceeds of parens patriae* litigation.

[16] Third circuit litigation to establish criteria and award fees in a *settled* antitrust case has been pending for years without definitive rulings, and many more years may pass before the law is settled. *Lindy Bros. Builders, Inc. of Philadelphia et al.* v. *American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077 (E.D., Pa. 1972), *vacated* 487 F. 2d 161 (3d Cir. 1971), *opinion after remand* 382 F. Supp. 999 (E.D. Pa. 1974), now on appeal to third circuit.

In connection with the "reasonable attorneys' fee" to be awarded under section 4C(a)(2) (and again by title III, section 304) the majority report purports to list a host of "other expenses" which might be awarded, which is not consistent with the way the bill is actually phrased. Under standard principles of statutory construction, by providing for the payment of costs, attorneys' fees, and "other" expenses, the "other" expenses include items only within the general categories expressly listed, such as actual court filing fees, witness fees, transcript costs, plus reasonable attorneys' fees separately provided.

defendants. In the *Tetracycline* drug litigation, plaintiffs' attorneys have been awarded fees of over $41 million to date. In the *Gypsum* cases, $10 million of a $75 million settlement fund went to plaintiffs' attorneys' fees. *In re Gypsum* cases, 1974 CCH Trade Case ¶ 75,272 (N.D. Cal. 1974).

Would not the still larger recoveries possible in massive *parens patriae* actions from frightened defendants, on behalf of millions of nameless State residents, generate even larger attorneys' fees *with* court approval? Is not such court approval of large fees out of settlement funds inevitably when neither the anonymous individual plaintiffs nor the capitulating defendants buying their peace have a real incentive to blow the whistle on the fees of overreaching lawyers?

C. TITLE IV PENALIZES FAR MORE THAN PRICE FIXING AND EXTENDS TO THE ENTIRE SHERMAN ACT, THEREBY CREATING HUGE EXPOSURES FOR UNFORESEEABLE VIOLATIONS PARTICULARLY BY SMALLER FIRMS AND PROFESSIONAL OR SERVICE GROUPS, AND EVEN MEDIA OR LABOR UNIONS, UNDER RECENT COURT INTERPRETATIONS

Although portrayed as recapturing corporate "ill-gotten gains" from price fixing conspiracies in bread, milk, and other consumer products, title IV goes far beyond hard-core price fixing violations. It penalizes an open-ended catalogue of business activities, swept up by ever-broadening court interpretations of the Sherman Act's elastic ban on "restraint of trade." Actually, under recent judicial Sherman Act interpretations and Justice Department actions against advertising and fee restrictions by professional and service organizations, such smaller firms may become leading victims of *parens patriae* claims under title IV.

Every lawyer knows that the Sherman Act's elastic generalities allow court interpretations to reach any business activity chargeable as as "restraint of trade." Consequently, even business activities whose legality is governed by specific provisions of the Clayton Act, such as price discrimination, exclusive arrangements, and mergers, are likewise actionable under the Sherman Act. Hence, Professor Handler told the committee that title IV's ostensible "limitation to Sherman Act violations" "is in fact an almost totally meaningless 'safeguard' " (Hearings, pt. 3 at 137.) This assessment is confirmed by the majority report which recites title IV's aim to authorize *parens patriae* actions not only against pricefixing, but also against "group boycotts, division of markets, exclusive dealings, tie-in arrangements, fraud on the Patent Office, monopolization, attempts to monopolize, conspiracies to limit production, and other violations of the antitrust laws."

Due to shifting court interpretations, trade practices assumed for many years to be lawful, and even procompetitive, may thus incur open-ended liabilities under title IV *parens patriae* actions and the risks of massive title IV retribution for a wrong guess may well inhibit aggressive competition. Multimillion dollar *parens patriae* actions may strike at—

> Newspaper and other franchise restrictions on distributor resales; media rate practices; newspaper, gasoline, and other consignment price arrangements; lawyers' bar association fee

schedules; real estate broker commission and listing practices; medical association restrictions on advertising; architects' fee and advertising standards; anesthesiologists' "value guides"; engineers', architects', and accountants' bidding restrictions; and optometrists', pharmacists' and druggists' price or advertising restrictions.

Likewise, Sherman Act section 2's "monopolization" provisions may invite massive *parens patriae* actions aimed at—

> Patent pools and patent licensing restrictions; acquisitions and mergers; "predatory" pricing; and "fraud on the Patent Office, * * * and other violations", unspecified, in the majority report. (P. 39.)

Also our hearings revealed that labor unions may find themselves at the paying end of heavy *parens patriae* antitrust liabilities.[17] Since unions have only a partial antitrust exemption, cut back recently by the Supreme Court interpretations, State attorneys general or their private deputies may name labor unions as defendants or coconspirators with employers for allegedly restrictive, collusive, or monopolistic activities charged as curtailing competition or raising prices at the consumer level.

In sum, huge antitrust liabilities under *parens patriae* actions can hit not only alleged corporate price-fixers reaping "ill-gotten gains."

Rather, they will create heavy antitrust exposures particularly for smaller firms, professional and service organizations, media, and even labor unions.

According to Professor Handler's survey of recent Government retail price-fixing cases:

> The largest single category of retail price-fixing charged by the Government related to fee schedules and codes of ethics adopted by various professional associations and real estate boards. No less than 15 of these suits have been brought against groups of lawyers, architects, engineers, accountants, anesthesiologists, veterinarians and real estate brokers. (Hearings, pt. 3 at 136.)

He anticipated for *parens patriae* suits under title IV:

> Based on the cases brought by the Government having a maximum impact on consumers, they open the doors wide for the assertion of claims of astronomical proportions against small business and professional people for conduct whose legality very few questioned until recently. (Hearings, pt. 3 at 137.)

In particular, a smaller firm, charged as an antitrust co-conspirator with joint and individual liability for an alleged industry-wide conspiracy, may be unable to stand the risk of a potentially astronomical exposure. Understandably, the $750 million potential liability of each of 2,000 real estate brokerage firms "shocked the conscience" of the court of appeals, which declared:

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[17] Testimony of Professor Jonathan C. Rose, Hearings, pt. 1 at 482–83; *see also* ABA testimony, Hearings, pt. 3 at 273.

> The small individual operator faces a potential liability of upwards of three-quarters of a billion dollars for which all of his or her assets are responsible. The amount of a recovery in a law suit is not ordinarily of concern where a wrong has been inflicted and an injury suffered. But when 2,000 are joined in an action where each is jointly and severally liable, the liability is increased in geometric progression. Such an award against each of 2,000 real estate broker defendants would shock the conscience.[18]

Such litiagtion against smaller firms is inherently conducive to "blackmail settlements," since they often cannot carry the risk or the costs of an effective antitrust defense.[19]

Understandably, the National Association of Small Business came in at the end of our hearings to request an exemption for small business, fearing that title IV would catch small businessmen "in a perilous crossfire between the consumer on the one hand, and the Government on the other." (Hearings, pt. 3 at 288.)

Many others may yet be unaware of the plague on *their* houses by title IV's *parens patriae* "improvements," which are promoted by their proponents as redress against "concentration," corporate price fixing and "ill-gotten gains."

D. TITLE IV UNCONSTITUTIONALLY AWARDS HEAVY RECOVERIES WITHOUT PROOF OF INJURY, NOT ONLY IN ACTIONS BY THE STATE, BUT IN ALL PRIVATE CLASS ACTIONS, AND DESTROYS ESSENTIAL SAFEGUARDS AGAINST CLASS ACTION ABUSES

Disregarding constitutional defects stressed to our committee by the American Bar Association and eminent constitutional scholars, title IV would revolutionize decades of antitrust jurisprudence by adopting the so-called "aggregate" or "fluid recovery" theory of measuring and distributing damages which has been deemed unconstitutional and unwise by every court that has faced the issue. This provision, section 4C(c), would not only delete the Clayton Act's "injury" requirements on a broad basis, even as to class actions *without* State attorney general participation, but would permit the courts to dispense damage funds like charitable foundations where consumers have no interest. Moreover, other provisions will also destroy essential safeguards established by courts against blatant class actions abuses.

After the close of July committee hearings, and without notice, the committee print of July 28, 1975 undertook to break new ground by radical revisions of existing substantive law and class action procedures.[20] As subsequently stressed in the American Bar Association's

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[18] *Kline* v. *Coldwell, Banker & Co.*, 508 F. 2d 225, 237–238 (9th Cir. 1974).

[19] As noted in the testimony of Frederick M. Rowe, this has created a litigation tactic now of joining many smaller firms, such as dealers, as patsy defendant coconspirators, with larger manufacturer defendants in mass antitrust cases.

"Such people who are unable to afford a real defense may readily accept settlement on a seriatim basis, and those settlements can build a kitty to finance further litigation against the main defendants." (Hearings, pt. 3, at 13.)

[20] For the first time, Section 4F contained a sleeper amendment, redefining "State attorney general" to include retained *private* attorneys to be authorized to sue by State legislatures. See p. 5, minority overview.

followup protest, these midstream committee changes in section 4F extended title IV to

> all private class actions instituted on behalf of natural persons under section 4 of the Clayton Act. It thus removed, by one stroke, one of the most basic substantive requirements of private antitrust actions under section 4 of the act. That act has always required that the particular private plaintiff demonstrate that he has in fact been injured in his business or property by reason of anything forbidden in the antitrust laws. In other words, this addition, which is, of course, irrelevant to the subject matter of the bill because it deals with private suits rather than suits instituted by a State on behalf of its citizens, would radically alter the existing law by eliminating the requirement that a plaintiff prove, as an integral part of the antitrust violation, that he is in fact suffering cognizable injury as a proximate result of that violation. (Hearings, pt. 3 at 66.)

As the ABA statement further admonished,

> Federal court jurisdiction is limited, under article III of the Constitution, to a case or controversy involving parties who must show injury in order to have standing to bring a suit, and is subject to the requirements of procedural due process. Any provision that authorizes a court to assess damages against a defendant without hearing in regard to proof of any actual injury to identified plaintiffs almost invariably run afoul of these two principles. (Hearings, pt. 3 at 66–67.)

Indeed, emasculation of the "injury" requirement of Clayton Act section 4 would go beyond the Sherman Act to all other antitrust claims asserted in private class actions, even as to claims under the notorious obscurities of the Robinson-Patman Act.

Such radical extension of title IV are ill-advised and unconstitutional. By purporting to delete Clayton Act section 4's "injury" requirements, the proponents would transfer substantial sums to plaintiffs unwilling or unable to demonstrate any pecuniary injury caused by the defendants' challenged actions. But according to former Solicitor General and Harvard Law School Dean Erwin N. Griswold:

> Insofar as the property is taken for the benefit of this class, and the property is taken without proof of actual damage, or the amount of damage, it is in fact a taking of private property for private use, and this is an *a fortiori* case within either the due process clause or the just compensation clause of the Fifth Amendment. (*See* appendix 6.)

Dean Griswold's constitutional concerns were confirmed by other eminent constitutional scholars. The statement of former Deputy Solicitor General Philip A. Lacovara concluded that

> The overwhelming weight of judicial authority, therefore, rejects the *parens patriae*/fluid recovery mechanism em-

> bodied in title IV of S. 1284 as an unfair and unconstitutional expedient whose defects cannot be cured by inclusion in a statute. (Hearings, pt. 3 at 128.)

Hence, "While the objectives of title IV may seem reasonable, the means chosen are simply at odds with constitutional due process."

Similarly, Prof. Milton Handler, an eminent antitrust and constitutional law expert, advised the committee:

> It is likewise clear that an attempt to circumvent the need to prove injury by basing damage recoveries on pure guesswork would constitute an unconstitutional deprivation of property without due process of law. Indeed, Judge Medina found that the fluid recovery device proposed in the *Eisen* case violated precisely that constitutional safeguard of due process which, of course, is equally applicable to legislative as well as judicial lawmaking.[21] (Hearings, pt. 3 at 38.)

Indeed, the Supreme Court recently reaffirmed that the Constitution's "case and controversy" provisions of article III, bar persons from asserting claims which they themselves do not share. *Warth* v. *Seldin*, 422 U.S. 490 (1975). In disallowing a damages award to a class, the court noted that "in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." 422 U.S. at 515–16. As the court stresses, "article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." 422 U.S. at 501.[22]

Title IV purports to allow a *parens patriae* suit based upon an "injury" which may never have happened to anybody, or at least not to those on whose behalf recovery is sought. This "fluid recovery" provision, with its elimination of proof of actual damages to real individuals, transgresses fundamental constitutional tenets of due process of law and the requisite "case or controversy".

In *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005, 1018 (2d Cir. 1973), the court held that "even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject

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[21] The majority cannot justify this rejection of due process standards by ostensibly "codifying" In re *Western Liquid Asphalt* cases, 487 F. 2d 191 (9th Cir. 1973). There the District Court had dismissed the complaint as a matter of law, on the principle that only the first purchaser might sue for antitrust violations under *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). The court of appeals reversed this legal principle, holding that the plaintiffs should be allowed to try to prove that increased costs due to antitrust violations had in fact been passed on, through middlemen, to the ultimate purchaser plaintiffs, which were contractors and State highway authorities. The court specifically noted that the case did *not* involve "consumers who have only a miniscule interest in the outcome of the litigation," 487 F. 2d at 198, but rather there were substantial claims which probably *could be individually proven*, for instance, numerous cost-plus contracts.

The majority improperly stretches a ruling, on the facts of that case, as legislative precedent for cases involving multiple, widespread, individually unascertainable claims, *which the court specifically distinguished.*

[22] The majority report, at p. 61, when quoting the *Warth* opinion, *deletes* this all-important statement that these constitutional requirements cannot be evaded by Congress' purported grant of a statutory right of action.

it as an unconstitutional violation of the requirement of due process of law." [23]

Such "aggregate" or "fluid recovery" is a revolutionary change, designed to subject *every* business firm to vast, new unprecedented and uncontrollable antitrust damage exposures—by permitting (and encouraging) antitrust lawsuits on behalf of persons who have not in fact been injured, who could not sue under current law, and who are unlikely ever to receive anything under title IV.

Beyond these constitutional defects,[24] essential judicial safeguards which discipline abuses and protect the courts against unmanageable litigation may be eliminated by the reported bill. S. 1284 originally contemplated judicial discretion to designate the State attorney general as a representative of a "class," thus preserving the precedents and safeguards in Federal Rule of Civil Procedure 23.[25] As reported, however, title IV deletes all references to "a class or classes" in State *parens patriae* actions. Consequently, Rule 23's constraints against harassment of business and inundation of the courts, established by many judicial interpretations over the years, could apparently go out the window.[26]

Thus, the very type of antitrust class action dismissed under Rule 23 as unmanageable, extortionate or tainted may come back to life under title IV. The Supreme Court in *Hawaii* v. *Standard Oil*, 405 U.S. 251, 266 (1972), recited these Rule 23 protections as reasons for its holding that class actions "are definitely preferable in the antitrust area" to *parens patriae* suits. Indeed, ambitious *parens patriae* suits have been dismissed precisely because they were an "attempt to utilize class action principles without the class action safeguards so carefully worked out by the drafters" of Rule 23. *California* v. *Frito-*

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[23] Contrary to the majority's suggestions (pp. 57–58), *Eisen* has been repeatedly cited for the constitutional defect of "fluid" damages, even after the subsequent Supreme Court decision which vacated the second circuit's judgment. 417 U.S. 156 (May 28, 1974). The Supreme Court did *not* vacate the reasoning of the opinion, but merely vacated the judgment to permit the plaintiff to attempt to amend his complaint (an attempt which was unsuccessful).

On the contrary, the second circuit's opinion, not having been modified in any way by the Supreme Court, stands as authoritative precedent, and has been followed by other antitrust rulings *postdating* the Supreme Court's action in *Eisen*, for example. *In re Hotel Telephone Charges*, 500 F. 2d 86 (9th Cir. 1974) (characterizing the Supreme Court's action as an *affirmance* of the second circuit opinion).

Most recently, in *Windham* v. *American Brands, Inc.*, 68 F.R.D. 641 (D.S.C. 1975), the court explicitly adopted the reasoning and language of the second circuit's *Eisen* opinion, and discountenanced the fluid recovery theory, holding that "determining the amount of damages and the proper distribution thereof would result in an unfair trial if the fluid recovery approach were utilized."

[24] Under established canons of statutory interpretation, to avoid constitutional conflict courts may interpret § 4C(a)(1) to require proof of causal individual injury and damage as essential elements of the basic statutory cause of action under § 4, carrying over to § 4C. *See*, for example, *Eastern Railroad Conference* v. *Noerr Motors*, 365 U.S. 127 (1961); *Kent* v. *Dulles*, 357 U.S. 116 (1958).

[25] Notwithstanding the majority report's confusing treatment (pp. 46, 47) of sections 4C(b)(2) and (b)(3), dealing with notice and "opting out" by members of the "class," we assume that business entities—whether proprietors, partners, or corporations, need not "opt out" formally from *parens patriae* actions in order to preserve their own rights.

[26] Under rule 23 safeguards, courts have dismissed class actions where: (1) Issues common to the class did not predominate over individual issues (for example, *Cotchett* v. *Avis Rent-A-Car System*, 56 F.R.D. 549 (S.D.N.Y. 1972); (2) class methods were inferior to other methods of adjudicating the issues (for example, *Graybeal* v. *American Savings & Loan Association*, 59 F.R.D. 7 (D.D.C. 1973); (3) the litigation was unmanageable in terms of notice. administrative costs, and complexity (for example, *In re Hotel Telephone Charges*. 500 F. 2d 86 (9th Cir. 1974).

The majority report speciously "disapproves" (p. 40) many court precedents and principles which it dislikes. But a legislative committee report is only a guide to future judicial interpretation of an act of Congress, not a vehicle for extraneous legislative revision of past judicial decisions. Hence, we assume that courts will ignore such presumptuous pontifications by the majority report.

Lay, Inc., 474 F.2d 774, 777 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973). Another court dismissed a *parens patriae* suit, stating that "a strong preference for class actions over *parens patriae* has been repeatedly expressed" by the courts and that this preference is based on the "safeguards" built into Rule 23 to insure basic fairness, *Pfizer* v. *Lord*, 552 F.2d 612, 618 (8th Cir. 1975).

E. THE CONSTITUTIONAL DEFECTS OF TITLE IV ARE AGGRAVATED BY ITS BLATANTLY UNCONSTITUTIONAL RETROACTIVE FORFEITURES PENALIZING BUSINESS CONDUCT LONG PRE-DATING ENACTMENT

Since title IV exposes business conduct long preceding its enactment, and even assumed to be lawful at the time, to heavy treble damage forfeitures in *parens patriae* actions, such retroactive reach-back for punitive impositions offends elementary constitutional requirements of fairness and due process of law.

As reported by the committee, section 405 unmistakably provides that:

> This title shall apply to all civil actions filed under the antitrust laws in which a person representing a class of natural persons or a State is plaintiff, including those in which the cause of action accrued before the date of enactment of this title, but shall not apply to any civil action alleging a violation previously alleged in any civil action filed on behalf of a class of consumers.

But, under established constitutional principles,[27] confirmed by the testimony of Professor Handler,

> Since title IV makes substantial substantive changes in the law, its retroactive application would violate settled principles of due process. What is more, to change the rules of the game in midstream runs counter to everything we hold sacred in our system of law. (Hearings, pt. 3 at 136.)

This constitutional defect is confirmed by title IV's creation of a "new cause of action" enforceable by the State attorney general for masses of nameless State residents *without* the pre-existing statutory requirement of actual "injury," an essential element of a section 4 cause of action. One court has declared that "allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes." *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974). The ABA testified that title IV "would radically alter the existing law by eliminating the requirement that a plaintiff prove as an integral part of the antitrust violation that he is in fact suffering cognizable injury as a proximate result of that violation." Even the majority report declares that "New section 4C creates a new statutory cause of action for States." (P. 42.)

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[27] *Calder* v. *Bull*, 3 Dall. (3 U.S.) 386 (1798); *Burgess* v. *Salmon*, 97 U.S. 381 (1878) (constitutional prohibition may not be avoided by adopting civil, rather than criminal, form); *Locke* v. *New Orleans*, 4 Wall (71 U.S.) 172 (1866) (ex post facto prohibition applies to penalties and forfeitures).

Moreover, title IV changes the nature and purpose of the Clayton Act, section 4 private action from compensation to punishment and deterrence. Few if any consumers will ever be compensated for their individually nominal "damages" in a title IV action. Rather, the bulk of funds will escheat to the State, to be distributed "in accordance with State law or as the district court may in its discretion authorize." Section 4C(c) (2).[28] As Arnold Lerman told our committee:

> When society requires payments without regard to proof of actual injury and those payments are sought by and redound to the benefit of the State, we are in fact dealing with a system of social penalties. Perhaps by calling them "damages" we mean that there may be a new way to measure the penalty. But I do think that in this event we should stop the charade, recognize the system as a penalty system, and evaluate the penalties by the very different set of standards that we apply in assessing the propriety of those monetary sanctions that the State seeks to impose whether for vindication, deterrence, or other purpose, in its own right on behalf of society. (Hearings, pt. 1 at 457.)

Rather than attempt to overcome this defect in its creation, title IV's supporters have *embraced* it,[29] even to the point of deleting the traditional term "*parens patriae*" in order to emphasize title IV's breadth and novelty.[30]

Thus, Professor Handler's question is pertinent, and its answer is clear:

> Is it right, and consistent with the precepts of due process, to give retroactive application to drastic changes in the law, in effect imposing *ex post facto* penalties of astronomical dimension on our business units? (Hearings, pt. 3 at 145.)

The hard-core unconstitutional retroactivity contemplated by the proponents is made explicit by the narrow and selective qualification adopted in our committee markup session. While this committee amendment narrowly excepts from section 405 retroactivity "any civil action alleging a violation previously alleged in any civil action filed on behalf of a class of consumers," however defined,[31] it plainly and unlawfully enacts a retroactive and mandatory treble damage liability for a "cause of action" which "accrued before the date of enactment."

Since private antitrust treble damage actions are subject to a 4-year statute of limitations, and may be extended by tolling provisions during the pendency of Government actions and for other reasons, title IV's *parens patriae* actions would thus reach back for at least 4 and

[28] Thus, in the *Antibiotics* litigation, the settlement plan provided that the unclaimed amounts of the portion of the $85 million allocated to consumer classes represented by the attorneys general of several States should be paid over to the respective States to be used for public purposes. *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 728 (S.D.N.Y. 1970); see Wolfram, "The Antibiotics Class Actions," 1 American Bar Foundation Research Jour.. 251, 282–83 (1975).

[29] David Shapiro, Hearings pt. 1 at 336; Senator Hart, Hearings pt. 1 at 480; Professor Arthur Miller, Hearings pt. 2 at 691.

[30] Professor Rose, Committee Counsel O'Leary, Hearings pt. 1 at 480.

[31] The majority report's spurious gloss to confine this exception to prior litigation also involving the *same parties* (p. 57) is unsupported and contrary to section 405's text and intendment.

perhaps many more years, to penalize actions taken as far back as 1972, and far beyond in many cases.[32]

F. THE HEAVY CONTINGENT LIABILITIES OF BUSINESS FIRMS SUBJECT TO HUGE PARENS PATRIAE ACTIONS WILL INEVITABLY HURT BUSINESS FINANCING, THREATENING EXPANSION AND EMPLOYMENT, WHILE THE LAWYERS COLLECT LARGE FEES, THE CONSUMER PLAINTIFFS SHARE CRUMBS, AND THE PUBLIC FOOTS THE BILL THROUGH HIGHER PRICES

An inevitable negative impact of title IV upon the country's economic well-being, totally ignored by its proponents, stems from the curtailment of financing opportunities on the part of business firms faced with multimillion-dollar liabilities when named in massive *parens patriae* actions.

In a mailgram to this committee, Mr. Allen P. Stults, Chairman of the board, American National Bank & Trust Co. of Chicago, and former president of the American Bankers Association, pinpointed the problem as follows:

> I wish to stress the importance for the national economy of a careful assessment as to how potentially huge contingent liabilities, particularly of smaller firms named as co-conspirators in such antitrust actions, may affect their access to financing and capital markets.
>
> I understand that antitrust class actions in the past have asserted multimillion-dollar claims for which all named coconspirators are jointly and severally liable, including one recorded case in California claiming $750 million in joint and several liabilities against 2,000 real estate brokers.
>
> In view of SEC disclosure requirements in the financial statements of public corporations which incur material contingent liabilities in pending antitrust litigation, it is my considered opinion that such antitrust actions may have a substantial adverse impact on the financing opportunities particularly of smaller firms named in such actions.
>
> This is so because banks and other financial institutions will necessarily take such substantial contingent liabilities into account in their lending decisions. (*See* appendix 10.)

Such financing problems will hit not only large firms, but also real estate brokers, doctors, and other providers of services named in *parens patriae* actions. Take one of the 2,000 real estate brokers, a coconspirator in a recent California class action faced with an "individual"

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[32] Thus, the 4-year limitations period may be extended by alleged acts of fraudulent concealment, by deferral of the commencement of the running of the statute until damages resulting from overt acts have become "ascertainable," and by the tolling of the statute during the pendency of government actions. E.g., *Zenith Radio Corp.* v. *Hazeltine Research*, 401 U.S. 321. See Wheeler & Jones, The Statute of Limitations for Antitrust Damage Actions: Four Years or Forty?, 41 Univ. of Chicago L. Rev. 72 (1973). The "fraudulent concealment" doctrine still awaits Supreme Court validation. Thus, in *Westinghouse Electric Corp.* v. *City of Burlington, Vt.*, 326 F. 2d 691 (D.C. Cir. 1964). Chief Justice (then Judge) Burger concurred in a ruling that the statute of limitations was tolled by acts of fraudulent concealment, but stated: "I concur in our holding with considerable reservation and on the assumption that at some stage the Supreme Court may reexamine the problem and resolve it." *Id.* at 693.

As a result, antitrust litigation may range over alleged conspiracies lasting for decades. See Kirkham, "Complex Civil Litigation—Have Good Intentions Gone Awry?" (National Conference on Causes of Popular Dissatisfaction with the Administration of Justice, Apr. 9, 1976).

liability for the total amount of $750 million. Or take a doctor, accountant, or architect currently subject to antitrust exposures under recent Supreme Court decisions and Justice Department enforcement policies. Even though SEC public disclosure regulations would not apply to such individuals or small enterprises, what bank, looking at such a loan applicant's financial statement showing a large "contingent liability" from pending antitrust litigation, will readily extend a home or a business loan?

At a time of emergence from a deep economic recession, a healthy recovery based on sound business expansion is a national priority. Likewise, substantial unemployment rates, inflicting great personal hardships upon many families, urgently require job creation by the private sector.

Would not the financing problems of business firms exposed to such multimillion-dollar *parens patriae* recoveries inevitably slow down plant expansion and critical investments, to the detriment of the economy and the creation of new jobs?

Should the self-serving zeal of title IV's proponents, spearheaded by the organized State attorneys general and the private antitrust attorneys who stand to gain most in powers and pelf from its enactment, be permitted to blind us to the harmful impact of title IV on the Nation's economy?

Would not the huge exposures created by title IV, under the ever-shifting legal interpretations of the Sherman Act, serve to chill and inhibit many potentially procompetitive business moves?

Let us recognize that the consumer, title IV's intended beneficiary, stands to lose much more than he could possibly gain, while the lawyers—for *all* sides—will thrive on the fees and settlements from *parens patriae* litigation.

Akin to the medical malpractice scandals, where litigation has victimized the public with higher costs of health care, an epidemic of antitrust litigation spawned by title IV would work still greater harm to the public.

The heavy burdens of costly litigation, whether or not resulting in settlements, will end up on the backs of consumers in the form of higher prices passed on by the business firms which pay out and must recoup legal fees and settlement funds.[33]

All the while, the nameless individual consumer, title IV's purported beneficiary, gets crumbs at most. One court warned, dismissing a claim attacking a $1 overcharge in car rental fees on behalf of 1½ million class members, that "individual members of the class are unlikely to receive any significant personal benefit from a successful prosecution of this suit and, indeed, may ultimately have to pay for it through subsequently increased costs of car rental." [34]

In such actions, most of the members of the consumer class may not even respond to class notices or wish to participate given the option. In *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45 (D.N.J.

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[33] The astronomical costs of antitrust litigation are notorious. In its case against IBM, the Antitrust Division in 1975 already had spent $4,000,000; the Division expects to spend $3.6 million in its suit against A.T. & T. The Division estimates that Control Data spent $15,000,000 getting ready for a trial against IBM. S. Rep. No. 94–498, 94th Cong., 1st sess. p. 4 (1975).

[34] *Cotchett* v. *Avis Rent-A-Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972).

1971), only 3 percent of 21,000 "consumer" class members notified filed claims; only 1,700 even responded.

In the famous North Carolina *Antibiotics* litigation, notices were mailed to 2 million class members; 12,000 responses were received, of which 90 percent were "opt outs." (American College of Trial Lawyers Report, p. 11.)[35] Responses from the prospective consumer beneficiaries included:

> DEAR MR. CLERK: I would like to know why I am a party to this action that I don't know nothing about. Who made me a party to anything? I am a democrat.
>
> DEAR SIR: Our son Bill is in the Navy stationed in the Caribbean some place. Please let us know exactly what kind of drugs he is accused of taking. From a mother who will help if properly informed. A worried mother Jane Doe.
>
> DEAR MR. MORGAN: I received your card about the lawsuit and I would like to know how much I owe and can I pay it off by the month so I won't have to go to court? If I can pay by the month, I will do just that as soon as I hear from you. Shapiro, Processing the Consumer's Claim, 41 Antitrust L.Jour. 257, 267 (1971–72).

The antitrust class action's past is antitrust *parens patriae's* prologue. Class actions which have been denounced and dismissed include: an $80 million class action for 40 million persons based on a $2 per individual claim for alleged hotel service overcharges against 47 hotel chains and 600 individual hotels;[36] a $1½ million class action, seeking $1 per claimant based on car rental surcharges with the court stressing the abuse of such actions benefitting principally the lawyers;[37] an action to recover for each of some 6 million stock investors an average of $4—after trebling;[38] a suit on behalf of some 30 to 40 million new car purchasers, alleging that GM and other auto manufacturers should disgorge some $4 billion in excess profits, before trebling;[39] and a class action for 125 million people, claiming $375 trillion plus $3 million attorneys' fees, against automobile manufacturers.[40] An American College of Trial Lawyers Report also recites class suits "filed on behalf of all subscribers of business telephones in New York County, all Master Charge credit card holders similarly situated, all consumers of gasoline in a given State or States, all homeowners in the United States, and even all people in the United States." (p. 6).

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[35] The national *Antibiotics* litigation is often cited as an exception. One of the settlements in those cases, amounting to $39.6 million, was widely disbursed to 885,000 claimants. However, claim forms were sent to some 10,700,000 households and the amounts paid into the settlement fund were divided pro rata among the 885,000 claimants. The claim notice in that case was entitled, "Cash Refund Message" and in effect advised its recipients that a check was awaiting them. In bold letters it advertised that a fund of more than $20 million awaited distribution, urging recipients to "Claim Your Fair Share" and emphasizing that proof of purchase was not needed.

Followup of individual claims revealed that much of the money was going to spurious claimants, who could not demonstrate their claim in even the most rudimentary adversary procedure: (for example, when the claimant by his own admission of age would have been 5 years old when *he* allegedly purchased the "overpriced" drugs). *See* Lebendoff, Operation Money Back, 4 Class Action Rptr. 156 (1975).

[36] *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974).

[37] *Cotchett* v. *Avis Rent-A-Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972).

[38] *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973).

[39] *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D.Ill. E.D. 1973).

[40] *Heart Disease Research Foundation* v. *General Motors Corp., et al.*, 463 F.2d 98 (2d Cir. 1972).

Obviously, the real collectors in such massive antitrust class actions are the lawyers, not the strawman brigades of ostensible consumer beneficiaries.[41]

Understandably, therefore, Professor Handler urged the committee to "avoid encouraging a coterie of plaintiffs' lawyers from fomenting consumer class litigation for the purpose of generating gigantic legal fees, without regard to the interests of the consumers themselves." (Hearings, pt. 3 at 141.) For, "however profitable this kind of litigation may be to the lawyers involved, no consumer is going to derive any meaningful benefit." (Hearings, pt. 3 at 138.)

Quite aptly, Frederick M. Rowe, a prominent antitrust expert, saw title IV's potential as "a shakedown for corporations, a rip-off for consumers, and the great bicentennial money machine for antitrust entrepreneurs."

G. FURTHER PROLIFERATION OF LARGE ANTITRUST ACTIONS STIRRED UP BY TITLE IV WILL OVERWHELM ALREADY OVERLOADED COURT DOCKETS, DRAINING JUDICIAL RESOURCES AND THWARTING SPEEDY CRIMINAL TRIALS

Title IV will further prejudice the public interest by its heavy imposition upon the understaffed and overburdened judicial system, faced with a "crisis" of mounting caseloads while committed to the expedition of criminal trials under the Speedy Trials Act of 1974.

Imposition on the courts of further massive antitrust litigation fomented by title IV would thus be irresponsible—particularly in view of the report endorsed by the Judicial Conference of the United States on April 7, 1976.

While the Judicial Conference concluded that S. 1284 presented "policy matters for the determination of the Congress," the Conference-endorsed staff report pointed to the "dramatic increase in absolute number of the civil antitrust cases filed in the Federal court system." Significantly, the report concluded, with respect to S. 1284:

> The treble damage and notice provisions of this Act appear *certain to engender a greater volume* of private antitrust litigation. The most significant measure of the ramifications of that higher volume of private antitrust cases is the fact that the median time interval involved in the disposition of a private antitrust litigation is *twice* the time expended for other civil cases.
>
> The time factor of increased private antitrust litigation, noted above, *may seriously affect the processing of criminal caseloads*. It is worth noting that several of the districts which entertain most of the private antitrust filings have a higher than average criminal docket. * * *
>
> In sum, the present strain on the already underplenished resources of the judicial system will be further exacerbated by a proliferation of private antitrust litigation. As a consequence, the capability of the courts to meet the mandates

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[41] Western Livestock Journal recently carried a plea by one of the defendants in an antitrust suit by beef producers that he was reluctant to settle because "the attorney will end up with considerably more than one-third" of the $10 million settlement. Dudley, A & P Pays Another $1 Million. Western Livestock Journal, p. 3 (August 1975).

The inaugural issue of the Class Action Reporter, a service for lawyers, knowledgeably touts the lucrative character of class action litigation. 1 Class Action Rptr. 1 (1972).

of the Speedy Trials Act may be decreased. (p. 3) [42] (attached hereto as appendix 5) [Emphasis added]

The Judicial Conference position confirms many courts' distress over the antitrust class action plague. A recent opinion lamented the courts' "increasing disenchantment" with antitrust class actions as a "serious drag upon judicial functions." [43] Another district judge dismissed an antitrust class action which would immobilize "for years to come the Federal judicial personnel involved." [44] According to another court,

> [I]t is not idle to observe that class actions, which have proliferated tremendously since the advent of the current rule—indeed beyond the expectations of its sponsors—threaten to engulf the courts.[45]

Particularly in view of the Judicial Conference submission, a "court impact statement" should have been an important consideration by our Judiciary Committee. Such a statement would have assessed title IV's impact on the efficient administration of justice in the Federal judicial system, and on its processing of civil and criminal caseloads, as proposed by the Chief Justice of the United States. *See* Chief Justice Burger, The State of the Judiciary—1972, 58 A.B.A.J. 1049, 1050 (October 1972). Instead, ignoring the huge wastes of proliferating costs of antitrust litigation, the majority report absurdly claims, out of whole cloth, that the cost of this act will be *de minimis*, (p. 82).

With crime in the streets a public concern in major metropolitan areas, the Senate should carefully ponder the wisdom of title IV, which "may seriously affect the processing of criminal caseloads" with a resulting slowdown of criminal trials and appeals in overburdened Federal courts.

H. SINCE THE 1974 STIFFENED CRIMINAL ANTITRUST PENALTIES NOW PROVIDE EFFECTIVE DETERRENCE FOR WILLFUL ANTITRUST VIOLATORS, ALL ANTITRUST REMEDIES SHOULD BE REASSESSED IN AN OBJECTIVE STUDY BY EXPERTS WHO ARE REMOVED FROM THE SELF-SERVING PRESSURES OF AMBITIOUS STATE OFFICIALS AND ENTERPRISING ANTITRUST LAWYERS ADVOCATING TITLE IV

The overwhelming weight of the testimony in the committee's hearing record, and the ill-considered and harmful impact of title IV's dubious *parens patriae* proposal, establish the need for a broader assessment of antitrust remedies in the public interest.

Prof. Richard A. Posner, an eminent antitrust scholar, opposed S. 1284's enactment and advised the committee:

> The piecemeal creation of antitrust remedies is a great mistake. Congress has recently increased the public penalties for antitrust violations but has not, to my knowledge, attempted to evaluate the effects of that change in law. Nor have I seen

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[42] Between 1970 and 1975, the number of antitrust cases commenced increased from 929 to 1,431 cases, an increase of 54 percent, and between 1974 and 1975, antitrust class action filings increased from 114 to 190, an increase of 60 percent. From 1975 Annual Report, pp. XI–33, XI–81.

[43] *Stavrides* v. *Mellon National Bank & Trust*, 69 F.R.D. 424 (W.D. Pa. 1975).

[44] *Schaffner* v. *Chemical Bank*, 339 F. Supp. 329, 337 (S.D.N.Y. 1972).

[45] *Free World Foreign Cars* v. *Alfa Romeo*, 55 F.R.D. 26, 30 (S.D.N.Y. 1971).

> evidence that Congress has carefully considered the effect on compliance with the antitrust laws of alternative remedies such as the consumer class action. Your subcommittee has not, to my knowledge at least, considered how S. 1284 would fit in as part of a cohesive, general system of public and private penalties. (Letter to Senator Hart, Mar. 3, 1976, p. 2.) (Appendix 9.)

Reassessment is highlighted by the constitutional defects and disastrous implications of title IV's ill-conceived *parens patriae* proposal.

The *parens patriae* concept or its practical application have been deplored by the President, by the American Bar Association, and by eminent scholars. Better remedies surely exist to reach any legitimate goals of title IV's proponents.

Prof. Donald F. Turner, a former distinguished Chief of the Justice Department Antitrust Division, has proposed an overall reappraisal of the treble damage remedy in antitrust cases, in light of the many changes since its enactment by Congress in 1914.

During our hearings, the American Bar Association criticized the present title IV, but expressed sympathy with its legitimate objectives.

Representative Wiggins testimony recommended a substantial "civil fine" levy upon antitrust violators, as preferable to *parens patriae* which "creates such additional strain on the system, the judicial system, and potentially on the economy as a whole." Instead, he urged "a fair balancing of the interest of a consumer, who may or may not have suffered some miniscule loss," against "the kind of club which is to be given to State attorneys general under this bill, a club which if exercised aggressively can destroy an entire industry and all the consumers who work for that industry, and all the consuming public who may invest in that industry."

Another approach, vesting primary responsibility in the U.S. Attorney General to secure appropriate consumer redress, was proposed by Professor Handler. As he put it,

> I would recommend special legislation to allow the Attorney General of the United States to sue under Rule 23 of the Federal Rules of Civil Procedure as a statutory class representative on behalf of consumers in those cases where he finds that the consumers' claims are significant enough to justify the burden which the suit would impose on the judicial system. In such an action, the court should be empowered to determine not only whether or not there was an antitrust violation, but also the nature and extent, if any, of the injury to consumers resulting from the defendants' conduct. The court could then, as part of its judgment, lay down rules governing the measurement of consumer damages where the consumer has suffered cognizable injury.
>
> At that point, the adjudication of individual consumer claims should pass from the courts to an administrative body, such as the Federal Trade Commission. The agency should be empowered to award treble damages in such cases to individual consumers who comply with whatever simplified pro-

cedures the agency prescribes within congressionally mandated guidelines. (Hearings, pt. 3 at 140.)

Since the stiffened criminal penalties for antitrust violations, now punishable by 3-year jail sentences and million dollar fines, provide a potent deterrent, which is fortified by presently available treble damage actions on a class or individual basis, the public interest surely deserves a more thoughtful and constructive proposal than title IV's ill-considered and abortive *parens patriae* concept.

Especially in light of the views of Professors Turner and Posner, we propose the appointment of a Commission to Study Antitrust Remedies, composed of distinguished and objective experts, from the judiciary and the academic community, and including present and former chiefs of the Antitrust Division.

Such a commission should be charged with a study of the efficiency and effectiveness of existing antitrust remedies and penalties, and their adequacy for a vigorous antitrust enforcement program—with due regard for fairness, efficient court administration, and constitutional limitations.

To insure early consideration, the commission should be directed to develop and submit within 6 months recommendation for legislation to be proposed by the President and considered by the 95th Congress.

Antitrust Civil Process and Clayton Act Amendments (Title II)

Title II confers the powers of secret inquisition on the Justice Department that Congress rejected just 14 years ago, in the face of evidence that refutes any legitimate need for their adoption now, and arbitrarily destroys the historic secrecy of grand jury proceedings to facilitate private antitrust treble damage suits

We vigorously oppose title II, which contains some of the most far-reaching and harmful provisions of S. 1284.

Title II grants the Justice Department, the Federal Government's prosecutor, sweeping and unprecedented powers of secret inquisition into anything an individual, company, or State official does that may be related either to an antitrust investigation or to any activities of the Federal Government affecting competition. In authorizing the Department of Justice to demand documents, compel answers to written questions, and order sworn testimony in secret from individuals and innocent third parties not themselves under antitrust investigation, title II destroys the restraints and safeguards of the Antitrust Civil Procedure Act of 1962 against unwarranted harassment, burdens, and intrusions into individual privacy.

Title II does all of this in the face of record evidence demonstrating that those 1962 restraints were wise, and without any showing of present need for their abolition. Not surprisingly, the proponents must resort to strained—and inconsistent—justifications for this extraordinary departure from our legal and historical traditions.

Thus, title II ostensibly expands only the pretrial discovery rights of the Justice Department in civil cases, consistent with the protections of the Federal Rules of Civil Procedure. But in fact title II's powers could also be used for criminal investigations, they could be used in any Federal agency proceeding affecting competition, they may be used in secret without notice to other affected individuals, and they could be used anywhere *without prior court approval.*

Thus title II confers to the prosecutor an investigatory authority broader than the grand jury's but without any of its safeguards. Even though those safeguards largely depend on the prosecution's forbearance, and in fact, the grand jury has been grossly abused in recent years, title II will *extend* the potential for abuse, well beyond investigations now restricted to suspected criminal conduct.[1]

Perhaps because of such grand jury abuse, title II is also rationalized as doing no more than grant to the Justice Department the same powers long held by the Federal Trade Commission and other regulatory agencies. But this analogy, equating the powers of an *executive prosecuting* agency with the powers of an *independent regulatory* agency, is untenable.

A. AS CONGRESS RECOGNIZED 14 YEARS AGO, GRANTING THE INVESTIGATORY POWERS OF THE FTC AND OTHER INDEPENDENT REGULATORY AGENCIES TO THE PROSECUTORIAL ARM OF THE FEDERAL GOVERNMENT IS ALIEN TO OUR TRADITIONS AND SUSCEPTIBLE TO GROSS ABUSE

The Department of Justice is not a regulatory agency subject to direct congressional oversight, but is the prosecuting arm of the U.S. Government. There is a vast difference between a prosecutor and a regulator. Conferring the investigatory powers of a regulatory commission on a prosecutor is alien to our legal traditions and contrary to the premise of the fifth amendment, which contemplates that a prosecutor can investigate crime only through the grand jury process.

If this distinction has become blurred and forgotten over the years, Watergate and other recent disclosures should have reminded us of it. The civil libertarians opposed to S. 1 would hardly stand for conferring the powers of title II on the FBI, the CIA, or the IRS.

Are legitimate businessmen more evil than the Mafia or the drug pusher, to be singled out for unique forms of inquisition? The Department did not ask for the authority to demand secret sworn testimony from racketeers when it sought civil investigative demand authority for racketeering in the 1970 Crime Act that is virtually identical to the 1962 Civil Process Act. Why is it seeking this authority now over legitimate businessmen?

As Prof. Milton Handler, one of the deans of the antitrust bar, asked this committee:

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[1] Only 3 years ago a member of the majority complained of grand jury abuses under the organized Crime Control Act of 1970: "In part, of course, Congress is to blame for the present crisis because Congress failed to recognize the sinister potential abuses lurking beneath the innocuous surface of the 1970 law. In part, the Department of Justice is to blame for lulling Congress not only with excessive protestations of the need for this new act as a law and order tool, but also with equally excessive and wholly unfulfilled promises of good behavior if only the act were passed. Today, in consequence, the investigative grand jury has become a powerful new agency of political oppression." Hearings on H. Res. 220 before Subcommittee No. 1 of the House Committee on the Judiciary, March 13, 1973 (testimony of Senator Kennedy) (quoted by Mr. Arnold Lerman in hearings pt. 1 at 443). He largely blamed the 1970 act's "use" immunity provision *which is included in title II*. The very real threat to the rights and liberties of individuals in the way that use immunity has been interpreted [by the courts] . . . ought to cause serious pause to every person. We have seen how use immunity has provided one of the greatest threats to the fifth amendment since the founding of this Republic, *id.* at 22–23, 37, quoted in hearings at 464. The majority had not shown such concerns about the use immunity and other provisions of title II.

> Could you gentlemen really sleep at night if every branch of the Department of Justice were to possess the inquisitional powers which title II confers upon the antitrust division? (Hearings, pt. 3 at 143.)

The Congress flatly rejected giving the Department the power to take sworn testimony in secret from individuals 14 years ago even though the FTC was then also cited as precedent. The Congress did so for two reasons: (1) the need for the power was not sufficiently great to justify the burden,[2] and (2) the grant of the power, while proper for a regulatory agency, was wholly inappropriate for a prosecutor.

As the Attorney General's Committee To Study the Antitrust Laws, which originated the Civil Investigative Demand proposal, cautioned:

> We reject the proposal for legislation authorizing the Department of Justice to issue the type of administrative subpena typically employed by regulatory agencies. Unlike the Federal Trade Commission, for example, the Department of Justice is entrusted only with law enforcement. The grant of subpena powers suggests broader regulatory powers, structural reorganization; a system of hearing officers and a panoply of administrative procedural protections which the committee is not prepared to recommend. We would, in addition, disapprove any subpena power that would permit prosecuting officers in antitrust investigations to summon sworn oral testimony by placing businessmen under oath in the absence of a hearing officer and like safeguards. Such authority is alien to our legal traditions, readily susceptible to grave abuse and, moreover, seems unnecessary.[3]

Such concern over prosecutorial abuse affected all of the deliberations leading up to enactment of the 1962 Civil Process Act.[4]

In our view, the Justice Department has utterly failed to justify its recent claim for the type of administrative powers it deemed inappropriate for itself as a prosecutor 14 years ago.[5]

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[2] When asked in hearings on a predecessor bill of the 1962 *act* why the Department had *not* sought the inclusion of private citizens, the Assistant Attorney General responded: "We have had very few instances where we have need for such powers where individuals were included, and, frankly, we felt that it might be burdensome to an individual and that the need was not so great that we ought to place that burden on the individual." Hearings on S. 716 and S. 1003 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (1959).

[3] Report of Attorney General's National Committee To Study the Antitrust Laws, 345–6 (1955).

[4] For example, in the debates one Congressman declared that: "The fact that the Attorney General is the chief prosecuting officer of the Federal Government and the fact that a right to obtain information could severely harm the rights of the individual have led the Committee on the Judiciary to strictly circumscribe the extent to which [CIDS] may be used." 108 Cong. Rec. 3999 (1962).

[5] In a letter dated January 22, 1976, to Chairman Rodino of the House Judiciary Committee, Mr. Kauper cited *Hyster Co.* v. *United States*, 338 F.2d 183, 186 (9th Cir. 1964) as having rejected the argument that investigative tools appropriate for the FTC and other administrative agencies are improper when given to the Attorney General: "The fact that the Attorney General [unlike the FTC] can himself institute a prosecution, instead of referring the information to someone else, may be a distinction, but we do not think that it makes a constitutional difference." This reasoning, of course, was directed at the narrow provisions of the 1962 act. It has since been rejected by the Supreme Court in *Wyman* v. *James*, 400 U.S. 308 (1971), which makes it clear that whether an investigator (in that case a social worker) is also a prosecutor is *critical* in determining whether his investigatory authority is lawful under the fourth amendment.

Even though a social worker, like the FTC, can refer evidence of crime to the Department of Justice, the Court upheld his broad investigatory authority precisely because he is *not* a prosecutor and the investigation "is not one by police or uniformed authority." 400 U.S. at 323.

The fundamental distinction between prosecutor and investigator was underscored by the Supreme Court in *Hannah* v. *Larche*, 363 U.S. 420 (1960).[6] As the ABA's testimony has confirmed, the Supreme Court there approved the broad powers of the Civil Rights Commission *only* because the Commission was *not* a prosecutor, even though, like the FTC, it could refer criminal evidence to the Department of Justice:

> [The Commission's] function is purely investigative and factfinding. * * * It does not hold trials or determine anyone's civil or criminal liability. * * * Nor does it indict, punish, or impose any legal sanctions. 363 U.S. at 441.

As Justice Frankfurter noted in his concurrence, the prosecutorial body/investigatory body distinction was critical:

> Were the Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides. 363 U.S. at 489.

There are other critical differences between the FTC and the Department. The FTC does not use its broad investigative authority in intervening before all the other Government agencies, has no announced policy for such activity, and has not invoked its broad subpena powers in connection with filing "comments" with other regulatory bodies.

In any event, what the FTC does as a policymaking body is no support for what the Department should do as a prosecutor. As Earl E. Pollock testified on behalf of the ABA,

> The implications of this authority are, to say the least, far-reaching. Extension of the Department's CID powers to proceedings of their agencies—although styled as a procedural revision—would make changes of great significance in the relationship of the Department and the agencies. * * * We believe * * * that such changes are too important to make by indirection without facing the difficult issues which they present. (Hearings, pt. 3 at 267.)

In sum, the Justice Department's claim for administrative authority to investigate and regulate raises serious questions about the proper role of the Department vis-a-vis the rest of Government, aside from the constitutional issues.[7]

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[6] The case curiously is cited by the Department as supporting title II. (See Jan. 22, 1976 letter, p. 6.)

[7] In recent testimony, Mr. Kauper confirmed the prosecutorial nature of his division:

"Mr. ANDREWS. In other words, as you said, you would rather keep your shop as a criminal investigating agency?

"Mr. KAUPER. Yes. * * * I think in the long run the Department at least is structured to operate as a law enforcement agency. I don't know that I can speak for the [Federal Trade] Commission, because they do have a somewhat different historic role than we have had. * * * For us it would be a rather significant departure from our normal enforcement activity." Hearings before Subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong., 2d sess., pt. 4 (Department of Justice), p. 344.

B. THE DEPARTMENT OF JUSTICE HAS NOT DEMONSTRATED SUFFICIENT NEED FOR TITLE II TO JUSTIFY ITS BURDENS AND POTENTIAL FOR ABUSE

As Mr. Earl Pollock testified on behalf of the ABA, the major changes proposed—

> Raise questions of the utmost gravity concerning traditional requirements of fair procedure, the proper role of law enforcement officers, and the possible abuse of governmental power * * *. Governmental prosecutors, we believe, should not have such sweeping powers as a matter of principle; *and furthermore we are unaware of any showing by the Division that it needs such sweeping powers for effective enforcement of the Antitrust Laws.*[8]

When Assistant Attorney General Kauper initially testified in support of title II, he offered *no* specific example of how the limitations of his existing authority had impaired antitrust investigations.[9] The thrust of his testimony was that title II would simply make the Antitrust Division's investigations more efficient. Subsequent attempted rationalization by the Department to the House Judiciary Committee, never presented to our committee, cannot cure this total lack of justification.

The Department's belated afterthought about its need for title II consists of 14 examples of frustrated investigations described in appendix B to Mr. Kauper's January 22, 1976 letter to Chairman Rodino. But half of the cited case studies involve mergers, which are within the scope of the investigatory authority of the FTC with which the Department cooperates closely. The other examples add nothing to the record made by the Department in 1962, when it recognized that there was a few cases where depositions would have been helpful but felt they were insufficient to justify the "burdens" involved.

The lameness of the Department's belated rationalizations [10] is underscored by its ability to cite only a handful of problems, *out of nearly 1,700 CID investigations commenced* since the Antitrust Civil Process Act was passed in 1962.[11]

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[8] Hearings, pt. 3 at 61–62.

[9] His testimony before the House Judiciary Committee was similar. When asked how much antitrust enforcement had suffered because of existing constraints, he responded: "it would be easier to answer that after we had the authority and see what we can do with it." Hearings on H.R. 39 before the Subcommittee on Monopolies and Commercial Law, House Committee on the Judiciary, 94th Cong., 2d sess. at 34 (1976) (hereinafter "H.R. 39 hearings").

[10] In case study No. 3, for example, the Department indicates it never tried to interview the individuals involved. In case study No. 7, the Department does not state that it had to drop its investigation, and the recent fee schedule decisions suggest that the Department has adequately addressed this national issue. There is no indication in case study No. 9 that the Department would not be justified in filing a complaint. There is no indication that a more comprehensive document CID would not satisfy the Department's needs in case study No. 10. Case study No. 11, a price-fixing investigation, is subject to grand jury process. Case studies Nos. 13 and 14 are examples of now-completed investigations that were not thwarted, but at most delayed, by existing constraints.

[11] Even the Department's showing with respect to the authority to issue document CID's to third-party witnesses is flimsy. Mr. Kauper's Jan. 22, 1976, letter to Chairman Rodino stated that employees, customers, and suppliers of a powerful target company have been afraid of economic retaliation if they supply information voluntarily. In earlier correspondence to Chairman Rodino, however, Mr. Kauper cited a different reason for purported noncooperation by third parties: fear that volunteered information will be released to the public under the recent amendments to the Freedom of Information Act. H.R. 39 hearings at p. 53. In that correspondence, Mr. Kauper suggested that he was using a technique that solves both the retaliation and confidentiality problems—namely, the use of "friendly" subpenas at a witness' request, with provision for confidentiality via protective orders.

C. TITLE II DILUTES EVEN THE 1962 ACT'S EXISTING SAFEGUARDS, WHICH THUS BECOME WHOLLY INADEQUATE TO PROTECT AGAINST ABUSE OF THE NEW POWERS

Title II not only excludes the protective safeguards of the Federal Rules of Civil Procedure, but also dilutes even the procedural safeguards of the 1962 act.

1. The relevancy and scope test is destroyed

A principal safeguard of existing law is that a CID must specify the nature of the conduct constituting the alleged antitrust violation under investigation. This gives the respondent some means by which he can test the relevance and scope of the demand.

But title II totally eliminates this protection, requiring instead only that the CID state either the "nature of the investigation," (no longer limited to antitrust and no longer limited to alleged violations), or the Federal administrative or regulatory agency proceeding involved. Since this is as open-ended as all of Government itself, there is no title II demand under this standard that would not be relevant.

As a consequence, title II may authorize "unreasonable" searches in violation of the Constitution. As Judge Bazelon stated in rejecting in a Federal Maritime Board subpena worded similarly to the standard in title II:

> The Board's failure on the instant case to state its purpose in requiring the information demanded precluded a determination of relevancy.[12]

Judge Bazelon therefore concluded:

> Since the reasonableness of the order under review is dependent upon the relevancy of the information demanded, and that cannot be determined in the absence of a statement of purpose, the order is fatally defective.[13]

While the Department may be able to state the purpose of a CID sufficiently to satisfy the requirement of reasonableness, title II does not *require* it to do so.

Even the Justice Department recognizes that title II eliminates for depositions any requirement that the nature of its investigation be stated. In its view, however, a deponent will "rarely" be in doubt about the nature of the investigation, because the notice of deposition "will almost invariably be preceded or accompanied by a CID for documents," January 22, 1976 letter, Mr. Kauper to Chairman Rodino, appendix B at 8.

Yet the Department concedes that this procedure is *not* required, noting that "in rare instances" an accompanying CID for documents will not be sought. We cannot tell how "rare" these instances will be, and the majority report actually contemplates the use of depositions without document demands "in many instances."

In sum, the traditional requirements of relevancy and scope are destroyed or seriously diluted.

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[12] *Montship Lines, United* v. *Federal Maritime Board*, 295 F.2d 147, 155 (D.C. Cir. 1961).
[13] *Ibid.*

2. The right to cross-examination is cut off

Although the Federal Rules of Civil Procedure will govern the use of CID information *after a complaint* is filed, neither these rules nor the Criminal Rules of Procedure, nor the Rules of Evidence, came into play *until* a complaint is filed. Thus, they have no effect on how the Department uses the information *before* suit is filed.

Equally importantly, the Federal Rules of Procedure typically do not apply to *agency* proceedings. If the Department has obtained information for use in such proceedings without regard to the agency's own procedures, other parties to the proceeding will typically have no means at all of either cross-examining or rebutting the Department's evidence or testimony.

The unfairness is obvious.

3. The right to counsel is weakened

While counsel may not be present in the grand jury room—though they may be outside for consultation—the Federal Rules of Civil Procedure do contemplate a plenary right to counsel.

But title II's qualified right to counsel, while broader than in grand jury investigations, is probably illusory. Middle- and low-level managers are the initial focus of most antitrust investigations. But Mr. Kauper has warned them and their corporations that they should *not* rely upon corporate counsel, but should retain independent counsel.[14]

Can low-level officials afford outside attorneys? Unavailing is the provision for the attorneys' fees for third-party witnesses, for its benefit can be avoided by the Department's assertion that the deponent is, at least at the outset, a target.

Accordingly, the legislation may be most terrifying to the very persons the Department is most concerned about in connection with economic retaliation—namely, the employee, the supplier, and the customer.

4. The right of a deponent to a transcript is curtailed

While the Federal Rules of Civil Procedure guarantee any deponent in a civil trial the right to a copy of his own transcript, title II permits a deponent only to inspect and copy his transcript to the limited extent that he would be entitled to do so in a grand jury proceeding.

"Actually, courts grant witnesses virtually unlimited access to their own grand jury transcripts: [A] witness need make no showing of 'compelling necessity' or 'particularized need' to be entitled to a written transcript of his testimony. He must show only that his testimony was recorded and a transcript can be made." *In re Russo*, 53 F.R.D. 564, 572–73, (C.D. Cal. 1971). Re majority report, however, states that a witness must "make a showing of 'particularized and compelling need' for [his] testimony" (p. 24).

Paradoxically, the Freedom of Information Act will compel disclosure of information once an investigation is terminated to anyone *but* the witness, who is still constrained by the "grand jury" limitation.

5. Rights to privacy and confidentiality are crippled

Apart from the opportunity of noncustodian Justice Department personnel to release information, even this limitation may be nullified

[14] "Antitrust Enforcement From the Inside," address by Thomas E. Kauper, before the ABA, Apr. 9, 1976, at pp. 6–10.

by the recent Freedom of Information Act amendments narrowing its exemptions for investigative files. While even the Justice Department proposed adopting a blanket FOIA exemption for all CID material, such an exemption was *not* adopted.[15] In any event, it would provide little protection, only *permitting* but not *requiring* the Department to restrict public disclosure.

The majority defeated an amendment, at the Justice Department's urging,[16] requiring the Department to return all originals *and copies* of CID material to the respondent after the completion of an investigation (or subsequent trial). Our concern was not only to protect corporate trade secrets, but also to protect individuals from having "dossiers" compiled on them by the Department. It seemed to us clear that there was a potential for abuse of individual privacy, and Senator Hart initially expressed agreement with that concern. Mr. Lerman's testimony elaborated title II's deletion of the two 1962 limitations, stemming from the Dirksen and MacGregor amendments, prohibiting the Department from turning over CID material even to Congress and prohibiting issuance of CID's to innocent third-party witnesses. As Congressman MacGregor warned:

> The power which would have been granted by [the bill in the absence of the two amendments] would not properly safeguard the innocent third-party witness from bureaucratic harassment; books and records could have been demanded from anybody and everybody in business, and the Justice Department could have distributed the information obtained indiscriminately throughout various Government agencies. The basic individual rights to privacy and to protection against unreasonable search and seizure would have been trampled. [17]

To be sure, there has been little abuse of privacy *in the past*, precisely due to the limitations title II would destroy. But any claim that the business community is *not* concerned under title II *in the future* is wholly refuted by the hearing record.[18]

6. Testimony based on illegally seized evidence may be compelled

As the hearings pointed out, title II would allow the Department to compel testimony on *any* subject that a grand jury investigating a suspected antitrust violation is permitted to probe.

But *United States* v. *Calandra*, 414 U.S. 338 (1974) now makes it clear that a witness appearing before a grand jury *cannot* refuse to answer questions on the ground that they are based on unlawfully seized evidence.

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[15] A strict exemption from FOIA disclosure of CID-produced materials has been included in H.R. 39, as marked up by the Monopolies and Commercial Law Subcommittee of the House Judiciary Committee on Apr. 28, 1976.

[16] In a letter to Senator Kennedy dated Apr. 5, 1976, Mr. Kauper asserted that the only reason the Department opposed a provision requiring return of all copies and originals was administrative inconvenience. Mr. Kauper conceded that "administrative inconvenience should not ordinarily be a determining factor in assessing the advisability of a legislative safeguard," but urged that it should be a determinative factor here because there was "neither evidence of abuse nor indications of concern by the business community regarding present practice."

But this assertion is contradicted by the numerous objections in our hearing record to title II's invasions of privacy.

[17] Hearings, pt. 1 at 456, quoting 108 Congressional Record 18408 (1962).

[18] Mr. Kauper affirmatively acknowledged before the House that the business community was greatly concerned about the recent liberalizing FOIA amendments, which were in large part responsible for the growing lack of cooperation of both companies *and individuals* to provide information voluntarily. H.R. 39 hearings at 53. How the Department can ignore in the Senate its own concerns acknowledged to the House is a mystery.

Does the bill intend to permit the Department to utilize illegally seized evidence in the same way?

7. Interrogatory objections must meet unreasonable criteria

Subsection 209(g) erects a standard of "undue or oppressive burden" as a basis for quashing written interrogatories.

As with most of title II's other provisions, this provision appears to offer significantly less protection than the Federal Rules of Civil Procedure. The rules protect persons from "*annoyance*, *embarrassment*, oppression or *undue* burden *or expense*." F.R. Civ. P. 26(c) (emphasis added).[19]

8. Suspension of deposition on grounds of harassment is barred

Subsection 201(g) of title II would apparently deprive a witness of the traditional power to suspend a deposition in order to go to court to seek a protective order against harassment, provided by F.R. Civ. P. 26(c).[20]

9. Judicial review is made illusory

While title II's rights to judicial review are emphasized (Majority Report p. 24), § 201(r) in fact precludes judicial review of any objections not raised in court within 20 days of service of a demand (absent good cause for failing to raise an objection). If an individual fails to move to quash a subpena in the nearest Federal court within that time—because, for example, he is an employee who has had difficulty obtaining a lawyer—he may be faced with defending against the Department's enforcement action in virtually any court of the Department's own choosing.

Moreover, these rush provisions may in fact compel litigation in advance of the time period allowed for production. As a result, objections must be pressed under unrealistic time pressures, and before material and potential testimony may be reviewed for an orderly assessment of the scope they demand and the validity of possible objections thereto.

D. TITLE II ARBITRARILY ABOLISHES TRADITIONAL GRAND JURY SECRECY, IN ORDER TO FACILITATE PRIVATE ANTITRUST TREBLE DAMAGE ACTIONS, AND FOR NO PUBLIC PURPOSE

Without any apparent justification, support from the Department of Justice or any other source, or consideration of the adverse impact on criminal law enforcement, section 202 (k) and (l) abolish in one stroke the long-established policy for maintaining the secrecy of grand jury proceedings.

Sanctity and secrecy of grand jury proceedings serves an important function in antitrust and other law enforcement. As the Supreme Court pointed out in *United States* v. *Procter & Gamble*, 356 U.S. 677, 682 (1958):

> One [reason for secrecy] is to encourage all witnesses to step forward and testify freely without fear of retaliation. The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their com-

[19] See Lerman testimony in hearings, pt. 1, at 465.
[20] *Ibid.*

> petitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. This "indispensable secrecy" * * * must not be broken except where there is a compelling necessity.

The Supreme Court has confirmed that administrative efficiency or duplicative discovery procedures are *not* a sufficient reason for breaking that secrecy. Thus, while "[o]nly strong public policies weigh against disclosure," "the policy of secrecy of grand jury proceedings" can be overcome only by cases of particularized need. *Id.* at 682–83.

Apparently for the sake of expediency, the majority destroys these vital protections.

If title IV (*parens patriae*) is a guide, the real purpose of these provisions is to facilitate more private antitrust treble damage litigation by easing plaintiff's access to proof.

There is also a strange inconsistency in the committee's actions. The Justice Department insists on keeping its civil investigations secret in order to protect witnesses—employees, suppliers, customers—against retaliation by firms or individuals under investigation. It even asks for a complete exemption from the Freedom of Information Act for CID material, in order to encourage cooperation by persons concerned about confidentiality. While the committee accepts these concerns with respect to antitrust *civil* investigations, it ignores them in connection with antitrust *criminal* investigations.

There is, of course, no way to prevent either the FTC [21] or private parties [22] from disclosing to criminal defendants the identity of those who supplied information against them. This will necessarily inhibit testimony by third-party witnesses, thus crippling the grand jury or destroying its utility. The Department, of course, will still be able to utilize its title II powers in secret, but it will always have to present such material to the grand jury in order to get an indictment.

In our view, therefore, there is no reason why the committee is so determined to aid private treble damage lawyers at the expense of public law enforcement.

In sum, there was no need in 1962 for title II's excessive Justice Department investigative powers and there is no need for them today.

Nothing has transpired in the interim except abuses of the grand jury process, which confirm Congress wisdom in 1962 in adopting the safeguards the committee now discards.

Surely we should not so cavalierly cast off vital procedural protections, conferring more power on the executive branch, at a time when those powers have been gravely abused.

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[21] While the Congress may not intrude upon the sanctity of the grand jury, Congress has virtually unlimited right to any information in the hands of a Federal agency. See *Ashland Oil* v. *FTC*, 1976–1 Trade Cas. ¶ 60,714 (D.D.C. 1976).

[22] Contrary to the majority report (p. 35), the trend of jjudicial decisions is *not* in favor of ignoring grand jury secrecy. The governing standard is that stated in the Supreme Court's *Procter & Gamble* decision. The cases cited by the majority report are all consistent with the Supreme Court's decision, providing for release only where a particularized need has been shown, or the defendants themselves had already been given access to the material sought.

Premerger Notification and Stay Amendments (Title V)

Title V would give the Government arbitrary fiat powers to prevent any business acquisition, regardless of size or competitive impact, and runs counter to basic antitrust policies by inhibiting the competitive, efficient formation and allocation of capital resources

We strongly oppose title V, the "Premerger Notification and Stay" title.

Underlying title V is the false premise that all mergers and acquisitions are bad; that there is a "merger problem" which threatens a healthy economy and the public interest; and that the existing weapons of the Antitrust Division and the FTC are inadequate to cope with this so-called "merger problem."

But these propositions are unsupported and are disproven by the evidence presented to our committee.

Even the antitrust enforcement agencies agree that mergers are not *per se* bad and are often procompetitive and beneficial. Antitrust Division Chief Kauper testified that

> Many mergers are procompetitive, or promote efficiencies. many more are economically or competitively neutral.[1]

Moreover, big companies are not steadily gobbling up little companies: The uncontradicted statistics show that *mergers and acquisitions are generally declining.*

Above all, the antimerger weapons presently available to the enforcement agencies are not shown to be inadequate. On the contrary, their hand has been strengthened by powerful new legal weapons, yet to be fully tested, which confer much greater powers to prevent any illegal mergers.

In sum, there is no showing that there is *any* need for *any* such antimerger legislation today.

Certainly there is no demonstrated need for legislation such as the "automatic stay" provisions of section 7A(d). Such arbitrary and absolute enforcement agency power to stop and kill business transactions which are *not* inherently unlawful is at war with the most fundamental traditions of our jurisprudence.

A. THE AUTOMATIC STAY PROVISIONS, PERMITTING THE GOVERNMENT TO STOP AND KILL ANY ACQUISITION, ARE CONTRARY TO FUNDAMENTAL CONCEPTS OF FAIRNESS AND DUE PROCESS

Under section 7A(d) of title V, the Government could block any acquisition, of whatever size, simply by requesting a Federal district court to issue an injunction—*without* offering *any* proof that the transaction might transgress the antitrust laws. The court would be obligated, without discretion, to stay the transaction. Except in circumstances so rare as to be practically nonexistent, this automatic stay would remain in effect until the Government's claim had been finally adjudicated.

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[1] Hearings, pt. 1, at 99.

Since this might take years—5 or 6 years, according to the majority report itself (p. 9)—the practical result would be to prevent the acquisition totally.

This happens because title V in practical effect contains two quite distinct "automatic stay" provisions, one explicit and one implicit.

1. The automatic temporary restraining order

One is an automatic stay by temporary restraining order. Under subsection (d)(1) of title V, merely upon request the Government at the time the Government files its complaint it can obtain a temporary restraining order forbidding the consummation of the transaction.

Under subsection d(4), unless extended for good cause shown, this temporary restraining order would expire if the court had not rendered a decision on the request for preliminary injunction *within 60 days.*

This automatic temporary restraining order is the only element of the automatic stay provision which the majority report discusses.

2. The open-ended preliminary injunction, and the two illusory defenses

But in practical effect, subsection d(3) is likewise an automatic stay provision—and one with *no time limit.* It provides that a preliminary injunction lasting *until the final judgment is issued*—which concededly may take 5 or 6 years—must be issued to replace the temporary restraining order, subject to two illusory defenses.

Theoretically, the defendant could assert two defenses to such an automatic preliminary injunction. But these "defenses," shifting the burden of proof to the party *resisting* a stay order, are illusory:

The first theoretical "defense" permits the defendant to prove a negative—that the Government had *no* reasonable probability of ultimately prevailing on the merits. Since it is notoriously difficult to prove a negative, especially in antitrust cases where the issue of legality may often require close judgments, such a showing would of course be impossible in nearly every case. Moreover, if it has been "virtually impossible" for the Government to show that it *has* a substantial probability of success within a short time frame, it will be infinitely more difficult for any defendant to convince the court, within a similarly short time period, that the Government has *no* substantial probability of success.

The second theoretical defense allows the defendant to prove that it will be irreparably injured by entry of such a preliminary injunction. But this defense is likewise illusory, since section 7A(d) expressly provides that a showing of "loss of anticipated financial benefits" from the acquisition or merger would not be a sufficient showing of injury. Almost invariably, loss of "anticipated financial benefits" from the transaction would be precisely the irreparable injury that defendants *would* suffer. Such financial "benefits" may not be merely additional profits to the acquiring firm, but may well consist of enhanced financial and hence competitive strength for the acquired company, rendering it more able to compete, or even keeping it from going out of business.

Since these defenses are illusory, title V in practical effect gives the Government total authority to *prevent*—not merely to *delay*—any covered acquisition.

For experience demonstrates that a deal dies once a court stays it. As confirmed recently by Judge Friendly, in *Missouri Portland Cement Co.* v. *Cargill*, 498 F.2d 851, 870 (2d Cir. 1974),

> [T]he grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger. * * *

Even an Antitrust Division official has observed that:

> [I]n almost all Government cases in which preliminary injunctions enjoining an acquisition have been granted, the injunction has had the effect of a final determination without the benefit of a trial. The fluid financial and business context in which such agreements are made cannot be controlled by the court. Agreements usually cannot be held together during the time such litigation takes.[2]

Other commentators have made similar observations:

> The cases are few in which a decision granting a Government motion for a preliminary injunction enjoining an acquisition was followed by a trial on the merits, since it has rarely proven feasible for the parties to put their transaction on ice for the period of time required to obtain final judgment. Accordingly, a preliminary injunction enjoining an acquisition should only be granted if a substantial showing on the ultimate merits has been made.[3]

And a comprehensive study of the matter has concluded:

> It appears that *no proposed merger has survived a wholly prohibitory preliminary injunction for any substantial period of time.* Many mergers are delicate transactions involving compromises and predictions about the future. Obviously, changes in the capital market, the economy, and the industry may make the merger more or less attractive to the parties. The financing of a merger may be dependent on loans from financial institutions that cannot remain committed indefinitely without regard to changes in the money market.[4]

Thus, section 7A(d)'s automatic stay provisions in effect give the Antitrust Division power to *prevent and destroy* any acquisition, merely on the Justice Department's own sayso, without any showing of illegality in the acquisition.

Although the related so-called hold-separate provision of 7A(g) is only "declaratory of existing law"—majority report, page 76—it remains mischievous and objectionable.

Essentially, it retains residual remnants of discarded provisions in the original bill for mandatory divestitures at a previously established price, with segregation of assets and escrow of profits. These provisions include: (1) An administratively difficult, and now pointless,

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[2] R. Schneiderman, "Preliminary Relief in Clayton Act Section 7 Cases," 42 Antitrust L.J. 587, 598 (1973).

[3] G. Lewis, "Preliminary Injunctions in Government Section 7 Litigation," 17 Antitrust Bull. 1, 7–8 (1972).

[4] Note, "Preliminary Relief for the Government under Section 7 of the Clayton Act," 79 Harv. L. Rev. 391, 393 (1965). [emphasis added]

provision requiring the district court to establish the purchase price of stock or assets; (2) a probably innocuous but unnecessary requirement that any divestitures which are ordered must be accomplished expeditiously; (3) the incomprehensible requirement that "to the extent practicable, the court shall deprive the violator of all benefits of the violation including tax benefits"; and (4) a direction that the acquiring persons be required to hold the acquired stock or assets separate unless the interests of justice require otherwise.

The first three of these four provisions are pointless, meaningless, or both. The fourth adds nothing to existing law, since courts can and do enter hold-separate orders in merger cases, consistently with the interests of justice.

Inasmuch as the majority report itself deems this obscure subsection at most declaratory of existing law, it is both redundant and objectionable.

Above all, the whole destructive panoply of automatic stays and delays is unjustifiable and unfair, since mergers and acquisitions are not inherently bad but only offend antitrust laws *if* competitively injurious. Government agents do not ordinarily have arbitrary powers to permit or deny any kind of commercial activity. Nor are defendants normally required to prove that their conduct is lawful; rather, the Government must normally prove that their conduct is *unlawful.*

In any field other than antitrust, would such arbitrary powers be tolerated by the Senate? In any other field, would the law enforcement authorities be granted total authority to stop private activity with *no* showing of probable cause or illegality?

Actually, the FTC, the Department of Justice, and the American Bar Association all *oppose* the automatic stay concept.

Then FTC Chairman Engman testified:

> I think we all recognize that there may be instances in which mergers are economically desirable. The *merger law quite properly puts the burden on the government* to challenge by court or administrative proceedings those mergers which appear to threaten competition. If we can get the information that we need to make the determination as to whether a particular merger should be opposed, we think the burden should be on us to make the challenge. Rather than mandating a court, upon application of the enforcement agency, to enter an order prohibiting consummation of a merger pending final judgment, *the law should permit a court to require a showing by the Government of probable illegality.*" [6]

Similarly, Deputy Attorney General Tyler advised the chairman of the subcommittee, by letter dated February 19, 1976:

> The administration does not support enactment of the premerger stay provision of title V, preferring instead to reply upon existing decisional and statutory law to govern the issuance of preliminary injunctions in merger actions filed by the Department of Justice and the Federal Trade Commission."

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[6] Hearings, at pt. 1 at 71.

Likewise, the American Bar Association declared:

> Subparagraph (d) of the bill as reported would grant the Government preliminary injunctions at its will. We strongly oppose this provision * * * . As experience teaches, the grant of preliminary relief often aborts the deal. Therefore we can expect many lawful transactions to be frustrated. The present law that the Government must show a reasonable likelihood of success seems a far fairer allocation of the burdens. Indeed, we believe subparagraph (d) should be eliminated in its entirety except for its very salutary expediting procedures, for the existing law governing temporary restraining orders and preliminary injunctions is fair and effective."[6]

As Prof. Milton Handler eloquently testified:

> * * * There is no shortcut than can dispense with a thorough and comprehensive inquiry into the relevant facts if our merger law is to serve the public interest and have any semblance of fairness. The enforcement authorities * * * should not be in the position to prevent the merger by their own action or inaction or on their own *ipse dixit* that the public interest requires the prevention of the merger. If they have reason to believe that the merger violates the law, they should proceed in the courts by seeking a preliminary injunction.
>
> A restraining order ought not to be issued as a matter of course nor should the burden of proof be shifted to the defendants as proposed in the amendments offered by Senators Hart and Scott. This inversion runs counter to the traditions of equity procedure and violates every precept of fairness. The granting of a restraining order or the issuance of an injunction should be governed by the standards for preliminary relief which courts of equity normally apply. If these standards cannot be satisfied by the Government, it is unjust to prevent the merger. * * * In no other branch of the law with which I am familiar is a restraining order issued automatically by a judge without regard to the needs of the plaintiff, the balancing of the equities, and the circumstances of the case. In no other area of the law is the defendant put in a position where he will be restrained by a preliminary injunction unless he can satisfy the judge that he ought not to be enjoined. Mergers are hardly so universally evil in their consequences as to reverse the ordinary order of events and compel the defendants to prove their innocence.
>
> The Judiciary Committee should not put its stamp of approval on a procedure which, in my opinion, is alien to the American system of justice and the rule of law. Only in Alice in Wonderland do we proceed with verdict first and trial afterwards. Let other systems require defendants to prove that they are not in violation of law; let us stay with the kind of legal system which is integral to a political democracy particularly

[6] Hearings, pt. 3 at 71.

in a year in which we are celebrating the inception of our own democracy.[7] (Hearings, pt. 3 at 134–135.)

B. THE BANK MERGER ACT, INVOLVING A TOTALLY REGULATED INDUSTRY, IS NO PRECEDENT FOR AUTOMATED STAYS OF ACQUISITIONS IN FREE AND COMPETITIVE SECTORS OF THE ECONOMY

To be sure, the banking industry operates under provisions of the 1966 Bank Merger Act, 12 U.S.C. § 1828(c)(5)(B), and the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.*, which provide for an automatic preliminary injunction against bank mergers challenged by the Justice Department under the antitrust laws *within 30 days after banking agency approval.*

But the banking industry is subject to pervasive regulation, specially authorized by the Constitution. As the Council of Economic Advisers recently noted:

> The FRB, the FDIC, and the FHLBB, together with a host of other Federal and State agencies, regulate virtually every aspect of financial intermediation: entry, expansion, and exit, as well as pricing practices and allowable assets and liabilities.[8]

Hence, requirements of advance Government approval of mergers in banking—and in other regulated industries—are beside the point.

Indeed, such analogies dramatize the basic fallacy of title V—*its transformation of all American business into a regulated industry with respect to capital allocation.* To subject competitive business *generally* to regulatory mechanisms, acceptable only in the complex regulatory fields of banking and public utilities, would be a giant retreat from the basic antitrust principle that a free market is the best "regulator" of business activity.

C. TITLE V'S PREMERGER NOTIFICATION PROVISIONS ARE UNJUSTIFIABLY BROAD, REACHING TOO MANY TRANSACTIONS AND DELAYING THEM TOO LONG

The harmful impact of automatic stay provisions are aggravated by the excessive premerger notification provisions of section 7A(b).

Those provisions would require 30 days' advance notice to the Government for any stock or asset acquisition where the buyer and seller had sales or assets over certain relatively low thresholds. Simply by requesting more information, the Government could prolong this 30-day waiting period for another 20 days beyond its receipt of the additional information. Sections 7A (b) and (c)(2).

The dollar floor for prenotification transactions covers far more than "giant companies," and is unrealistic. Even FTC Chairman Engman criticized this amount as counterproductive:

> If we had to conduct full investigation of all mergers exceeding the $100 million assets or sales test that is contained

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[7] The majority report incorrectly insinuates (pp. 72–73) that "the core of the opposition to subsection (d) is centered in the New York investment banking community." Automatic stay provisions, such as those in subsection (d), were opposed in testimony before the Committee or by written communications to the committee by, among others, the American Bar Association, the Chamber of Commerce of the United States, Prof. Milton Handler, the Deputy Attorney General, the Secretary of the Treasury, and others.

[8] 1975 Annual Report of the Council of Economic Advisers at 155.

> in the bill, the fruits of our efforts might not be worth the cost. Our own premerger notification program sets higher limits of $250 million of assets or sales and appears to be satisfactory for purposes of getting basic information on large mergers.[9]

In an inflationary era, these dollar limits become even less rational or justifiable.

Likewise, these provisions authorize Government delays which are too long.

Thus, beyond the 30-day waiting period for an acquisition after the required prior information is filed, title V permits the Government to extend this period merely by requesting additional information. The acquisition would then have to be delayed by (a) whatever time was necessary to gather together the requested information, plus (b) 20 more days after its receipt by the Government. To accomplish this further delay, the Government would have to make no showing of diligence, or even of its need for the additional information.

Such an open-ended, mandatory, and unjustified waiting period is plainly unreasonable in the context of perishable financial transactions. Even Assistant Attorney General Kauper testified that the enforcement agencies should not be given "virtually unbridled discretion to delay",[10] and that "if a merger is to be held up by virtue of unilateral action of the enforcement agencies, there should be an incentive for the agencies to proceed with their evaluation as rapidly as possible." [11] At a minimum, as the American Bar Association suggested, the enforcement agencies should be required to make a prompt preliminary examination of the submitted material, and decide whether additional material is necessary, within 10 days of the original submission. For without some such "incentive" for speedy action, enforcement agencies may well drag their feet until the end of the original 30-day period, and then demand additional material taking substantially more time to gather and submit.

Tender offers would specially suffer from such delays, and should be eliminated from the ambit of premerger notification. Such offers serve a salutary purpose in keeping management on its toes and making it possible to oust entrenched inefficient management. The time periods in the bill would be disruptive to them. Under present securities laws, such offers must be consummated within 60 days or tenders can be withdrawn. While the waiting period has been shortened from the original version of the bill, in part because of this requirement, the Government could still request, at the last minute, more information requiring more than 10 days to accumulate and submit, without any showing of due diligence or even of need for such information.

Similar premerger notification legislation having died in the fifties, it is even less viable today. There is currently no "merger problem," and the FTC is now operating an active premerger notification program.

Hence, no reason exists for now exhuming this legislative corpse.

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[9] Hearings, pt. 1 at 71–72.
[10] Hearings, pt. 1, at 96.
[11] Hearings, pt. 1, at 97.

D. SINCE THE SO-CALLED "MERGER PROBLEM" IS A MYTH, AND THE GOVERNMENT ALREADY HAS ADEQUATE POWERS TO PREVENT ANTICOMPETITIVE MERGERS, TITLE V IS A DEADLY CURE FOR AN IMAGINARY DISEASE

Above and beyond its total lack of support and justification, title V's specious antitrust "improvement" contradicts fundamental antitrust principles favoring fluid resource mobility in free and competitive markets.

The basic premise of antitrust is the removal of artificial barriers to the free, natural play of market forces in the allocation of economic resources. By contrast, title V would block the free market in capital allocation—the buying and selling of businesses—by authorizing the Government to stop all acquisitions by fiat, irrespective of their competitive impact.

Especially today, a free market for the transfer of business is vital for the essential formation and availability of capital for the economy over the next decade. Key to such capital availability is the promotion of incentives for new investment, and the most productive channeling of existing capital resources. A major incentive for an entrepreneur to enter the competitive arena, and develop a new business, is the prospective ability to sell it some day if it succeeds. Even unsuccessful businesses need some outlet, short of bankruptcy liquidation, to make room for healthy new competitors. And diversified companies must be able to sell off operations that turn out not to fit their overall requirements. Also, corporate takeovers permit inefficient managements to be ousted, by a new group taking control through a tender offer.

These essential economic processes result in the conservation of capital resources, and facilitate their most efficient allocation.

Such normal, healthy methods whereby capital flows freely to its most productive uses reflect sound economic and antitrust principles—recognized by Assistant Attorney General Kauper's testimony:

> Many mergers are pro-competitive, or promote efficiencies. Many more are economically or competitively neutral.[12]

As to tender offers, which allow challenge to entrenched inefficient managements, he testified:

> There is no inherent reason to suspect such offers, which are in and of themselves purely neutral facts. They may be pro-competitive in some circumstances.[13]

To like effect, Chairman Engman, of the FTC, noted:

> I think we all recognize that there may be instances in which mergers are economically desirable. The merger law quite properly puts the burden on the Government to challenge by court or administrative proceedings those mergers which appear to threaten competition.[14]

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[12] Hearings, pt. 1, at 99.
[13] Hearings, pt. 1, at 97.
[14] Hearings, pt. 1, at 71.

And Prof. Milton Handler emphasized:

> What is wrong is to endow governmental officials with virtually unlimited discretion to halt or delay a proposed merger to the point that it is aborted by the mere passage of time without regard to the merits. We must bear in mind that mergers are neither all good nor all bad. Some enrich, fortify, and enhance the vigor of competition; others devitalize competition or create industrial structures inimical to the maintenance of effective competition. The lawfulness of an acquisition depends on the facts of each case.

But title V's provisions would cripple this normal and healthy process. A transaction could be aborted by Government fiat even though a court might ultimately have found it perfectly lawful. Neither purchasers nor sellers would have any assurance that the deal they had made would be allowed to go through. The mere existence of this lethal power would have a chilling effect on all business mergers and acquisitions, regardless of size.

Business firms would have to go, hat in hand, to Government agents in advance of any such transaction—*even a perfectly lawful one*—to plead that it should not be strangled at birth, with no hope of any independent judicial review.

Indirectly, therefore, title V would vest in the Justice Department and the FTC an unjustifiable and destructive regulatory authority and veto over the process of capital allocation.

Understandably, Secretary of the Treasury Simon, for the administration, advised the committee on March 13, 1976:

> In our view, any premerger stay provision would discourage healthy, efficient, competitive change in ownership of businesses in response to economic conditions, and promote inefficient allocation of capital resources. A premerger stay provision would give the Government the power to hold up proposed mergers for extensive periods of time without having to make any showing in court that it has a meritorious case. When coupled with the proposed premerger notification requirement of S. 1284, even a 60-day premerger stay provision would allow the Government to hold up a merger for over 135 days without effective judicial review. The mere existence of this discretionary power in the antitrust enforcers could significantly deter lawful mergers to the detriment of the economy. More importantly, by exercising this discretionary power, the Government could prevent—not merely delay—proposed mergers since the economic reasons for such transactions could well pass during the period of delay. (Attached hereto as appendix 7.)

Even the Assistant Attorney General for Antitrust acknowledged that title V's automatic stay feature would "operate as a severe disincentive to mergers generally,"[15] however neutral or beneficial. Ad-

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[15] Hearings, pt. 1, at 99.

dition of the illusory defenses in section 7A(d) are largely cosmetic, and perpetuate rather than eliminate this harmful "disincentive."

Above all, such a chilling and destructive "disincentive" to acquisitions cannot be rationalized by any credible current so-called merger problem. There is *no evidence* to support the majority report's contention that "the pace of merger activity has greatly accelerated since the Celler-Kefauver amendments."

All reliable published sources confirm a general decline in merger activity in recent years.[16]

Similarly, with respect to manufacturing and mining industries, the FTC's 1975 Statistical Report on Mergers and Acquisitions (at p. 112) shows that acquired manufacturing and mining firms with assets of $10 million or more declined by over three-fourths between 1968 and 1973 (even without allowing for the huge intervening inflation), and continued to decline:[17]

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[16] Thus, statistics compiled by W. T. Grimm & Co., of Chicago, a leading merger broker which regularly publishes compiled statistics on announced mergers, show that the number of merger announcements *in 1975 was the lowest in 10 years*, roughly only a third of the number in 1969:

Number of merger announcements

Year:		Year:	
1966	2,377	1971	4,608
1967	2,975	1972	4,801
1968	4,462	1973	4,040
1969	6,107	1974	2,861
1970	5,152	1975	2,297

See hearings, pt. 1, at p. 194.

[17] See table below:

Year	Number of acquisitions	Assets [1] (millions)
1948	4	$63.2
1949	6	89.0
1950	5	186.3
1951	9	201.5
1952	16	373.8
1953	23	779.1
1954	37	1,444.5
1955	67	2,168.9
1956	53	1,882.0
1957	47	1,202.3
1958	42	1,070.6
1959	49	1,432.0
1960	51	1,535.1
1961	46	2,003.0
1962	65	2,241.9
1963	54	2,535.8
1964	73	2,302.9
1965	62	3,232.3
1966	75	3,310.7
1967	138	8,258.5
1968	173	12,554.2
1969	136	10,996.2
1970	90	5,876.0
1971	58	2,443.4
1972	58	1,860.3
1973	64	3,148.8
1974 [2]	62	4,471.3

[1] Acquired firms with assets of $10,000,000 or more.
[2] Figures for 1974 are preliminary.

Note: Not included in above tabulation are companies for which data were not publicly available. There were 346 such companies with assets of $8,161,200,000 for period 1948–74.

Source: Bureau of Economics, Federal Trade Commission.

Likewise, the FTC's 1975 Statistical Report (at p. 122) shows that assets acquired in such acquisition amounted to only 10 percent of new investment in 1974, as against 45 percent in 1968.[18]

Also, a recent trend in acquisitions may be toward *deconcentration*, since increasingly they reflect *divestitures* of *parts of* businesses. Thus. according to W. T. Grimm figures, in the first quarter of 1976, 65 percent of announced mergers were fractional—that is, only part of a company bought or sold—as against 52 percent in the first quarter of 1975, 39 percent in the year 1973 and 11 percent in 1967. New York Times, April 7, 1976, page 58; Wall Street Journal, April 28, 1976, pages 1, 26.

In short, to justify title V, the majority must conjure up a nonexistent "merger problem." The assertion that the alleged "concentrated structure of American industry * * * in major part stems from mergers and acquisitions" is not only unsupported by the record, but is contrary to fact. The sole record basis for any asserted "merger problem" is stale, superannuated data from the unique merger wave of the late 1960's, an era of financial "frenzy" unlikely to recur in the near future.[19]

[18] See table below:

[Dollar amounts in billions]

Year	New investment [1]	Acquired assets [2]	Acquired assets as percent of new investment
1948	$9.94	$0.114	1.1
1949	8.00	.089	1.1
1950	8.23	.186	2.3
1951	11.82	.202	1.7
1952	12.66	.385	3.0
1953	13.11	.795	6.1
1954	12.52	1.479	11.8
1955	13.20	2.231	16.9
1956	17.04	2.111	12.4
1957	18.20	1.428	7.8
1958	13.81	1.173	8.5
1959	14.13	1.724	12.2
1960	16.39	1.734	10.6
1961	15.62	2.211	14.2
1962	16.46	2.641	16.0
1963	17.49	3.107	17.8
1964	20.68	2.536	12.3
1965	24.90	3.617	14.5
1966	29.82	3.832	12.9
1967	30.16	8.891	29.5
1968	30.00	13.480	44.9
1969	33.54	11.618	34.6
1970	33.84	6.475	19.1
1971	32.15	2.851	8.9
1972	33.77	2.356	7.0
1973	40.75	3.515	8.6
1974 [3]	48.90	5.016	10.3

[1] Total expenditures for new plant and equipment by manufacturing and mining firms.
[2] Acquired firms with assets of $10,000,000 or more.
[3] Figures for 1974 are preliminary.

Source: "Economic Report of the President," February 1974, p. 296 and Bureau of Economics, Federal Trape Commission.

[19] The "strong fundamental factors" operating against such a recurrence include:

"For one thing, many companies that might tempt raiders have learned better defensive tactics. Acquisitors, who have often been burned, have grown more careful today about what companies they buy and the price they pay. Tightened accounting rules make it more difficult and less attractive than it used to be to consummate acquisitions. And the Government has raised new obstacles to many mergers. Partly to discourage secret preparations for corporate raids, Congress imposed more stringent disclosure requirements. Now the owner of as little as 5 percent of a company must publicly identify himself and state his inten-

(Continued)

In the face of data reflecting the current picture, it is not surprising that the majority report is forced to rely on figures dating back to the administration of Calvin Coolidge to bolster its case.

Aside from the false "merger problem" myth underlying title V, the Government *already* has ample power to protect the public interest against anticompetitive mergers.

Since 1969 an FTC program has required premerger notification of proposed mergers involving large companies.[20] As testified by Chairman Engman, present FTC notification requirements effectively cover significant transactions, without overwhelming the FTC with trivia.[21]

First, the FTC as well as the Justice Department may now obtain preliminary injunctions to halt competitive acquisitions. The Alaskan Pipeline Authorization Act, 15 U.S.C. section 53(b), effective November 16, 1973, gave the Federal Trade Commission new authority to obtain preliminary injunctions against alleged violations of the antitrust laws—including any allegedly unlawful proposed merger or acquisition. The Justice Department has long had the power under section 15 of the Clayton Act to sue to "prevent and restrain violations" of section 7, and pending determination of the case, "[t]he court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." [22]

Also, both enforcement agencies can seek a temporary restraining order prior to hearing on a request for preliminary injunction. Under the Federal Rules of Civil Procedure, such an order can be issued *ex parte*—on a proper showing by the Government—for 10 days, extendable for another 10 days for good cause (and extendable indefinitely if the defendant consents).

To be sure, the Government has not always been as successful as it would like to be in securing such preliminary relief. Maybe it would do better if its cases were more meritorious.

Second, the Government may surely improve its success record now that the recent amendments to the Expediting Act permit the Government to appeal the trial court's disposition of motions for preliminary

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tions. The Federal Trade Commission now requires advance notice of all acquisitions of companies with sales above $10 million by companies with sales of more than $250 million. And the Justice Department has adopted a tougher antitrust line toward conglomerate mergers.

"History provides a further basis for reasoning that another big surge of mergers is not imminent. Merger movements of dramatic intensity have occurred only three times since the 1890's, at intervals of 30 or 40 years. The phenomenon is infrequent, some economists content, because it requires a rare conjuncture of events. Appropriately, those three merger waves all show a consistent pattern. Each began with a moderate but persistent rise in the number of mergers as a new type of enterprise, with an economic reason for consolidation, came along. Each reached a peak in the midst of a bull market that offered unusual opportunities to issue new securities. And the period of hyperactivity lasted only a year or two, after which the number of mergers dropped to more normal levels." L. Berman, "What We Learned From the Great Merger Frenzy," 87 *Fortune* 70, 72–73 (1973).

As the most recent and detailed economic study of the merger activity of the 1960's concludes:

"That the merger explosion of 1966–68 caused an atmosphere of crisis is hardly surprising when one looks at the statistics available in 1968 * * *. *But whether or not the worst anticipations were ever justified, they are no longer. This is shown not only by the merger statistics of the period 1968–72, but by virtually every recent study. Not only has the merger rate returned to prewave levels, the effects of the completed mergers on concentration and on competition proved to have been much less than was feared and less than might reasonably have been expected. P. Steiner Mergers: Motives, Effects. Policies* (1975) at 320–21. [Emphasis added.]

[20] The program was initiated by a resolution dated Apr. 8, 1969, and continued and implemented by resolutions in 1972, 1973, and 1974. For texts of the Aug. 15, 1974, resolution, current public notices, and special report forms, see 1 Trade Reg. Rep. ¶ 4540.

[21] Hearings, pt. 1, at 71–72.

[22] 15 U.S.C. § 25.

injunction. Prior to these amendments, the district court's disposition of the Government's request for a preliminary injunction *could not be appealed*, exerting a cautionary influence on a district court contemplating an unappealable preliminary injunction which would effectively kill the transaction. The natural tendency would be to deny such a lethal request, giving the defendant his day in court and permitting the Government to prove its case on the merits. Such denials of preliminary injunctions were *not appealable.*

But the 1974 Expediting Act amendments (15 U.S.C. sections 28–29) now allow interlocutory appeals of orders granting, continuing, modifying, refusing or dissolving injunctions in antitrust cases.

The Justice Department deemed this 1974 Expediting Act amendment a powerful addition to its antimerger arsenal:

> We strongly believe in the desirability of appellate review of district court orders granting, modifying, or denying preliminary injunctions.
>
> Such review is generally limited to the outset of a case and would not cause undue delay or disruption. The district court's discretion on injunctions can be reviewed, in substantial part, separately from a determination of the ultimate merits of the case and court of appeals review is not therefore, inconsistent with subsequent direct Supreme Court review of the final judgment in the event of certification. Moreover, the immediate impact of injunctive orders, whether the injunction is granted or denied, calls for appellate review as a matter of fairness. *The public interest that possibly unlawful mergers not be consummated until their validity is adjudicated, in addition to the obvious desire of private business to avoid a costly and complicated unscrambling, would, in our view, benefit from making the provisions of section 1292(a)(1), title 28 of the United States Code, available in Expediting Act cases.*[23]

In view of this 1974 Expediting Act Amendment, it is specious now to claim that, if pressed for time, the court's normal reaction would be to deny the Government's request and try the case on the merits. Rather, the court's normal reaction now would more likely be to preserve the status quo *by grant* of the preliminary injunction, knowing that the defendant can promptly appeal the matter to the court of appeals. Even if the injunction were denied, the Government has an immediate right of appeal which it has never had before.[24]

Experience with this 1974 amendment will doubtless reveal enhanced Government ability to obtain preliminary injunctions in merger cases. The courts of appeals will develop criteria for appropriate disposition of requests for preliminary injunctions against mergers.

No reason exists, therefore, to legislate title V's radical provisions without permitting these new procedures to prove out in practice.

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[23] Letter of July 14, 1969, from Attorney General Mitchell to the Congress, reaffirmed in testimony of Assistant Attorney General Kauper at hearings on S. 782 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 93d Cong., 1st sess. (1973), at 41–42, 96 (emphasis added).

[24] Nor is there any reason why a written opinion of the District Court should be necessary in these cases, any more than in any other type case. Majority report, p. 74.

Moreover, existing Government antimerger weapons provide safeguards of fairness and due process, The Alaskan Pipeline Act provides express standards to guide the court's discretion: the FTC can obtain the injunction "upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest.[25] And a leading commentary has analyzed the current showing required for Justice Department to secure preliminary relief:

> The courts have looked generally to traditional equitable principles in ruling or motions for such injunctions. While other considerations sometimes influence the granting or denial of preliminary relief, the most important factor considered in deciding such questions is whether the facts indicate the probability that a violation of section 7 will be established at a full hearing on the merits.[26]

In sum, there has been *no* showing that these existing antimerger powers are inadequate to guard against anticompetitive acquisitions.

From the perspective of a lifetime's study of the antitrust laws, Prof. Milton Handler demolished this notion:

> After all, the Government can institute suit, as it usually does, after the merger takes place. To suggest that the courts are powerless to decree effective relief if the acquisition is found unlawful after trial is to ignore 25 years of experience in the administration of the Celler-Kefauver Act. If there were time, I could satisfactorily explain the instances referred to by Senator Hart in the memorandum accompanying his amendments to title V. If the committee took the time to examine the facts in those cases it would conclude that no court would have granted a preliminary injunction in any of them at the time they were litigated.

It was in light of such considerations that Secretary of the Treasury Simon on March 13, 1976, advised the committee on behalf of the administration:

> The administration does not support enactment of any premerger stay provision. We believe that existing procedures for staying proposed mergers challenged by the Government, together with S. 1284's provision for premerger notification, are adequate. Furthermore, we believe that enactment of any premerger stay provision would produce adverse effects on the economy that would outweigh the benefits of any possible improvement in antitrust enforcement.
>
> * * * The Government considered various formulations of a premerger stay provision in an effort to arrive at a suitable time period beyond which the stay could not be extended unless the Government demonstrated to the court that it had a meritorious case. However, we concluded that any time limit short enough to avoid unduly delaying or deterring mergers would not add significantly to the Government's

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[25] 15 U.S.C. § 53(b).

[26] Section of Antitrust Law of the American Bar Association, Antitrust Law Developments 95 (1975).

arsenal in challenging their legality. (Attached here to as appendix 7.)

On the basis of the committee record and sound public policy, therefore, we are convinced that title V is contrary to the public interest and should not pass.

Miscellaneous Amendments (Title III)

Lacking any justification or showing of need, title III is an ill-conceived mish-mash of unrelated amendments which unwisely expose local business transactions to Federal antitrust sanctions, inflict shocking new antitrust forfeitures, change court procedures in disregard of the judiciary's views, and authorize more antitrust lawyers' fees

In a radical departure from traditional legislative practice in enacting important statutory changes, title III contains provisions which lack any reasoned consideration or analysis of their implications on antitrust enforcement, or any demonstration of necessity.[1]

A. Extension of the Clayton Act to local transactions is unjustified and unnecessary, and the ill-conceived Sherman Act amendments would create shocking forfeitures

In effect, section 301 would extend the Clayton Act's coverage of pricing, exclusive arrangements, and mergers into basically local transactions, and overrule the contrary Supreme Court decisions.[2]

According to the ABA analysis, section 301's effect "would be to transfer to the Federal courts—already heavily overburdened—a large number of local disputes that more appropriately belong in the State courts."

Especially objectionable is such extension of the Robinson-Patman Act's obscure provisions into local pricing disputes, which overrides the Justice Department's strongly expressed opposition:

> Robinson-Patman in its present form is anticompetitive and clearly new legal rights based on Robinson-Patman should be and are strongly opposed by this administration. This rationale would also, of course, apply to the proposed expansion of jurisdiction of the Robinson-Patman provisions of the Clayton Act in section [301] which the administration opposes.[3]

Since many States are now undertaking vigorous antitrust enforcement programs, with the active support of the Federal antitrust agen-

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[1] An American Bar Association resolution "expressed its profound concern over the apparent departure from established legislative procedures," especially in this title, whose "conglomeration of substantive and procedural changes to the antitrust laws" included provisions which "had not been the subject of full legislative hearings or any meaningful analysis as to their potential consequences upon the free enterprise system," and which had been "offered for serious legislative consideration despite the absence of any showing of compelling need which would justify such significant changes." (Report and resolution, approved by American Bar Association Board of Governors, Oct. 16–17, 1975; hearings, pt. 3, at p. [?].

[2] *United States* v. *American Maintenance Industries,* 422 U.S. 271 (1965); *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186 (1974).

[3] Such expansion was also opposed by the U.S. Chamber of Commerce, Hearings, pt. 1, at 199, the New York State Bar Association, hearings, pt. 2, at 535, and by Professor Handler, Hearings, pt. 3 at 133.

cies, we deem it unwise to inject the Federal antitrust laws, busy Federal antitrust agencies, zealous private antitrust plaintiffs, and the overburdened Federal judiciary into local business activities best dealt with by State enforcement authorities.

The committee's cavalier and hasty approval of title III's ill-considered provisions and disregard of the hearing record is exemplified by section 301(c)'s shocking new forfeitures.

Without a trace of explanation, justification, support, or the most minimal attention to its "sleeper" implications, section 301(c) would revive the deadletter section 6 of the Sherman Act, apparently never enforced since 1890, with a throwaway amendment of frightful consequences. As explained by Professor Handler's careful analysis of this clause,

> The essence of this amendment is that every piece of property embraced by any unlawful contract, combination, or conspiracy is to be forfeited to the Government. Such condemnation is mandatory and not discretionary with the courts. This means, for example, where a merger is challenged under the Sherman Act, the properties of buyer and seller are forfeited if the acquisition is declared unlawful. In price-fixing cases, the products whose prices are conspiratorially rigged, be they electrical equipment, plumbing fixtures, steel, sugar or other commodities, become the property of the United States after judgment of illegality is entered. In a case such as *United Shoe Machinery* all machines subject to the unlawful leases would likewise be forfeited. I could go on ad infinitum.
>
> I can only ask whether the members of this committee seriously intend to impose so Draconian a penalty on American business whenever the Sherman Act is infringed. Has the committee given consideration to the fact that in cases involving the same degree of culpability, one defendant may have $100,000 of property condemned where another would be faced with forfeiture of billions of dollars?" (Hearings, pt. 3 at 140–141.)

Although the absurdity of such bizarre antitrust forfeitures is apparent in our record, and no justification for this incredible change appears even in the majority report, the committee nevertheless recommends Senate enactment of this incredible provision.

Surely the Senate must decide otherwise.

B. NO JUSTIFICATION EXISTS FOR LEGISLATIVE REORDERING OF COURT PRIORITIES AND PROCEDURES, WITHOUT THE JUDICIARY'S ADVICE AND WITHOUT PROVIDING REQUIRED APPROPRIATIONS

Without the advice of the judiciary, section 302 would authorize courts to designate any antitrust lawsuit, Government or private, as a "complex" antitrust case, entitled to court expedition and priority treatment. Likewise, without providing the necessary appropriations, section 302 would authorize the courts' appointment of "special masters, economic experts, and other personnel", for this purpose.

Indeed, the Judicial Conference of the United States on April 7, 1976 endorsed a staff report which reported "a dramatic increase" in civil antitrust cases filed in the overburdened Federal court system. Specifically, with respect to S. 1284's foregoing provisions, the report commented that "the act fails to adequately explain the source of funds for these persons," and noted that "the courts are not provided the necessary contracting authority * * *; also there are no available funds from which to make payments to these persons."

The Justice Department has deemed this provision "unnecessary," and the American Bar Association statement characterized section 302 (b) as "legally and ethically unsound," since "authorizing trial use of such personnel as both witnesses and assistant judges raises disturbing ethical and legal, let alone constitutional, questions."

On the basis of this record, lacking any support or necessity, section 302 surely does not deserve enactment.

C. THE PROVISION TO COMPEL INFORMATION PROTECTED BY FOREIGN LAWS WAS UNIVERSALLY OPPOSED BEFORE THE COMMITTEE, BY THE JUSTICE DEPARTMENT, BY THE STATE DEPARTMENT, BY THE AMERICAN BAR ASSOCIATION AND OTHERS

Section 303's provision to compel production of evidence protected by foreign laws lacks any showing of need or consideration of its potentially far-reaching implications in this record.

It was opposed by the Justice Department as redundant and rife with international conflict and complications. (Hearings, pt. 1 at 102–103.) The State Department "strongly urged" its deletion because of "undersirable implications abroad." Appendix 11. It was criticized by the FTC as "subject to substantial abuse" and potentially "detrimental to competition." (Hearings, pt. 1 at 72.) It was denounced by the New York State Bar Association as "a knee-jerk reaction to foreign statutes which prohibit disclosure of information or documents. If there is a quarrel with the foreign law, the appropriate course to effectuate change is through discussion at the political or enforcement levels." (Hearings, pt. 2, at 530.)

In the absence of any record support or showing of need for such a controversial provision, its adoption by the Senate would be most unwise.

D. PROVISION OF MANDATORY LEGAL FEES IN PRIVATE INJUNCTION ACTIONS CAN ONLY FOMENT MORE ANTITRUST LITIGATION

With no justification of need in the record, section 304's authorization of attorneys' fees to prevailing parties obtaining injunctive relief in private antitrust litigation is unworthy of enactment.

Although Congress in 1914 authorized the award of treble damages and attorneys' fees to parties "injured" by antitrust violations, as an incentive and redress by deserving parties, no further bounty is needed in 1976. With Federal court dockets groaning under the burdens of proliferating private antitrust treble damage litigation, as attested by the Judicial Conference of the United States, any additional incentives to encourage more private antitrust litigation are unwarranted in the absence of any compelling need.

Although the American Bar Association would allow "discretionary" fee awards in such cases, there is no record support for the enactment of the *mandatory* fee awards of section 304.

We oppose it as another unneeded incentive to foment more private antitrust litigation.

Declaration of Policy (Title I)

The declaration of policy underlying S. 1284's substantive titles is based on myths and misconceptions about concentration, which expose the faulty foundation upon which the entire edifice is built

Title I's declaration of legislative objectives and findings is the basis for the four substantive titles: title II (Antitrust Civil Process Act amendments), title III (miscellaneous amendments), title IV (*parens patriae* amendments), and title V (premerger notification and stay amendments).

Title I is unsupported and refuted by the record upon which these proposals rest, and thus S. 1284 in its entirety is built on a defective legal foundation.

In order to justify S. 1284's revolutionary revision of antitrust concepts which have served the Nation well over many decades, section 102(b)(3) asserts that the "Congress finds and declares" that "increased concentration" is an important factor for "the high rates of inflation and unemployment."

In fact, there is *no* record basis for any "findings" causally correlating so-called "concentration" with inflation or unemployment. On the contrary, such unsubstantiated assertions reflect theoretical speculations of "structuralist" economists, contradicted by other economists and refuted in our record.

According to uncontroverted record studies, there is:

(1) "No significant correlation between industrial concentration and price changes";

(2) "No relationship between concentration and either wage levels or price levels or changes in wage levels or changes in price levels over time"; and

(3) "Between 1967 and August 1974, the average price increase of the less concentrated industries was substantially higher than that of the more concentrated industries." (Hearings, pt. 2 at 675–678.[1])

A study submitted by the U.S. Chamber of Commerce refuted that S. 1284 "can contribute significantly to reducing prices, unemployment and inflation." (Hearings, pt. 1 at 171.) The American Bar Association's statement conclusively documented the lack of support for title I's purported findings blaming "concentration" for inflation or

[1] Conclusions based upon studies by staff of Antitrust Division, headed by Dr. Leonard Weiss, then Special Economic Assistant to the Antitrust Division Chief; Prof. Fred Weston and S. H. Lustgarten; and Dr. Jerome Cohen.

unemployment.[2] The ABA statement also cited studies which relate any correlation between "concentration" and profitability to greater efficiencies by relatively larger firms in concentrated industries.[3]

At his confirmation hearings, Attorney General Levi, an experienced and respected antitrust scholar, commented that it was "quite possible that high economic concentration in certain industries has actually kept prices down."

Moreover, the majority's claim that concentration has "rapidly increased" is flatly untrue.

Actually, recent FTC data confirm a *decline* in aggregate asset concentration among the largest U.S. manufacturing firms since 1968. Thus, between 1968 and 1973 the share of the top 100 declined from 49.2 percent to 47.6 percent (actually 44.7 percent excluding non-U.S. assets), and of the top 200 from 60.8 percent to 60.3 percent (actually 56.9 percent).*

A March 1976 Conference Board study, based on census data published in 1975,[4] reports

> Since 1963, the share of value added by the 50 largest manufacturing companies *has not changed*;
>
> Since 1963, there has been *no change* in the value added share of the 100 largest manufacturing companies; and
>
> Such increases by the largest 200 manufacturing companies occurred mostly between 1947 and 1954.

Overall, this 1976 study concludes that

> The concentration figures would have to be stood on their heads—or revolved through 180 degrees—to generate findings that concentration, in general, is increasing.

The study aptly observed that

> Fear of bigness, fear of concentration, fear of economic power in a few hands—these represent a threatening triad to those who believe that the economy is moving toward a one-company, or a few-company, system. But the facts, although based on all-purpose rather than specialized data, suggest that the fears are nightmares conjured up through ignorance and the opacity of the voluminous numbers designed to measure various facets of concentration in a complex economy.

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* See Penn, Aggregate Concentration: A Statistical Note, XXI Antitrust Bulletin 91. 93 (1976).

[2] Hearings, pt. 3 at 45. The ABA cited a study for the Council on Wage and Price Stability concluding: "For most of the past 20 years average BLS wholesale prices in the concentrated industries have risen less rapidly than prices in the unconcentrated industries." R. E. Beals, "Concentrated Industries, Administered Prices, and Inflation: A Survey of Recent Empirical Research," 1–11 (June 17, 1975), corroborating J. F. Weston and S. H. Lustgarten, "Concentration and Wage-Price Changes," printed in "Industrial Concentration: The New Learning" at 330 ("there is no relationship between concentration and either wage levels or price levels or changes in wage levels or changes in price levels over time"). See also S. H. Lustgarten, "Industrial Concentration and Inflation" (American Enterprise Institute 1974); statement by Dean Lowell C. Smith in hearings on S. 1167 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 93d Cong., 1st sess. (Mar. 27, 1973).

[3] H. Demsetz, "The Market Concentration Doctrine: An Examination of Evidence and a Discussion of Policy" (AEI-Hoover Policy Studies 1973); H. Demsetz, "Industry Structure, Market Rivalry, and Public Policy," 16 J.L. Econ. 1 (1973); H. Demsetz, "Two Systems of Belief About Monopoly," printed in *Industrial Concentration, supra.*

[4] Conference Board *Record*, vol. XIII, No. 3, March 1976.

While a legislative proposal's declaration of policy should be factually supported and uncontroversial as a basis for important statutory change, S. 1284's entire legislative edifice rests on a shoddy foundation which supplants fact with fiat and subordinates evidence to myth.[5]

Conclusion

The so-called Hart/Scott Antitrust Improvements Act of 1976 is unneeded, unjustified, unworthy, and unconstitutional in critical respects.

A mish-mash of unrelated and disconnected provisions, S. 1284's common denominator is an unreasoned bias toward business firms, large and small.

It inflicts extreme and unfair impositions by the enforcement agencies, which are unnecessary for effective antitrust enforcement.

It creates huge financial liabilities for business firms, at the hands of ambitious State officials and of private attorneys with large incentives to foment litigation to extort lucrative settlements benefiting themselves rather than the ostensibly benefited consumers.

In the end, as in the medical malpractice mess, the public will pay, in the form of higher prices charged by business firms to defray large settlements, costly antitrust litigation, and the unjust enrichment of the lawyers.

Hence, S. 1284's "improvements" would *not* come for effective antitrust enforcement or for the public interest. Most of the "improvements" will come for lawyers celebrating the Hart/Scott Antitrust Improvements Act of 1976 as "the great Bicentennial money machine for antitrust entrepreneurs."

At a time of "crisis" in the Federal court system, and in an era of cynicism about our Nation's basic principles and institutions,[1] it ill behooves the Senate to enact this lawyers' unjust enrichment bill in the guise of "antitrust improvements."

In sum, the Senate should *not* approve this hodge-podge of so-called antitrust improvements in the final weeks of the 94th Congress, in the political atmosphere of an election year.

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[5] These myths, embellished with a spurious assertion of $80 billion of monopolistic overcharges, underlie title IV's *parens patriae* provisions, and title V's premerger stay. The majority report baldly asserts that "concentration in the American economy has rapidly increased and monopoly power exists in many industries—200 corporations now control two-thirds of all manufacturing assets in the United States" (p. 63).

In fact, 1975 census data show no increase in concentration, by value added, among the 50 and 100 largest manufacturing companies between 1963 and 1972, and, as to the largest 200 companies, show that their share grew only 2 percent, from 41 to 43 percent, between 1963 and 1972. See Conference Board Study, table 1, p. 19.

Likewise, specious is the majority's recitation of monopoly exactions of "as much as $80 billion in terms of 1973 GNP" (p. 10).

This unsupported $80 billion assertion was thoroughly discredited by the U.S. Chamber of Commerce statement:

"It began with F. M. Scherer, now Chief Economist at the Federal Trade Commission, who wrote in a book a few years back that ineffective competition costs 6.2 percent of the gross national product. Applying 6.2 percent to the 1973 GNP, Mr. Kauper next came up with $80 billion. In October of last year, however, Dr. Scherer admitted in an article published in *Barron's*, National Business and Financial Weekly, that he 'threw scholarly caution to the wind' in reaching the original figure." (Hearings, pt. 1 at 171.)

[1] See Chief Justice Burger's Annual Report on the State of the Judiciary, 62 A.B.A.J. 443, 445 (1976); Proceedings of National Conference on Administration of Justice, 44 U.S.L. Week 2487 (Apr. 20, 1976) (Chief Justice Burger, Solicitor General Bork, and Mr. Kirkham).

Instead, as proposed by eminent and objective antitrust authorities. the President should charter a commission to undertake a serious and thoughtful study of the effectiveness of *all* antitrust remedies, criminal and civil, public and private.

Mobilizing the experience and unbiased views of the best experts in the judiciary and in the public as well as the private sector, such a study commission should develop sound proposals worthy of the high purpose of strong but fair antitrust enforcement in a free society and deserving of speedy consideration by the next Congress.

James O. Eastland,
John L. McClellan,
Roman L. Hruska,
Strom Thurmond,
William L. Scott.

Appendix 1

THE WHITE HOUSE,
Washington, March 17, 1976.

Hon. JOHN J. RHODES,
Minority Leader, House of Representatives,
Washington, D.C.

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

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

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

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

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

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

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

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

Sincerely,

GERALD R. FORD.

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 94-499

ANTITRUST PARENS PATRIAE ACT

*   *   *   *   *   *   *

MINORITY VIEWS OF MESSRS. HUTCHINSON, RAILSBACK, WIGGINS, MOORHEAD, ASHBROOK, HYDE AND KINDNESS

In the name of providing a legal remedy to those who, as a practical matter, have none, this bill charges far beyond the mark to impose a mandatory irreductible fine on violators of the antitrust laws. Although this remedy is deemed civil, it partakes of both civil and criminal aspects. In doing so, the remedy fails to meet ordinary standards for civil or criminal remedies. As a civil remedy, the damages paid generally will not be paid to compensate victims for their losses. As a criminal remedy, the damages paid will be a mandatory fine, often astronomical, but irreducible, without regard for the interests of justice in the specific case. In our opinion, this legislative remedy presents the worst of both worlds.

We agree that the bill establishes no new substantive liability. No new antitrust violations are created. However, the bill does establish procedural machinery for the calculation and imposition of damage awards that undoubtedly will revolutionize the law of antitrust damages.

It will be said that all this bill does is to allow defendants' current potential liability to become realized, and that to oppose this legislation is, in effect, to oppose the promise of section 4 of the Clayton Act, now over 60 years old. But since the logic of a single idea does not take account of competing ideas, one may by mere logical extensions step over the precipice.

This bill does go too far. It is critical to note that this bill operates in an area where the claimants are often nameless, unidentified, unidentifiable, and ignorant of the trivial injury allegedly suffered and ignorant of who inflicted it. Nevertheless, the bill extracts from defendants three times the damages sustained. Why? Because, it is suggested that's the way it's done in antitrust law.

But the purpose of treble-damage awards in antitrust law as we understand it is to compensate victims for their injury and to provide the incentive for bringing the action. But in the typical case envisioned by this bill—for example, one involving price-fixing bread—there is no incentive to bring the case even though treble damages are obtainable and there generally are no provably known victims to compensate. What the treble-damage award really is in this context is punishment.

Although we believe wrongdoers should not be allowed to retain illgotten gains, this principle does not compel the imposition of treble damages. It is respectfully suggested that payments exacted from defendants which, as a general matter, will not go to compensate victims for losses and which will be put to some noble purpose at the discretion of the court may be more accurately termed "fines" then damage awards.

But the fines imposed by this bill—and this is critical—may not be imposed commensurate with the interests of justice. The committee rejected an amendment that would have permitted the court to take into consideration the "defendant's degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business and such other matters as justice may require." Although these actions may be filed on behalf of millions of unknown individuals and involve millions of dollars, the resultant award must be arbitrarily calculated and may not be reduced even if the interests of justice so require.

The imposition of minimum mandatory penalties may have its place in the law, but such penalties are established at the low end of the scale so as to be "just" in every application. Not so with these fines, which may run into millions of dollars. Moreover, such penalties envision a range of choices from which the court, in the interests of justice, might fashion an appropriate penalty. But this bill goes far beyond that. Under this bill once the extent of the injury is shown, the imposition of the fine, both in fact and in amount, is automatic.

It is argued that it is of no concern to the defendant to what purpose the award is put after it has paid it. The argument misses the point. It should be of concern to the Congress how necessary it is to inflict possibly astronomical awards, definitionally three times the damage done, when there is no interest among the victims in bringing the case and where there are no provably known victims or only a few able to make claim against the award.

If the purpose is not to compensate in the manner of a civil remedy, it must be to punish and deter in the manner of a criminal penalty. But as a criminal penalty, it is harsh and arbitrary. If the major part of an award is committed to the discretion of the court to be used for some related purpose, it is difficult for us to understand how the purpose, to be fashioned by the court after the case is heard, must be satisfied by an amount which is exactly three times the damage proven to have been done by the defendant.

The purpose fashioned by the court will be a public one. For example, it is suggested that in a case involving the price-fixing of drugs, it is appropriate to commit the award to support a drug clinic. But it is patently clear that the needs of the drug clinic do not define the amount of the award. Nor does the need to compensate, nor does the need to provide incentives for enforcement, as stated before.

We believe that the public interest served by the channeling of the award to some analogous purpose must also admit other factors. For example, if the award is such that it will require the defendant to liquidate assets and lay off employees from work, there may be circumstances where the economic well-being of the community should be a matter for the court to consider in determining whether the defendant should be required to pay the full amount.

The provisions of the bill treating with the aggregation and distribution of damages are the crux of this legislation. We believe they are the wrong answer to the problem. Beyond that we believe that the bill will be subject to much abuse. By calling on the State attorneys general to champion these antitrust actions, the bill seeks to provide a political incentive for antitrust enforcement in cases where even treble damage awards provide no economic incentive.

We believe that politics and antitrust will not make a happy marriage. The temptations for the politically ambitious to ride into the public eye as its champion against "fat cat" antitrust violators by filing lawsuits to the sound of political trumpets may be too great. Since antitrust cases take years to complete, the politically ambitious attorney general need not fear the embarrassment of a string of losses. In any event, many of the cases will have been undoubtedly settled because of their adverse publicity and their nuisance value. This bill underscores how quickly we have forgotten the lesson many thought we learned last year that politics and antitrust should not be mixed.

Finally, in our opinion, the committee report does not correctly describe the notice requirements of the bill. In subcommittee there was substantial debate on the quality of the notice to claimants that should be required. It was recognized that to require only publication notice would certainly streamline the lawsuit, but it was likewise conceded that such a provision without more would be susceptible to constitutional attack on due process grounds in instances where the names and addresses of the claimants were known but where mailed notice—the best notice practicable—was not given. Thus in order to insulate the bill from litigation over its procedure and to eliminate the notice issue as a matter of controversy the subcommittee adopted the proviso that the notice had to be the "best notice practicable," which the committee ratified without further debate. Although the report correctly describes where the phase is found in the Federal rules of civil procedure and in case law, other language of the report can be fairly read to give this phrase of art a new meaning. The report suggests that the tests for adequacy of notice is not whether it is "best" for the claimants to be notified but whether it is "best" for the policy of authorizing parens patriae actions against antitrust violators. Such a suggestion is foreign to the intention expressed in adopting the language explained in the report.

For these reasons we respectfully dissent.

Edward Hutchinson.
Tom Railsback.
Charles E. Wiggins.
Carlos J. Moorhead.
John M. Ashbrook.
Henry J. Hyde.
Thomas N. Kindness.

Appendix 3

SENATE JUDICIARY COMMITTEE AND HOUSE RESPONSES TO ADMINISTRATION PARENS PATRIAE OBJECTIONS

	S. 1284, parens patriae title, as reported by Senate Judiciary Committee	H. R. 8532, as passed by the House
CONCERNS EXPRESSED BY PRESIDENT FORD		
Parens patriae concept, bypassing State legislatures, is questionable.	Authorizes actions by Attorney General to recover damage sustained by natural persons by reason of antitrust violations.	Authorizes parens patriae suits by State attorney general on behalf of natural persons in State and class actions on behalf of "persons."
Reach should be narrowed to price fixing violations.	Limited to the Sherman Act (though this includes wide range of antitrust violations).	Limited to sec. 1 of Sherman Act (though these include broad range of possible antitrust violations); aggregated damages allowed only for price fixing in "willful violation of the antitrust laws."
Should provide actual damages, not mandatory treble damages.	Requires mandatory treble damages. No provision for reducing to single damages.	Requires mandatory treble damages, except aggregated damages for "willful" price fixing may be reduced to single damages, if defendant acted in "good faith."
Statistical aggregation of damages should be limited to parens patriae suits.	Statistically aggregated damages available in all class actions on behalf of natural persons under sec. 4 of Clayton Act.	Statistically aggregated damages available only in actions for "willful" price fixing, brought by State attorney general as parens patriae (or as changed from parens patriae to class action.)
Attorneys' fees awards should be discretionary, rather than mandatory.	Attorneys' fees are to be awarded at the discretion of the court, but contingent fee arrangements are permitted.	Reasonable attorneys' fees must still be awarded, though contingent fee arrangements are banned.
OTHER CONCERNS		
Parens patriae penalties should not be applied to conduct occurring before enactment.	Explicitly authorizes applying parens patriae penalties when cause of action accrues before date of enactment (except that they are not available if the alleged violation was already subject of some civil action on behalf of a class of natural persons.)	No provision authorizing application to preenactment conduct.
Relief should be strictly defined......	Provides for "other relief as is just in the circumstances" in addition to mandatory treble damages and reasonable attorneys' fees and "other expenses" of litigation.	No provision comparable to "other relief" and "other expenses."
Prevailing defendants should be able to recover attorneys' fees, costs and expenses.	Court is authorized to award only reasonable attorneys' fees, not other costs or expenses, to defendant if action is frivolous, or attorney general acted in bad faith, vexatiously, wantonly, or for oppressive reasons.	Same as S. 1284.

Appendix 4

Supreme Court of the United States,
Washington, D.C., February 9, 1976.

Hon. Roman L. Hruska,
U.S. Senate,
Washington, D.C.

Dear Senator Hruska: I have your letter of February 2. The Judicial Conference will meet April 7 and we will present the above matter and your letter at that time.

Cordially,

Warren E. Burger.

APPENDIX 5

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., April 14, 1976.

Hon. ROMAN L. HRUSKA,
Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HRUSKA: This is in further reference to your letter to the Chief Justice requesting the views of the Judicial Conference on S. 1284, a bill relating to the antitrust laws. At its April 7, 1976 session the Judicial Conference considered the provisions of S. 1284 and was in agreement that the basic questions involved are policy matters for the determination of the Congress. The Conference did, however, endorse a statement relating to the workload of the federal courts submitted to the staff of the committee considering this legislation, a copy of which is enclosed.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

Enclosure.

REPORT OF THE GENERAL COUNSEL OF THE ADMINISTRATIVE OFFICE TO THE COMMITTEE ON COURT ADMINISTRATION

In connection with the committee's review of S. 1284 relating to the antitrust laws, the General Counsel's Office has prepared the following statement relating to the current workload of the federal courts to which would be added the burdens imposed by S. 1284:

There has been a dramatic increase in absolute number of the civil antitrust cases filed in the federal court system; 1431 civil antitrust actions were filed in 1975, up 54 percent from 929 actions in 1970.[1] In the thirteen districts where at least thirty private antitrust actions were filed, seven show a rise in private antitrust filings between the years 1973 and 1975, ranging from 3 percent to 167 percent.[2].

While the absolute number of class action cases filed is quite small, five of those districts have seen their class action antitrust cases grow strikingly; rising in 1975 to three and four times the level filed in 1973.[3] The figures of pending private antitrust litigation are also substantial for those districts. Nine of the thirteen districts have grown sharply. Seven of those districts reflect an increase in class actions pending ranging from 50 percent to 130 percent.[4]

In evaluating the impact of further increases in private antitrust action filed in federal courts as a result of this act, cognizane must be taken of the present critical shortage of judgeships in both the district

[1] See Annual Reports of the Director for cited years.
[2] See table 3, p. 236.
[3] See table 2, p. 236.
[4] Id.

and circuit courts. In the ten years between 1965 and 1975 the total number of cases filed in appellate courts rose 146 percent, while only nineteen additional judgeships were provided (an increase of 24 percent). The number of district court cases docketed rose nearly 60 percent in the last 10 years.[5] The present shortage of judgeships is calculated at 13 circuit court judgeships and 52 district court judgeships. The estimated cost to adjust this shortage on an annual basis is $2,119,000 and $10,816,000 respectively.[6]

The treble damage and notice provisions of this Act appear certain to engender a greater volume of private antitrust litigation. The most significant measure of the ramifications of that higher volume of private antitrust cases is the fact that the median time interval involved in the disposition of a private antitrust litigation is *twice* the time expended for other civil cases.

The time factor of increased private antitrust litigation, noted above, may seriously affect the processing of criminal caseloads. It is worth noting that several of the districts which entertain most of the private antitrust filings have a higher than average criminal docket. For example, the nationwide criminal cases represent 15.8 percent of the total pending caseload, yet the Central District of California has had criminal case loads of 33 percent, 27 percent, and 31 percent respectively, in the years 1973–1975.[7] In 1975, four of the thirteen districts which have a high concentration of private antitrust litigation had above average criminal dockets. In 1973 and 1974, more than half of those districts had above average criminal case loads. In sum, the present strain on the already underplenished resources of the judicial system will be further exacerbated by a proliferation of private antitrust litigation. As a consequence, the capability of the courts to meet the mandates of the Speedy Trial Act may be decreased.

Besides the increased volume of cases, the Act poses an additional problem for the financial administration of the judiciary. Section 21(b) provides for special masters, economic experts, and other personnel to be appointed by the court to assist in complex antitrust cases. The Act fails to adequately explain the source of funds for these persons. Pursuant to Section 21(c), the compensation and expenses of such masters, experts, and other personnel are to be paid under the provisions of 28 U.S.C. § 604. Yet, the courts are not provided the necessary contracting authority by section 604; also there are no available funds from which to make payments to these persons. Taxing the fees against the parties involved in the litigation might be an appropriate resolution of this matter. That procedure is utilized to compensate experts and masters under Rule 53(a) of the *Federal Rules of Civil Procedure* and also under Rule 706(b) of the *Federal Rules of Evidence.*

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[5] See Statement of Judge Robert A. Ainsworth, U.S. Court of Appeals, Fifth Circuit, Before the Subcommittee on Monopolies, Regarding Omnibus Judgeship Hearings.

[6] See table 7, p. 237.

[7] See table 6, p. 237.

TABLE 1

DISTRICTS WITH 30 OR MORE PRIVATE ANTITRUST FILINGS IN FISCAL YEAR 1975

[Data are shown for fiscal years 1973–75]

District	Total civil filings			Private antitrust filings						Class action antitrust filings [1]		
				1973		1974		1975				
	1973	1974	1975	Number	Percent of total	Number	Percent of total	Number	Percent of total	1973	1974	1975
District of Columbia	2,811	2,003	2,029	34	1.2	63	3.1	30	1.5	7	2	4
Massachusetts	4,091	4,863	5,045	38	.9	27	.6	36	.7	----------	1	4
New York, southern	5,680	5,639	6,282	106	1.9	95	1.7	109	1.7	21	8	16
New Jersey	1,895	1,951	2,244	29	1.5	18	.9	35	1.6	5	2	5
Pennsylvania, eastern	2,890	3,173	3,539	64	2.2	53	1.7	59	1.7	8	4	8
Pennsylvania, western	1,271	1,345	1,629	20	1.6	31	2.3	32	2.0	----------	2	----------
Florida, southern	2,168	2,031	2,853	23	1.1	36	1.8	59	2.1	6	9	15
Georgia, northern	2,032	2,668	2,731	12	.6	11	.4	32	1.2	1	2	16
Illinois, northern	3,395	3,438	4,075	95	2.8	65	1.9	78	1.9	18	3	10
Minnesota	1,131	1,043	1,174	29	2.6	18	1.7	34	2.9	14	2	4
Missouri, western	1,596	1,657	1,854	39	2.4	25	1.5	33	1.8	1	2	----------
California, northern	2,322	2,647	2,751	81	3.5	76	2.9	94	3.4	7	3	24
California, central	3,118	3,420	4,282	82	2.6	78	2.3	78	1.8	6	7	2

[1] These cases are included in the private antitrust case filings.

TABLE 2

CIVIL CASES PENDING IN DISTRICT COURTS WITH 30 OR MORE PRIVATE ANTITRUST FILINGS IN 1975

[Data are shown for fiscal years 1973–75]

District	Total civil cases pending			Private antitrust cases pending						Class action antitrust cases pending [1]		
				1973		1974		1975				
	1973	1974	1975	Number	Percent of total	Number	Percent of total	Number	Percent of total	1973	1974	1975
District of Columbia	2,471	1,760	1,741	83	3.4	125	7.1	134	7.7	38	44	44
Massachusetts	6,968	8,945	10,422	90	1.3	92	1.0	93	.9	1	13	14
New York, southern	10,596	8,582	8,182	263	2.5	234	2.7	209	2.6	45	36	35
New Jersey	2,601	2,801	2,856	41	1.6	40	1.4	50	1.8	1	2	3
Pennsylvania, eastern	4,303	3,749	3,699	483	11.2	148	3.9	107	2.9	17	17	14
Pennsylvania, western	1,200	1,250	1,527	41	3.4	53	4.2	61	4.0	2	4	2
Florida, southern	943	980	1,443	26	2.8	37	3.8	64	4.4	6	11	18
Georgia, northern	1,321	1,915	2,073	24	1.8	25	1.3	37	1.8	4	4	18
Illinois, northern	2,683	2,902	3,422	151	5.6	164	5.7	157	4.6	49	62	46
Minnesota	1,101	1,216	1,439	96	8.7	99	8.1	112	7.8	32	48	48
Missouri, western	1,074	1,147	1,354	60	5.6	69	6.0	70	5.2	3	9	13
California, northern	2,878	2,840	2,857	384	13.3	274	9.6	207	7.2	8	16	36
California, central	2,720	3,196	3,692	160	5.9	141	4.4	125	3.4	11	19	13

[1] These cases are included in the private antitrust cases pending.

Table 3

PERCENT CHANGE SINCE 1973 IN PRIVATE ANTITRUST CASES FILED AND PENDING IN 13 SELECTED U.S. DISTRICT COURTS

[Percent change 1975 over 1973]

District	Private antitrust filings	Class action antitrust filings	Private antitrust pending	Class action antitrust pending
District of Columbia	−11.8	−42.8	61.4	15.8
Massachusetts	−5.3		3.3	1,300.0
New York, southern	2.8	−23.8	−20.5	−22.2
New Jersey	20.7		22.0	200.0
Pennsylvania, eastern	−7.5		−77.8	−17.6
Pennsylvania, western	60.0		48.8	
Florida, southern	156.5	150.0	146.2	200.0
Georgia, northern	166.7	1,500.0	54.2	350.0
Illinois, northern	−17.9	−11.1	4.0	−6.1
Minnesota	17.2	−28.6	16.7	50.0
Missouri, western	−15.4	300.0	16.7	333.3
California, northern	16.0	242.9	−46.1	350.0
California, central	−4.9	−66.7	−21.9	−72.7

Note: These percent changes should be viewed in conjunction with the actual number of cases involved in the comparison as shown in the 2 previous tables. While some of the percent changes are large, the absolute difference in cases is small. This is particularly true for the percents shown for class action antitrust cases.

Table 4

U.S. DISTRICT COURTS, MEDIAN TIME INTERVALS FROM FILING TO DISPOSITION IN CIVIL CASES

Fiscal year	All civil cases		Private antitrust cases	
	Total terminated [1]	Median time interval in months	Total terminated	Median time interval in months
1973	80,598	10	981	15
1974	79,101	9	1,473	23
1975	85,420	9	1,341	18

[1] Excludes land condemnation cases, prisoner petitions and deportation reviews.

Table 5

U.S. DISTRICT COURTS, CIVIL CASES FILED SHOWING PRIVATE ANTITRUST CASES AND CLASS ACTION ANTITRUST CASES

Fiscal year	Total civil filings	Total private antitrust filings		Private antitrust-class actions	
		Number	Percent of total civil filings	Number	Percent of total civil filings
1973	98,560	1,152	1.2	156	0.16
1974	103,530	1,230	1.2	113	.11
1975	117,320	1,375	1.2	189	.16

TABLE 6

CRIMINAL CASES PENDING IN DISTRICT COURTS WITH 30 OR MORE PRIVATE ANTITRUST FILINGS IN 1975

[Data are shown for fiscal years 1973-75]

District	Total criminal cases pending: 1973 Number	1973 Percent of total [1]	1974 Number	1974 Percent of total [1]	1975 Number	1975 Percent of total [1]
District of Columbia	761	23.6	362	17.1	399	18.6
Massachusetts	350	4.8	374	4.0	543	5.0
New York, southern	778	6.8	807	8.6	896	9.3
New Jersey	809	23.7	586	17.3	491	14.7
Pennsylvania, eastern	268	5.9	267	6.7	267	6.7
Pennsylvania, western	253	17.4	256	17.0	268	14.9
Florida, southern	416	30.6	429	30.5	534	27.0
Georgia, northern	332	20.1	333	14.8	322	13.4
Illinois, northern	603	18.4	577	16.6	553	13.9
Minnesota	264	19.3	187	13.3	222	13.4
Missouri, western	324	23.2	395	25.6	298	18.0
California, northern	526	15.5	391	12.1	275	8.8
California, central	1,357	33.3	1,184	27.0	1,667	31.1

[1] The average percentage of criminal actions of the total filed is 15.8 percent.

TABLE 7

Appropriation

SALARIES OF JUDGES

Salary of Judge	$42,000
Agency contributions for life insurance, health benefits, and the Judicial Survivors Annuity Fund	2,000
Total	44,000

SALARIES OF SUPPORTING PERSONNEL, THE JUDICIARY

Salaries:	
Law clerk, Grade JSP-12	19,386
Secretary, Grade JSP-10	14,824
Crier-law clerk, Grade JSP-9	13,482
Courtroom deputy, Grade JSP-11	16,255
Court reporter, ungraded	20,605
Agency contributions for retirement, life insurance, and health benefits	7,448
Total	92,000

TRAVEL AND MISCELLANEOUS EXPENSES, U.S. COURTS

Travel, Judge and staff	8,000
Library:	
Initial cost	20,000
Annual cost (second and succeeding years)	(4,000)
General office equipment	[1] 6,000
Miscellaneous expenses (communications, supplies, etc.)	6,000
Total (initial cost)	40,000
Total (annual recurring cost)	18,000

TABLE 7—Continued

SPACE AND FACILITIES, THE JUDICIARY

Rental of space and related services	$50,000

EXPENSES, U.S. COURT FACILITIES

Furniture and furnishings	[1] 16,000

SALARIES AND EXPENSES, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Salaries and expenses of clerical staff (unit cost based on a ratio of one clerical position to every four new judgeships)	4,000
Grand totals:	
Initial (first year) cost	246,000
Annual recurring cost	208,000

[1] Nonrecurring expense.

NOTE.—The creation of additional district judgeship also will result in additional petit jury costs of approximately $30,000 per annum.

Appropriation

SALARIES OF JUDGES

Salary of Judge	$44,000
Agency contributions for life insurance, health benefits, and the Judicial Survivors Annuity Fund	2,000
Total	46,000

SALARIES OF SUPPORTING PERSONNEL, THE JUDICIARY

Salaries:	
Law clerk, Grade JSP–12	19,386
Law clerk, Grade JPS–11	16,255
Secretary, Grade JSP–10	14,824
Agency contributions for retirement, life insurance, and health benefits	4,535
Total	55,000

TRAVEL AND MISCELLANEOUS EXPENSES, U.S. COURTS

Travel, Judge and staff	6,000
Library:	
Initial cost	20,000
Annual cost (second and succeeding years)	(4,000)
Printing of opinions	6,000
General office equipment	[1] 4,000
Miscellaneous expenses (communications, supplies, etc.)	6,000
Total (initial cost)	42,000
Total (annual recurring cost)	22,000

SPACE AND FACILITIES, THE JUDICIARY

Rental of space and related services	36,000

EXPENSES, U.S. COURT FACILITIES

Furniture and furnishings	[1] 12,000

SALARIES AND EXPENSES, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Salaries and expenses of clerical staff (unit cost based on a ratio of one clerical position to every four new judgeships)	$4,000
Grand Totals:	
Initial (first year) cost	195,600
Annual recurring cost	163,600

[1] Nonrecurring expense.

NOTE.—Prepared Nov. 14, 1975.

APPENDIX 6

MEMORANDUM ON CERTAIN CONSTITUTIONAL QUESTIONS ARISING WITH RESPECT TO "FLUID RECOVERY" PROVISIONS OF TITLE IV OF S. 1284

On March 2, 1976, four representatives of the Section of Antitrust Law of the American Bar Association appeared before the Committee on the Judiciary of the United States Senate in opposition to certain provisions of S. 1284. One of the persons who appeared was Allen C. Holmes, of Cleveland, Ohio, who is a member of the Council of the Antitrust Section. Mr. Holmes is my partner in the firm of Jones, Day, Reavis & Pogue, and, at his request, I have prepared this memorandum dealing with certain constitutional questions which appear to me to be involved with the so-called "fluid recovery" provisions of Title IV.

In this connection, I have read the testimony given by Philip A. Lacovara, Esq., on March 3rd, and the memorandum subsequently filed by Mr. Lacovara with the Committee. Although Mr. Lacovara refers to some of the same authorities as those relied on in this memorandum, they are presented here from a different point of view, and with special emphasis on the constitutional aspect of the questions which are raised by Title IV.

Title IV of S. 1284 is entitled "Parens Patriae Amendments." It undertakes to amend the Clayton Act by adding a new Section 4C(a), which provides for suits by State Attorneys General to recover damages for Sherman Act violations on behalf of—

> the natural persons residing in such State, or any of them. . . .

The amendments contain a further provision, in paragraph (c)(1) of Section 4C, which reads as follows:

> (c)(1) In any action brought under subsection (a)(1) of this section, and in any class action on behalf of natural persons under section 4 of this Act, damages may be proved and assessed in the aggregate on the basis of statistical or sampling methods, or such other reasonable method of estimation as the court in its discretion may permit, without separately proving the fact or amount of individual injury or damage to such natural persons.

This paragraph is applicable not only to the parens patriae suits authorized by Sec. 4C(a)(1), but also to private antitrust suits brought on a class basis. It purports to authorize the so-called "fluid recovery" in both types of antitrust suits. More specifically, it provides for the award of damages against the defendant in favor of persons who are not in court, are not notified, except by publication, and who are not required to prove either that they were injured, or the amount of their injuries.

These provisions raise serious constitutional questions, which should be carefully examined and considered before the Congress starts down so novel and draconian a road. I will endeavor in the following pages of this memorandum to summarize three aspects of these questions in terms of basic constitutional requirements.

A. "FLUID RECOVERY" IS NOT WITHIN THE CONSTITUTIONAL JURISDICTION OF THE FEDERAL COURTS, WHICH ARE LIMITED TO THE CONSIDERATION OF "CASES AND CONTROVERSIES" INVOLVING ACTUAL PARTIES PROPERLY BEFORE THE COURT

The law of "case or controversy" may fairly be said to be lawyers' law.[1] But it is real. It reflects the language of the Constitution; and the language is not accidental. It was carefully chosen, and it was designed to limit the federal courts to consideration of cases of "a Judiciary nature,"[2] that is, to the decision of controversies between parties who are before the court, and subject to appropriate rules of proof.

In the case of "fluid recovery," the "case or controvery" requirement is not met, for the persons on whose behalf recovery is obtained make no claim, are not parties to the case, and provide no proof. For the most part, they are simply unknown.

Although no precise authority on this question is known—probably because the possibility of such a contention has seemed so far-fetched—it seems obvious that a claim on behalf of such persons does not meet the requirements of Article III of the Constitution, limiting the jurisdiction of the federal courts to "cases and controversies" since such a claim does not arise between actual parties, presenting a real issue and supported by proof designed to show an actual, rather than a supposed or hypothetical, injury.

There are a number of decisions which go far to show that this question under Article III is a substantial one which would be given serious consideration by the courts. One of these is *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005 (C.A. 2d, 1973), decision vacated on other grounds,[3] 417 U.S. 156 (1974). That case involved an effort to obtain a "fluid recovery" on behalf of all persons who had bought or sold odd lots on the New York Stock Exchange between May, 1962 and June, 1966. It was estimated that there were 6,000,000 members of this group, of whom 2,250,000 could be identified. The basic question in the case was who should bear the cost of giving notice to the members of the class who could be identified. The court of appeals held

[1] Compare the language of Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 149–150 (1951): "The jurisdiction of the Federal court can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.' "

[2] Madison's Journal in 2 Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1937) 430.

[3] The decision was vacated to allow the plaintiff to amend his pleading so as to present a "real" or properly limited class. The action of the Supreme Court did not in any way impair the validity of the decision of the court of appeals on the questions discussed here.

that this burden could not be put on the defendant, under a proper construction of Rule 23 of the Federal Rules of Civil Procedure; and this conclusion was affirmed by the Supreme Court. But the court of appeals went further in an opinion by Judge Medina, and discussed the impropriety of "fluid recovery," which had been suggested by the district court as a possible solution to the manageability problem posed by the case (479 F.2d at 1018):

> Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. . . . We hold the "fluid recovery" concept and practice to be illegal, inadmissable as a solution of the manageability problems of class actions and wholly improper.

It is, of course, quite true that this passage does not speak in terms of the Article III limitations of "case and controversy." It seems equally clear, though, that the factors to which the court referred are those which are involved in determining whether there is a case or controversy, that is, whether the matter to be undertaken by the court is truly "of a Judiciary nature."

There are other recent decisions which point in the same way. *In Re Hotel Telephone Charges*, 500 F. 2d 86 (C.A. 9th, 1974), is an example. In this case, it was estimated that the class (all hotel guests who had been subjected to a surcharge) would number more than forty million persons. The court held that this was not appropirate for a class action. Although it did not put the decision specifically on any constitutional ground, it said (500 F. 2d at 92): "The antitrust laws focus on the compensation of parties actually injured, presupposing that a plaintiff can prove that he was in fact injured as a proximate result of an antitrust violation." Another case reaching a similar result is *Kline* v. *Coldwell, Banker & Co.*, 508 F. 2d 226 (C.A. 9th, 1974). This case involved a suit against real estate brokers brought by the plaintiffs, "on behalf of themselves and all sellers of residential real estate in Los Angeles County." It was estimated that the number of persons in the class was "upwards of 400,000," and possibly more. The court held that this was not appropriate for a class action.

Again, its conclusion was not put on constitutional grounds, but much of its language would support the contention that the effort to bring in so large and indefinite a class was inconsistent with the "case or controversy" limitation of Article III of the Constitution. Judge Duniway's concurring opinion is particularly relevant. He referred to the suit before the court as a "judicial juggernaut" (508 F. 2d at 236), while recognizing the possibility that class action suits might be brought on behalf of classes made up of: "truly and actively aggrieved plaintiffs." 508 F. 2d at 239. This is language that is apt to the consideration of the question of "case or controversy." He also said (508 F. 2d at 238):

> It is inconceivable to me that such a case can ever be tried, unless the court is willing to deprive each defendant of his undoubted right to have his claimed liability proved, not by presumptions or assumptions, but by facts, with the burden of proof upon the plaintiff or plaintiffs, and to offer evidence

> in his defense. The same applies, if he is found liable, to proof of the damage of each "plaintiff."

Here again, it can fairly be contended that without such proof there is no "case" within the constitutional sense of that word as it is used in Article III.

The recent decision of the Supreme Court in the case of *Warth* v. *Seldin*, 422 U.S. 490 (1975), is of especial importance on this question. That case turned on an issue of "standing," which is closely related to the "case or controversy" question. The case was a suit brought by organizations and residents of Rochester, New York to contest the validity of a zoning ordinance in the town of Penfield, adjacent to Rochester. The contention was that this ordinance excluded persons of low and moderate income from living in Penfield. The suit was originally filed by an organization called Metro-Act of Rochester, Inc., and eight individual plaintiffs, "on behalf of themselves, and all persons similarly situated." The Supreme Court held that the plaintiffs did not have the requisite standing to maintain the suit.

In reaching this conclusion, the Court said (422 U.S. at 478–499):

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. The inquiry involves both *constitutional limitations on federal-court jurisdiction* and prudential limitations on its exercise. *E.g.*, *Barrows* v. *Jackson*, 346 U.S. 249, 255–256 (1953). In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society. See *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 221–227 (1974); *United States* v. *Richardson*, 418 U.S. 166, 188–197 (1974) (Powell, J., concurring).
>
> In its constitutional dimension, standing imports justiciability; whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the courts' remedial powers on his behalf. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. [First emphasis supplied; second emphasis in original.]

The Court also said (422 U.S. at 499) that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

This decision makes it plain that the Court is fully aware of the fundamental importance of the "case or controversy" requirement of Article III, and that it regards this constitutional limitation on judicial power as "the threshold question in every federal case." The Congress should be as careful as the courts to see that remedies provided are within the role that our courts can properly play in our constitutional system.

This does not mean that there cannot be representative suits, where there is a clear relationship between the representative and the person he represents. A trustee can represent his beneficiary, a guardian can represent his ward, and a parent may appear as the next friend of his child. In each such case, though, there is a clear and directly adverse claim of injury and the burden is on the plaintiff to produce the facts which will prove the injury and the amount of the damages, by a preponderance of the evidence.

Nor does this mean that there cannot be class actions, even, sometimes, with rather large classes, where there is some sort of coherence between the members of a reasonably circumscribed and defined class. For example, a suit may be brought on behalf of all the shareholders in a corporation. A suit might, in some circumstances, be brought on behalf of the members of a church, or the students in a school. In such cases, there is a clear relationship between the members of the class, and the class is finite and readily determinable. Moreover, in many class suits, if not most, the object is to seek an injunction. If an injunction is obtained by some plaintiffs, this will inure to the benefit of all persons similarly situated, since a decision in favor of some plaintiffs would operate on behalf of all, under ordinary principles of *stare decisis*. In such cases, there is no "recovery" by the plaintiff. The fact of injury to any individual plaintiff, or the amount of that injury, is irrelevant, as long as some of the plaintiffs before the court show the requisite grounds for injunctive relief. It is suits of this kind in which expansive notions of the scope of a proper class have taken root.

When there is a claim for money damages, however, the situation is entirely different. The purpose of having a class is for the convenience of the court, to avoid multiplicity of litigation, and needless repetition of the same issue. But this does not negate the constitutional requirement that there must be a case or controversy with respect to all members of the class, who must in some way—for example, through actual notice, or appearance in court—be before the court. Similarly, it does not mean that there is a case or controversy with respect to any member of the supposed class whose actual identity is completely vague and uncertain, and who does not provide proof that he has been injured, and proof of the damages he has sustained from such injury. Surely the fact that some members of the class may be properly before the court does not mean that there is a case or controversy with respect to other members of the class. The fact that there is a case or controversy with respect to a named or identified plaintiff, does not give the court jurisdiction to decide other and hypothetical or abstract questions. Thus, a plaintiff that is properly before the court could not say: "And, by the way, we would like to have you declare this other, unrelated, statute unconstitutional." Cf. *Muskrat* v. *United States*, 219 U.S. 346 (1911). Similarly, the fact that proof is provided by some members of the class who are before the court does not necessarily mean that there is a case or controversy with respect to other members of the class who make no proof at all, either of actual injury, or of damages. The fact that others may seek to provide some sort of proof on their behalf does not mean that there is an actual controversy on such matters before the court. Under Article III, the court has no constitutional power to decide such collateral questions, on behalf of parties not before the court, and making no claims, and the Congress should not seek to assign such powers to the courts under our constitutional system.

B. THE PROVISIONS OF SECTION 4(C)(1) VIOLATE THE GUARANTEE OF THE FIFTH AMENDMENT AGAINST TAKING PROPERTY WITHOUT DUE PROCESS OF LAW

A substantial constitutional argument can also be made against the provisions of Title IV on the ground that they provide for taking the defendant's property without due process of law, insofar as they authorize the award of damages on behalf of some members of the class, without proof of injury, and without proof of the actual extent of damage sustained by those members of the class.

Congress cannot constitutionally provide that the property of A shall be taken from him and given to B, without complying with the requirements of due process. As the Supreme Court said in *Warth* v. *Seldin* (422 U.S. at 499): "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party. . . ." There should be no recovery on behalf of a plaintiff who has provided no proof of injury or damages. Recovery in such a case is a clear violation of due process. See also the recent decision of the Supreme Court in *Eisen* v. *Carlisle & Jacqueline*, 417 U.S. 156 (1974).

This is especially true when it is known in advance that a substantial part of the recovery will not, in fact, go even to the members of the class. That this is the intended effect of Title IV is evident from the provision of Section 4C(c)(2) which provides that—

> The court shall distribute . . . any monetary relief awarded to the State either in accordance with State law or as the district court may in its discretion authorize.

The purpose of this provision is to legislate that any unused portion of the fund—that is, any "monetary relief" in excess of that actually proven by a known and existing plaintiff—should be used to benefit others, in some way, even though many of the others will not be members of the same class on whose behalf the suit was brought. Thus, in the *Tetracycline* litigation, unused funds (obtained in a settlement) were, in effect, distributed *cy pres* to hospitals and other charities. And in *Eisen* v. *Carlisle & Jacqueline*, 479 F.2d 1005, it was proposed that the unclaimed funds relating to past odd lot traders should be used to reduce costs for future odd lot traders, many of whom would not be members of the original class.

It is said that the defendant has done wrong, and he should be made to disgorge. But, consistently with due process, damages cannot be awarded *in vacuo*. A person can be mulcted for wrong doing only pursuant to a criminal statute imposing a fine, or pursuant to a statute imposing a civil penalty or forfeiture, subject to proper requirements and standards of proof. This is not the purport of Title IV. And it would not satisfy some of the proponents of Title IV, since it would not provide a fund for distribution, or for the payment of attorneys' fees.

The contention is made that the allocation of the funds to charity, or to other groups, is simply an example of escheat; and the case of *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950) is pointed to. But the *Mullane* case is distinguishable. In the first place, the case required service of process, where the claimants could be identified. Moreover, the case involved specific amounts held by a bank in a company trust fund. There was no contention that the bank did not hold the money for the beneficiaries. There was no issue either as to liability, or as to the amount of the liability. The money was held by the bank without any claim to keep it. The issue in the case was the protection of the bank against future claims by beneficiaries, and it was held that the bank would not be protected unless there was actual notice to all beneficiaries who could be identified.

Thus, the decision in the *Mullane* case with respect to notice by publication related to the defendant bank only with respect to its protection against a further suit by a beneficiary. The persons to be protected there were the persons who made the payments to the common trust fund. Thus, the defendant bank was not deprived of anything without proof of its liability; and the beneficiaries were not deprived of their rights without actual notice when that would be given.

C. THE PROVISIONS OF TITLE IV VIOLATE THE PROHIBITION IN THE FIFTH AMENDMENT AGAINST THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION

It is plain that Title IV provides no compensation to the defendant for the property taken from him. In the ordinary case, under Ttitle IV, of course, the property is taken from the defendant for the benefit of an indefinite class, a large part of which will, in fact, never be specified. Insofar as the property is taken for the benefit of this class, and the property is taken without proof of actual damage, or the amount of damage, it is in fact a taking of private property for private use, and this is an *a fortiori* case within either the due process clause or the just compensation clause of the Fifth Amendment.

Insofar as the propety taken is applied *cy pres* for some public use or benefit, it can well be contended that this is a violation of the just compensation clause. It is a taking of the property of the defendant, not for any identified plaintiff, on proof of his injury and damages, but, in effect, for public use and benefit. The Fifth Amendment provides that private property shall not be taken for public use without just compensation. Since private property is taken under Title IV without compensation and proof that any identified person has been injured, a serious question can be raised under the just compensation provision of the Fifth Amendment.

CONCLUSION

For the reasons indicated, a strong case can be made that the provisions of Title IV violate the Federal Constitution: (a) with respect to the "case or controversy" requirement of Article III, (b) with respect to the due process clause of the Fifth Amendment, and (c) with respect to the just compensation clause of the Fifth Amendment. These constitutional reasons against the enactment of Title IV should be given full consideration, in addition to the practical arguments which have been advanced by other witnesses before the Committee.

Respectfully submitted,

ERWIN N. GRISWOLD.

APPENDIX 7

THE SECRETARY OF THE TREASURY,
Washington.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am writing to clarify the Administration's position on the premerger stay provision of Title V of S. 1284. I hope this clarification will assist the Committee in its consideration of this provision during markup.

The Administration does not support enactment of any premerger stay provision. We believe that existing procedures for staying proposed mergers challenged by the government, together with S. 1284's provision for premerger notification, are adequate. Furthermore, we believe that enactment of any premerger stay provision would produce adverse effects on the economy that would outweigh the benefits of any possible improvement in anti-trust enforcement.

In our view, any premerger stay provision would discourage healthy, efficient, competitive change in ownership of businesses in response to economic conditions, and promote inefficient allocation of capital resources. A premerger stay provision would give the Government the power to hold up proposed mergers for extensive periods of time without having to make any showing in court that it has a meritorious case. When coupled with the proposed premerger notification requirement of S. 1284, even a 60-day premerger stay provision would allow the Government to hold up a merger for over 135 days without effective judicial review. The mere existence of this discretionary power in the anti-trust enforcers could significantly deter lawful mergers to the detriment of the economy. More importantly, by exercising this discretionary power, the Government could prevent—not merely delay—proposed mergers since the economic reasons for such transactions could well pass during the period of delay.

The Government considered various formulations of a premerger stay provision in an effort to arrive at a suitable time period beyond which the stay could not be extended unless the Government demonstrated to the court that it had a meritorious case. However, we concluded that any time limit short enough to avoid unduly delaying or deterring mergers would not add significantly to the Government's arsenal in challenging their legality.

We therefore concluded that the most effective tools that could be provided are the premerger notification provisions coupled with the investigatory powers contained in Title II. These would assure an adequate base of information on which to act, and a provision calling for expedited judicial consideration would guarantee all parties a prompt judicial determination of the issues.

Sincerely yours,

WILLIAM E. SIMON.

APPENDIX 8

THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., February 19, 1976.

Hon. PHILIP A. HART,
Chairman, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, United States Senate, Washington, D.C.

DEAR MR. CHAIRMAN: When the Subcommittee on Antitrust and Monopoly held hearings on S. 1284 during the spring and summer of 1975, the Administration expressed support for the major provisions of the bill, although it generally opposed Title VI. There has been division within the Administration, however, regarding the desirability of Title V, and the Administration position has been reconsidered in light of the scheduled consideration of the bill by the full Judiciary Committee.

Although the Administration adheres to its previously expressed position on other provisions of S. 1284, and particularly Title II of the bill, this letter is to inform you that the Administration does not now support Title V in its present form.

The Administration does not support enactment of the premerger stay provision of Title V, preferring instead to rely upon existing decisional and statutory law to govern the issuance of preliminary injunctions in merger actions filed by the Department of Justice and the Federal Trade Commission.

The Administration continues to support enactment of a premerger notification provision, providing that the waiting period and extension period are reduced to 30 days and 20 days respectively. Furthermore, to assure that challenges to pending mergers are considered on an expedited basis by district courts, the Administration would encourage enactment of a provision directing the Chief Judge of the appropriate United States Court of Appeals to assign a District Court judge who is able to proceed on an expedited basis with the case, and further to direct that a hearing on the Government's motion for a preliminary injunction be held at the earliest possible time, taking precedence over all matters except older matters of the same character and trials pursuant to 18 U.S.C. § 3161.

If I may be of any assistance to the Subcommittee or the Committee, please do not hesitate to contact me.

Sincerely,

HAROLD R. TYLER, Jr.

APPENDIX 9

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, Ill., March 3, 1976.

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monoply,
Washington, D.C.

DEAR SENATOR HARTS I am writing to express my views on S. 1284 which is pending before your subcommittee. I request that the statement which follows be made a part of the record of your subcommittee's deliberations on this bill:

My name is Richard A. Posner. I am a professor of law at the University of Chicago Law School and I have taught and written extensively in the field of antitrust law.

I believe that the enactment of S. 1284, which would allow state attorneys general to bring suits under Section 1 of the Sherman Act to recover damages for injury to the residents of their states, would be a serious mistake. It is important to provide effective damage remedies for violations of the antitrust laws; and where the injury inflicted by such a violation is widely diffused, no individual may have a substantial incentive to bring a damage action, even though the aggregate injury imposed by the violation may be very great. Because antitrust violations frequently do impose such diffuse injuries, procedural innovation is necessary if there is to be effective redress of antitrust violations. I am persuaded, however, that the most effective innovation is the modern consumer class action, which permits the aggregation of many small claims. That is not to say that the class action is free from opportunities for abuse on the one hand, and inadequacies and insufficiencies on the other; but it seems to me the best of the available procedures. S. 1284 would be among the worst:

1. State attorneys general might file groundless antitrust suits designed for purposes of political self-aggrandizement. We must be realistic and recognize that attorneys general are politicians who have been known to use their office to advance a political career. The temptation to file a multibillion-dollar suit for publicity purposes would in some cases, I fear, prove overwhelming. It is a salutary limitation on the powers of the attorney general of the United States that he is not empowered to bring money actions under the antitrust laws (other than for actual damages to the United States in its proprietary capacity). I fear, in short, that S. 1284 would turn the antitrust laws into a political football.

2. Calculating the damage to a state's residents from an antitrust violation would be fraught with uncertainty. It is difficult enough to estimate the injuries suffered by a class of individuals or firms doing business with the antitrust violator. To trace out the possible economic ramifications of the violation throughout a state's economy—which is what would be necessary in order to measure the injury to the state's residents—would strain the capacities of the economic science and the judicial process, and would violate the traditional limitation of damages to those that are foreseeable.

3. The piecemeal creation of antitrust remedies is a great mistake. Congress has recently increased the public penalties for antitrust violations but has not, to my knowledge, attempted to evaluate the effects of that change in law. Nor have I seen evidence that Congress has carefully considered the effect on compliance with the antitrust laws of alternative remedies such as the consumer class action. Your subcommittee has not, to my knowledge at least, considered how S. 1284 would fit in as part of a cohesive, general system of public and private penalties. In these circumstances its enactment would be premature even if, considered alone, it did not have the two disabling disadvantages that I have identified.

In sum, I urge you not to report favorably on S. 1284. I may add that in offering these views I am speaking as an individual and not as the representative of any group or interest.

Sincerely,

RICHARD A. POSNER.

APPENDIX 10

[Mailgram]

AMERICAN NATIONAL BANK & TRUST CO. OF CHICAGO,
Chicago, Ill., February 12, 1976.

Hon. ROMAN L. HRUSKA,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HRUSKA: I understand that the Congress will shortly vote on proposed legislation which would authorize the Attorneys General of the States to bring antitrust treble damage actions in the Federal courts on behalf of all or large groups of residents of a State claiming damages from violations of the antitrust laws.

In this connection, I wish to stress the importance for the national economy of a careful assessment as to how potentially huge contingent liabilities, particularly of smaller firms named as co-cospirators in such antitrust actions, may affect their access to financing and capital markets.

I understand that antitrust class actions in the past have asserted multi-million dollar claims for which all named co-cospirators are jointly and severally liable, including one recorded case in California claiming $750 million in joint and several liabilities against 2,000 real estate brokers.

In view of SEC disclosure requirements in the financial statements of public corporations which incur material contingent liabilities in pending antitrust litigation, it is my considered opinion that such antitrust actions may have a substantial adverse impact on the financing opportunities particularly of smaller firms named in such actions. This is so because banks and other financial institutions will necessarily take such substantial contingent liabilities into account in their lending decisions.

ALLEN P. STULTS,
Chairman of the Board.
(Former President, The American Bankers Association).

APPENDIX 11

APRIL 5, 1976.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate.

DEAR MR. CHAIRMAN: I wish to bring to your attention the views of the Department of State concerning certain provisions of S. 1284, "a bill to improve and facilitate the expeditious and effective enforcement of the antitrust laws."

Most provisions of the bill relate to questions which are domestic in character. However, we have serious reservations about the international effects of Section 703 of S. 1284. In our view, this section is unnecessary in light of judicial practice in applying the existing discovery rules, and will lead to confusion as to their intended effect which will have undesirable implications abroad. We therefore urge that it be deleted from the bill.

Section 703 provides that in certain civil proceedings in which the court orders a party, or a person in privity with a party "to furnish discovery, evidence or testimony, and such person or persons refuses, declines or fails to do so on the ground that a foreign statute, order, regulation, decree or other law prohibits compliance with such order, the court may enter an order forthwith against such party, dismissing all or some of such party's claims, striking all or some of such party's defenses or otherwise terminating the proceeding or any portion thereof adversely to such party."

Foreign discovery in the face of foreign laws limiting or prohibiting disclosure, particularly in antitrust proceedings, almost invariably involves competing considerations which we believe are better balanced under the present Federal Rules of Civil Procedures than under proposed Section 703. We recognize that antitrust litigation particularly requires the kind of extensive discovery provided by the Federal Rules. At the same time, we believe that principles of due process and of international law and comity may in some cases be properly invoked to limit the reach of U.S. courts to sanction failure to comply with discovery orders where compliance may be contrary to foreign law. The present structure of the Federal Rules, particularly the provisions of Rule 37 for sanctions, provide a proven, workable procedure for balancing these interests.

Rule 37(b)(2) of the Federal Rules provides a number of sanctions in addition to those contained in the proposed Section 703. These include entering an order establishing that designated facts shall be taken as asserted by the party seeking discovery; prohibiting introduction of designated material into evidence by the refusing party; staying further proceedings; or contempt of court orders. All such sanctions are subject to the overriding requirement that the sanctioning order be just in light of the facts of the case.

The proposed Section 703 contains a less extensive range of sanctions, and places greater emphasis on the possibility of orders terminating the proceedings adversely to the party refusing discovery. We do not know whether Section 703 is intended to limit the range of sanctions presently available under Rule 37. This would be clearly undesirable. Presumably Section 703 is intended to encourage courts to apply more drastic sanctions in cases where discovery orders cannot be complied with because of requirements of foreign law. We believe that this is an undesirable mandate to the courts since the appropriate and effective sanctions in any given case must be tailored to the specific facts of that case. Further the sanctions contained in Section 703 are already available, and there is no evidence that a change is necessary for effective antitrust enforcement.

Finally, the United States courts have long recognized that the principles of international comity require us to respect the laws and policies of foreign governments regulating matters properly within their own jurisdiction to the greatest extent possible. Further, in cases where persons may be subject to conflicting requirements under both U.S. and foreign law, we believe that both sovereigns should give good faith consideration to moderating the exercise of their jurisdiction in light of such considerations as the interests of the other state concerned and the effect of conflicting legal requirements on the person involved. This balancing principle is recognized by the *Restatement (Second) of the Foreign Relations Law of the United States*, Section 40.

We believe that these principles are not consistent with an intent to apply drastic sanctions to persons who may be faced with conflicting legal obligations. We believe that the necessary balances are better struck under the existing Federal Rules, with their wide range of sanctions and evolving history of pragmatic judicial construction.

For these reasons, we strongly urge the deletion of Section 703.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the submission of this report.

Sincerely yours,

ROBERT J. MCCLOSKEY,
Assistant Secretary for Congressional Relations.

APPENDIX 12

YALE LAW SCHOOL,
New Haven, Conn., March 12, 1976.

Re: Title IV, S. 1284 (Parens Patriae).

Senator PHILIP A. HART,
Chairman, Senate Subcommittee on Antitrust and Monopoly, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR HART: As an economist who has spent most of his adult life working with lawyers on problems of competition and monopoly,[1] I write to express my gravest apprehensions about the enactment of S. 1284.

I have long shared the consumer interest concern which S. 1284 purports to support. But allowing state attorneys general to bring suits

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[1] 1937–46, economic expert and consultant Antitrust Division, Department of Justice; 1946–56, research associate, University of Chicago Law School; 1956–76, professor of law and economics, Yale Law School.

under the Sherman Act to recover damages for their state residents would create more problems than would or could be resolved. Important as it is to deter collusive activity among competitors when total injury is substantial but injury to individual consumers is minimal, I am confident that alternative means of deterrence are far better means of enforcement. Included are high fines, better case priority for prosecutions by the Antitrust Division, state antitrust laws and their more stringent enforcement, and private class actions. As to the latter, the proposed legislation seems to be attempting to undo the effects of recent federal court decisions without at all clarifying what would or should make these cases go the other way were state attorneys general to represent a class.

Furthermore, I must emphasize, what for me, is an even more basic problem—increasing deterrence for antitrust violations which are inconsistent with efficient use of resources to the benefit of consumers. In recent years much antitrust activity has centered on protection of competitors rather protecting the competitive process. Thus, both public and private actions under the Sherman Act, and particularly its Section 1, have had the effect of making illegal actions which lead to efficiency and lower costs, making for consumer benefit rather than consumer harm. As I read S. 1284, and the arguments in support of it, there seems to me to be a presumption that all antitrust actions that state attorneys general might bring would be reasonably exact facsimiles of horizontal price fixing agreements or division of fields agreements which would clearly be adverse to the interest of consumers.

I see nothing in S. 1284, however, which would limit state action to such obvious consumer interest cases. As my 1973 book, *Patents and Antitrust Law, a Legal and Economic Appraisal*, analyzes in detail, all violations of antitrust law under current standards are not consumer benefiting. And your S. 1284 ignores or seriously underplays the deficiencies in existing antitrust law. To be specific, I see nothing which would prevent state attorneys general from bringing actions based on such antitrust precedent as *Schwinn*, *Von's Grocery*, *Topco*, or *Brown Shoe*. And I must restress, as I, and others, including the Solicitor General of the United States,[2] have long contended, such cases are undeserving of antitrust support, much less treble damages from either private action or class suits brought on behalf of state attorneys general.

My conclusion, therefore, supports the position taken by Professor Richard Posner of the University of Chicago in his letter to you dated March 3, 1976. All of his valid arguments apply to such obviously consumer harming activity as collusive price fixing agreements. That S. 1284 is not limited to such arrangements makes it worse not better.

Sincerely,

WARD S. BOWMAN, Jr.,
Ford Foundation Professor of Law and Economics.

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[2] See, for example, *Crisis in Antitrust*, by Robert H. Bork and Ward S. Bowman, Jr., Fortune Magazine, December 1963.

APPENDIX 13

MARCH 9, 1976.

SUPPLEMENTAL STATEMENT OF PHILIP A. LACOVARA[1] ON CONSTITUTIONAL ISSUES RAISED BY PROPOSED "FLUID RECOVERY" DAMAGES PROVISIONS OF S. 1284 SUBMITTED TO THE SENATE COMMITTEE ON THE JUDICIARY

During my testimony before the Committee on March 3, 1976, I referred to some of the cases casting grave doubt on the constitutional validity of those provisions of Title IV of S. 1284 that would codify the judicially discredited "fluid class recovery" mechanism. Those provisions, proposed Sections 4C(c) (1) and (2), would authorize "damages" in any *parens patriae* suit brought by a State attorney general—as well as in any private antitrust class action brought on behalf of natural persons—to be "proved and assessed in the aggregate" on the basis of statistical estimates "without separately proving the fact or amount of individual injury or damage to such natural persons," and would provide that the fund so created should be distributed in accordance with state law or as the district court may "in its discretion" authorize. These provisions raise several levels of constitutional problems. I intend merely to point out these problems without embarking on a full analysis of them.

I. ACTUAL PROOF OF THE FACT AND AMOUNT OF INJURY IS CONSTITUTIONALLY REQUIRED

The avowed object of Title IV is to overrule a long and growing line of cases holding that class actions for alleged injuries to large numbers of consumers, whether brought by State attorneys general or by private counsel, cannot be maintained under Rule 23 of the Federal Rules of Civil Procedure. Although many of the decisions speak exclusively in terms of the requirements of Rule 23, other courts have frankly recognized that the Advisory Committee which drafted Rule 23 was guided by basic concepts of due process and fundamental fairness. Thus, before this Committee recommends dispensing with those requirements of Rule 23 which the courts have held to preclude entertaining massive actions for consumer claims in litigated cases, the Committee must consider the Constitutional underpinnings of such requirements as actual notice to interested persons, actual proof of injury, and the trial of damage claims by jury. Respect for Constitutional rights is frequently inconvenient, and often interferes with what some persons would consider expedient. Title IV rather brazenly disregards these vital concerns.

A. Proof of actual injury

The crux of Title IV seems to be the aggregation-of-damages provision. One feature of this section would dispense with the need to prove

[1] Partner, Hughes Hubbard & Reed, Washington, D.C.

"the fact or amount of individual injury or damage." This language is designed to repudiate the cases holding that such proof is required in a Rule 23 class action and that the need to have such issues proved individually before a jury (if demanded) renders massive consumer class claims "unmanageable" within the meaning of Rule 23. But the attempt to wipe out that requirement of actual proof by legislative fiat is impermissible. The desire to deal with the unmanageability of these individually minute claims cannot justify an attempt to abrogate the underlying Constitutional requirements which Rule 23 codifies.

It is axiomatic in our legal system that damages can be claimed by one person from another only upon adequate proof (a) that the defendant committed a legal wrong; (b) that the wrong actually injured the plaintiff; and (c) that the plaintiff suffered damage in a reasonably acertainable amount. Title IV's provision for recovering alleged damages to consumers in a *parens patriae* action cannot avoid these requirements. The Supreme Court's treatment of the "pass-on" issue in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), illustrates the point. There, an antitrust defendant contended that the plaintiff whom the defendant had allegedly overcharged in renting certain machinery to it had not borne the financial injury but had "passed on" the overcharges to the persons who purchased the goods the plaintiff manufactured with the machinery. The Court rejected the defense on sound economic and policy grounds, holding the possibility of recoupment from others irrelevant. The Court quoted (392 U.S. at 490) Justice Holmes' opinion in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533–34 (1918):

> "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. . . . The [defendant] carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. . . ."

The Court in *Hanover Shoe* explained why the law does not ordinarily treat the ultimate consumer as the person injured by an antitrust violation committed by someone in the manufacturing/distribution chain with whom the consumer did not deal directly. Justice White's opinion noted that the "mere fact that a price rise followed an unlawful cost increase" does not show that the increase was the result of the violation. (392 U.S. at 493 n. 9) The consumer would be the injured party entitled to sue for damages only in the rare case where it was *provable* that an illegal overcharge had automatically been "passed on" to him —and if there were several levels of business activity between the violator and the consumer, the plaintiff consumer would have to prove a pass-on at each level. The Court thus aptly noted that, since proving that the ultimate consumer rather than the immediate purchaser was the injured party "would require a convincing showing of virtually unascertainable figures, the task would normally prove insurmountable." 392 U.S. at 493.

Unavoidable but impossibly speculative requirements of actual proof were also recognized in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), where the Supreme Court refused to recognize a State's claim to sue as *parens patriae* to recover damages to its "general economy" allegedly occasioned by an antitrust violation. Justice Marshall's opinion for the Court pointed out, among other things: "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy for all injuries that might conceivably be traced to an antitrust violation." 405 U.S. at 263 n. 14. The Court also held that, in authorizing treble damage suits by a person "injured in his business or property", 15 U.S.C. § 15, Congress was referring "to commercial interests or enterprises". 405 U.S. at 264. This focus reflects the almost imponderable difficulties of establishing whether consumers are injured in any amount and what that amount could conceivably be. Congress cannot validly sweep away these practical problems of proof of injury in antitrust cases—or any other cases—by simply declaring such proof unnecessary. See, *e.g.*, *Leary* v. *United States*, 395 U.S. 6, 29–36 (1969).

Title IV would stand on its head these settled principles by jumping down to the consumer level and substituting surmise and speculation, on a class-wide basis, for proof of actual individual injury. Such a facile device cannot be sustained. Depending on the myriad ways in which a particular product reaches a particular consumer, he may or may not have absorbed some or all of an illegal overcharge collected by the manufacturer of that product—or, even more remotely, of some component of it. That must be a matter of proof on an individual basis, and if a jury trial is demanded, the fact *and* amount of injury must be made the subject of a jury's consideration. Otherwise, there is a real danger that duplicative damages will be assessed: On the basis of actual proof of injury by a commercial purchaser and on the basis of estimates and aggregation at the consumer level. It was for this reason, in part, that Justice Marshall—certainly no foe of efforts to assure justice for the wronged—stated flatly in his opinion for the Court in *Hawaii:*

> "*Parens patriae* actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for determining the appropriate plaintiff class, establishes who is bound by the action, and effectively prevents duplicative recoveries." 405 U.S. at 266.[1]

In this connection, the Committee must also consider the Supreme Court's holdings in *Warth* v. *Seldin*, 422 U.S. 490 (1975), which had been brought as a class action by individuals claiming to represent others similarly situated and by associations claiming to represent

[1] Proponents of the "aggregation of damages" device point to cases like *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), to support its validity. Those cases furnish no such support. In those cases, individual plaintiffs who were directly injured by the antitrust violations of the defendants (with whom they dealt), established both the fact of injury and the amount of damage. All the cases, fairly read, support is the unquestioned proposition that, once actual personal injury is proved, the plaintiff's burden to show the amount of damages can be met if damages are shown with reasonable reliability. The cases say nothing about aggregating claims and dispensing with the need for individual proof.

their members. Beyond injunctive relief (which was refused), the plaintiffs sought damages. The Court's analysis in rejecting the damage claim by a home builders association is instructive. After noting that it was not the plaintiff association that had allegedly been damaged but some of its individual members, the Court continued (422 U.S. at 515–16):

> "No award therefore can be made to the association as such. Moreover, in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and *both the fact and extent of injury would require individualized proof*. Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit. . . ." (Emphasis added.)

In short, in a group damage action where actual injury to individuals may or may not have occurred, and if it occurred it may have involved different amounts of damages, there is simply no lawful substitute for individual proof of both the fact *and* amount of injury—precisely what Title IV purports to disregard.

B. The "fluid class recovery" concept

The attempt to by-pass these constitutional requirements and settled policies ultimately turns on the "fluid class recovery" device which Title IV would adopt. In essence, the concept disregards the question of actual injury to individual consumers, presumes injury to the class of consumers as a whole, creates liability "in the air", and, in light of the practical disinterest of consumers in tiny *pro rata* shares, provides for the bulk of the "compensation" recovered to be applied to miscellaneous court-approved projects or to escheat to the State.

In the class-action setting this approach has been branded as unconstitutional, and a mere change in labels will not transform it into an acceptable device. The most eloquent statement of this position came in Judge Medina's opinion in "Eisen III", *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), vacated on other grounds, 417 U.S. 156 (1974).[2] Judge Medina firmly rejected the attempt to have the "class as a whole" treated as the real party in interest, with the "claims of the individual members of the class becom[ing] of little consequence" (479 F.2d at 1017–18):

> "Even if amended Rule 23 could be read so as to permit any such fantastic procedure, *the courts would have to reject it as an unconstitutional violation of the requirement of due process of law*. . . . We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the man-

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[2] At the Committee hearing on March 3, 1976, a member of the Committee's staff suggested that the force of *Eisen III* had been undercut by the Supreme Court's later action vacating the judgment of the court of appeals. Significantly, all portions of the Supreme Court's treatment of Judge Medina's opinion reflect explicit approval of his analysis of the questions the Court found it necessary to reach. It was not his opinion that was vacated, merely the formal judgment of the court of appeals. This action was explained (417 U.S. at 179 n. 16) as allowing the plaintiff an opportunity to amend his complaint, without prejudice, to try to allege a smaller class. The Second Circuit had ordered dismissal with prejudice. And as shown below, other courts have continued to treat Judge Medina's opinion as authoritative.

ageability problems of class actions and wholly improper." (Emphasis added.)

Efforts to present this theory elsewhere have met with similar rebuffs on the firmest grounds. For example, Circuit Judge Ely, another judge considered to be in the vanguard of protecting individual rights, nevertheless rejected the plaintiff's arguments in the *Hotel Telephone* case that "the individual questions arising from the damage claims [of an enormous consumer class] can be solved by allowing damages in the form of fluid recovery. . . ." *In re Hotel Telephone Charges*, 500 F. 2d 86, 89 (9th Cir. 1974). Distinguishing those instances where this device had been accepted by defendants as part of a settlement (such as in the *Tetracycline Antibiotic Drug Litigation*), Judge Ely's opinion stated:

> "We agree with the decision reached in *Eisen v. Carlisle & Jacquelin*, 479 F. 2d 1005 (2d Cir. 1973), that allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes." 500 F. 2d at 90.

In that opinion, Judge Ely echoed Judge Medina's reasoned observation in *Eisen III* that rhetorical statements "about 'disgorging sums of money for which a defendant may be liable', or the 'prophylactic' effect of making the wrongdoer suffer the pains of retribution . . do little to solve specific legal problems." 479 F. 2d at 1013. After re-referring to that language, Judge Ely put the issue this way (500 F. 2d at 92):

> "The antitrust laws focus on the compensation of parties *actually injured*, presupposing that a *plaintiff can prove that he was in fact injured* as a proximate result of an antitrust violation, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). The fact that the injured plaintiff is allowed treble damages does not change the basic nature of the private antitrust action as an action intended to compensate. When, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind boggling manageability problems should be rejected." (Emphasis added.)

An even more insistent posture was adopted by another panel of the Ninth Circuit in the real estate brokerage commission case, *Kline* v. *Caldwell, Banker & Co.*, 508 F. 2d 226 (9th Cir. 1974). In that massive class-action case, the court noted that "plaintiffs must prove both that the defendants' conduct contravened section 1 [of the Sherman Act] *and* that the plaintiffs suffered injury as a direct result of the illegal conduct." 508 F. 2d at 230–31 (emphasis in original). The Court held that, because "[p]roof of injury is *an essential substantive element* of the sucessful treble damage action" (508 F. 2d at 233; emphasis added), each class-member would have to prove to a jury that he had sustained actual injury resulting from a particular defendant's violation. Judge Duniway's concurring opinion expressed alarm at the practical consequences of entertaining the "judicial juggernaut" that plaintiffs and their counsel sought to create there. 508

F. 2d at 236. He insisted that it would be necessary for "each such 'plaintiff'" in the alleged class of 400,000 to prove actual injury *and* the amount of *his* damages. He explained (*ibid.*):

> "It is inconceivable to me that such a case can ever be tried, unless the court is willing to deprive each defendant *of his undoubted right to have his claimed liability proved, not by presumptions or assumptions, but by facts*, with the burden of proof upon the plaintiff or plaintiffs, and to offer evidence in his defense. The same applies, if he is found liable, *to proof of the damage of each 'plaintiff'.*" (Emphasis added.)

These decisions follow the Ninth Circuit's refusal to entertain a *parens patriae* suit by the State attorney general in *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973). There the court held the device unauthorized by law, and criticized the *parens patriae* mechanism on grounds equally applicable to the pending legislation: "To a greater or lesser degree these [*parens patriae*] theories attempt to utilize class action principles *without the class action safeguards* so carefully worked out by the drafters." 474 F. 2d at 777 n. 11 (emphasis added). Although the court commended the problem of consumer protection to the attention of Congress, it was careful not to endorse the *parens patriae* in balanced safeguards.[3] Later opinions of the Ninth Circuit, as we have seen, make clear that statutory codification of the *parens patriae*/ fluid class recovery concept is not the kind of solution to the problem that the court would or could approve.

And other courts as well have rebuffed the *parens patriae*/ fluid recovery concept. In *Pfizer* v. *Lord*, 522 F.2d 612 (8th Cir. 1975), the Eighth Circuit ordered dismissal of a *parens patriae* case brought under the antitrust laws by foreign governments on behalf of their citizens. It noted that a "strong preference for class actions over *parens patriae* has been repeatedly expressed" by the courts and that this preference is based on the "safeguards" built into Rule 23 to insure the basic fairness which the *parens patriae* device circumvents. 522 F.2d at 618.

Recently, the District Court for the District of South Carolina, in a lengthy and careful opinion, continued the trend of judicial repudiation of "fluid class recovery" which title IV would try to overrule. See *Windham* v. *American Brands, Inc.*, —— F. Supp. —— (DS.C. 1975) (CCH Trade Cas. ¶ 60,530). The court there refused to tolerate the " 'fluid recovery' theory of damages" that had been used in the settlement of the *Tetracycline Antibiotic Drug Litigation*, noting that that approach "has been rejected by subsequent opinions, the reasoning of which this Court adopts" (quoting *Eisen III's* language) (p. 67,345). The court stated in no uncertain terms that liability and damage must be proved individually, holding: "aside from proof

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[3] See 474 F.2d at 776 n. 9, saying of the *parens patriae* device indistiguishable from that proposed in Title IV: "No matter how it is labeled, a basic problem still exists. The class action safeguards of Fed. R. Civ. P. 23 are absent."

of liability, determining the amount of damages and a proper distribution thereof would result in *an unfair trial if a fluid recovery approach were utilized*. . . ." (p. 67,346).

The overwhelming weight of judicial authority, therefore, rejects the *parens patriae*/ fluid recovery mechanism embodied in Title IV of S. 1284 as an unfair and unconstitutional expedient whose defects cannot be cured by inclusion in a statute.

C. Actual notice

Finally, the premise of Title IV is that there ought to be a remedy for consumers injured by antitrust violations. No one questions the basic principle that the legal rights to be asserted by a State attorney general are those belonging to consumers. It has long been settled that a person whose interests are being litigated in a proceeding to which he is not a named party is constitutionally entitled to notice of that fact and the concomitant opportunity to decide *for himself* whether he wants *his* claim pressed at all, in that suit or elsewhere. Rule 23, as interpreted by the Supreme Court in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), requires individual notice to all reasonably identifiable class members. Proposed Section 4C(b)(1) of Title IV, however, would instead direct that notice of a *parens patriae* action be given "by publication" unless the court finds that such notice would be "manifestly unjust as to any person or persons". Such a procedural short-cut is at odds with the due-process requirements undergirding both Rule 23 and *Eisen*.

In *Eisen*, the Supreme Court expressly noted that Rule 23's provisions requiring actual notice if at all possible were intended by the draftsmen ". . . 'to fulfill requirements of due process to which the class action procedure is of course subject' . . ." 417 U.S. at 173. The Court then noted: "The [Advisory] Committee explicated its incorporation of due process standards by citation to *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and like cases." 417 U.S. at 174. In *Eisen* the Court described *Mullane* as holding "that publication notice could not satisfy due process where the names and addresses of the beneficiaries [the interested persons] were known." *Ibid.* The Court also noted its application of this same principle in *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), where it held that due process "required rejection of notice by publication where the name and address of the affected person were available." *Ibid.*

Thus, Title IV's effort to treat *Eisen* as simply involving a matter of interpretation of Rule 23 and to make notice by publication presumptively sufficient for *parens patriae* actions disregards the undeniable fact that Rule 23's provisions in this regard reflect a constitutional imperative which Congress should not be induced to try to flout.

II. A STATE ATTORNEY GENERAL MAY LACK CONSTITUTIONAL STANDING TO SUE

A basic requirement of the Constitutional plan for federal courts under Article III is that these courts can only entertain "cases or controversies". This limitation has been construed by the Supreme Court as having a variety of manifestations, one of which is the requirement that a plaintiff invoking the jurisdiction of the courts to allege that the defendant has done something improper and to seek some redress must establish his "standing" to do so. The Supreme Court's most recent major expression on this point came in *Warth* v. *Seldin*, 422 U.S. 490 (1975). While acknowledging that Congress has some authority to lift certain court-imposed "prudential" barriers to standing, the Court emphasized that Congress does not have a completely free hand in authorizing prospective litigants to represent and assert the rights of others (422 U.S. at 501):

> ". . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege *a distinct and palpable injury to himself*, even if it is an injury shared by a large class of other possible litigants. *E.g.*, *United States* v. *SCRAP*, 412 U.S. 669 (1973)." (Emphasis added.)

In that case, the Court denied a variety of plaintiffs, including various trade associations, public interest groups, and individuals the standing to maintain actions for damages or for injunctive relief, under the federal civil rights laws and various Constitutional amendments, challenging a municipality's restrictive zoning practices. The Court held that none of the plaintiffs was able to allege and prove a direct and palpable *personal* injury from the allegedly illegal conduct. Since these principles are founded upon the Constitutional limits on federal judicial power, it would seem plain that a State official could not validly be authorized to go into a federal court to recover "damages" allegedly incurred by others unless he satisfies the constitutional requirement, codified in Rule 23, that he must be a member of the class he seeks to represent.[4] Otherwise, no matter how worthy the goal, the *parens patriae* device is simply not one the Constitution allows.

CONCLUSION

This Committee certainly has an obligation to oversee the strict enforcement of the antitrust laws. But it has an even higher duty to insure that any mechanisms intended to promote antitrust enforcement comport with overriding interests of Constitutional fairness. While the objectives of Title IV may seem reasonable, the means chosen are simply at odds with Constitutional due process.

APPENDIX 14

MARCH 17, 1976.

MEMORANDUM OF PHILIP A. LACOVARA ANALYZING CONGRESSIONAL RESEARCH SERVICE MARCH 8, 1976 MEMORANDUM ON "CONSTITUTIONAL QUESTIONS IN RE PARENS PATRIAE TITLE OF S. 1284"

On March 8, 1976, the American Law Division of the Library of Congress Congressional Research Service provided to Senator Hart and his staff a memorandum discussing the applicability of *Warth* v. *Seldin*, 422 U.S. 490 (1975), to Title IV of S. 1284, and discussing the

[4] Of course, where the State has itself suffered its own direct injury, its Attorney General may have standing to sue as a representative of a class *of which the State is a member*. That, however, is likely to be the exceptional case, and is already permissible under Rule 23.

effect of the opinion in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), on the validity of Title IV. There are several flaws to the memorandum which should be revealed.

I

The American Law Division's discussion of *Warth* v. *Seldin* misses the crucial point. The memorandum first emphasizes what is uncontested, namely that in *some* circumstances States have been allowed to sue as *parens patriae*. But these cases involve instances in which the quasi-sovereign interests of the State itself have allegedly been adversely affected. Title IV, however, involves suits for alleged injuries to consumers, not to the State itself in any sense.

Secondly, the memorandum notes that, as *Warth* itself recognizes, standing may exist by reason of "statutes creating legal rights, the invasion of which creates standing. . . ." But Title IV is not creating new legal rights—new coverage by the antitrust laws or a new class of protected persons. It is supposed to be only a procedural device for enforcement of rights already existing under current law.

Properly understood, therefore, the points made in the Division's memorandum do not support the validity of Title IV. As pointed out in my Supplemental Statement submitted to the Committee on March 9, 1976, Title IV unquestionably proceeds on the premise that the legal interests being enforced are *not* those of the State, either in its proprietary or its quasi-sovereign capacity. Rather, the Title would purport to authorize State officials to bring suits to enforce the private financial interests of individual citizens who may (or may not) have suffered some personal damage. This is not the kind of situation in which *parens patriae* standing has been permitted in the past.

By the same token, cases dealing with the statutory creation of standing are not applicable here. The cases cited in the Division's memorandum (and other cases with which I am familiar) deal with the distinctly different situation where the plaintiff has allegedly suffered some *personal* injury "in fact" and is recognized to have standing to sue because a statute has provided that he has a *legal* right not to suffer that impact. That is, if there is some concrete personal interest at stake, Congress can create standing by providing that the person injured has a right to relief against the damaging conduct. The distinction is fundamental: Title IV has nothing to do with whether a State is injured by an antitrust violation, and deals exclusively with injuries allegedly suffered only by third parties—consumers—not by the State itself.

In *Warth*, as the Division's memorandum necessarily concedes, the Supreme Court imediately insisted, after recognizing that "Congress may grant an express right of action to persons who otherwise would be barred by prudential rules of standing":

> "Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury *to himself* even if it is an injury shared by a large class of other possible litigants." (Emphasis added.)

Title IV fails to satisfy this Constitutional minimum because in the typical case the State will not be able to alege that *it* has suffered a "distinct and palpable injury" of the type allegedly suffered by the consumers whose interests it would present in litigation. Without this minimal personal stake in the outcome of the case, it is perfectly clear under *Warth* and the cases on which it relies that the State atorney general cannot validly invoke the jurisdiction of the federal courts to represent legal rights that are *exclusively* those of third parties. The memorandum of the American Law Division, in citing irrelevant generalities and failing to relate the specific provisions of Title IV to the Constitutional law of standing, is not an adequate basis for reliance.

II

The memorandum of the American Law Division also downgrades the significance of Judge Medina's opinion in *Eisen* v. *Carlisle & Jacquelin.* The memorandum acknowledges that his opinion for the Second Circuit flatly held that the "fluid recovery" device would violate due process. The attempt to undermine the force of the opinion by noting that the judges who joined in it were senior circuit judges carries no weight. Under federal law, senior judges are in every respect as competent as their younger "active" colleagues. As practicing lawyers know, many "senior" judges assume that status solely because it permits the appointment of another judge to their court, while they continue to play a full part in the judicial business of their circuit. That was true for Judges Medina and Lumbard, whose technical status as senior judges in no way compromised their authority or their stature.

The Division's memorandum also emphasizes that two of the eight active judges of the Second Circuit filed a statement dissenting from the denial of rehearing *en banc*, disagreeing with the panel's Constitutional conclusions. To the extent that their opinion, which was not the result of any briefing or argument, deserves any attention, it is far outweighed by the fact that the five active judges who voted against rehearing, while recognizing the importance of the various issues, nevertheless did not impugn the soundness of Judge Medina's analysis.

Nor is there any basis for the implication in the Division's memorandum that the Supreme Court's later opinion somehow casts doubt on the Second Circuit's conclusions. The Division's memorandum is simply wrong as a matter of law in asserting: "The lower court's decision having been superseded by a more authoritative Supreme Court opinion and its judgment vacated, the lower court's Constitutional conclusions have no precedential value." The Supreme Court found it unnecessary to reach the ultimate issues addressed by the Second Circuit but that hardly strips those conclusions of precedential value when there is not a word in the Supreme Court's opinion in any way challenging them. Moreover, if inferences are to be drawn, the contrary inference is more reasonable, since the Supreme Court approved all of the analysis of Judge Medina's opinion which it found it necessary to address. The Supreme Court, indeed, twice referred to the Second Circuit's rejection of what the Court itself termed the "expedient of a fluid-class recovery" (417 U.S. at 166, 169), and in no way implied that it was any more willing to let expediency prevail over fairness than had been the Second Circuit. The bulk of the Supreme Court's opinion in *Eisen* reflects the identical concern for fundamental fairness in civil procedure which animated the Second Circuit's opinion, and it is wistful to suggest that the Supreme Court was silently undercutting the Second Circuit's manifestation of that same concern in treating the "fluid recovery" concept.

Finally, the Division's memorandum acknowledges that the Second Circuit's opinion in Eisen must at least be recognized as having the force warranted by the "persuasiveness of the arguments" underlying the court's statements. As described in my March 9th Supplemental Statement to the Committee dealing with the Constitutional issues raised by the "fluid recovery" provisions, later decisions of trial and appellate courts have in fact approved and adopted the reasoning of the Second Circuit in Eisen.

The conclusion to be drawn from this discussion must be that Title IV's procedural mechanisms raise the gravest Constitutional questions and their enactment into law would be inconsistent with the duty of care that should be observed when Constitutional rights are at stake.

APPENDIX 15

[From the Bureau of National Affairs, Inc., Washington, D.C., Aug. 3, 1965]

ANTITRUST AND TRADE REGULATION TODAY: 1967

SELECTED ANALYSES FROM BNA'S ANTITRUST AND TRADE REGULATION REPORT

Subject: Multi-Employer Collective Bargaining and the Antitrust Laws.

Question. What impact are the Supreme Court's recent decisions on labor's antitrust exemption likely to have on joint collective-bargaining negotiations with groups of employers?

REFERENCES

United Mine Workers v. Pennington, 381 U.S. 657, 33 U.S. Law Week 4520 (pp. A–1, X–1, ATRR No. 204, 6/8/65).

Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 675, 33 U.S. Law Week 4525 (pp. A–1, X–6, ATRR No. 204, 6/8/65).

Report to Counsel for All IUD Affiliates from Office of IUD Counsel, July 2, 1965 (p. A–1, ATRR No. 212, 8/3/65).

BACKGROUND

Last February at a meeting of the District of Columbia Bar Association's Antitrust Law Committee, Guy Farmer, former chairman of the National Labor Relations Board, presented a paper on the growth of industry-wide collective bargaining and the relationship of that phenomenon to the antitrust laws. He suggested that labor-relations lawyers may have overlooked "one significant aspect" of the Supreme Court's decision in Allen-Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945). That opinion did more than curtail the scope of labor's antitrust exemption. "Allen-Bradley established a legal principle which made associations of employers potential co-conspirators with labor unions."

He reported that between 80 and 100 percent of the workers covered by union contracts in the coal-mining, clothing-manufacturing, building-construction, longshore, maintenance, hotel, and trucking and warehousing industries are covered by multi-employer contracts. In baking, book and job printing, textiles, glass and glassware, malt liquor, pottery, and the retail trades, the percentage is about 60 to 80 percent. Joint negotiations are conducted by the larger enterprises in other major industries, such as steel, although separate contracts are signed.

But Mr. Farmer said these employer associations or groupings seldom represent all the business components of the industry involved. Typically the members of the association are the larger and more stable business units. Yet the labor agreement negotiated by the employer association generally sets the wage-rate and working-condition standards accepted "fairly uniformly" by the remainder of the industry. At least it will always be the union's policy to seek uniform labor standards in its separate dealings with the other members of the industry. Furthermore, the employers participating in the joint negotiations frequently seek some sort of guarantee that nonparticipating competitors will not be permitted to negotiate more favorable terms with the union. Some contracts have included "most favored nation" clauses, assuring participating employers that the terms of their contract will be adjusted to match any more favorable terms negotiated by competing employers.

PENNINGTON CASE

Mr. Farmer spoke one month after argument (p. A-1, ATRR No. 186. 2/2/65) had been held in the Pennington and Jewel Tea Co. cases. In Pennington, the UMW was challenging a verdict against it in an antitrust damage suit brought by a small mine operator hurt by the National Bituminous Coal Wage Agreement of 1950. The UMW and the large mine operators had been charged with agreeing to eliminate critical over-production in the coal industry by driving the smaller operators out of business. The union was said to have promised to go along with mechanization of the mines and to impose the terms of the Wage Agreement on all mine operators without regard to their ability to pay. And the Wage Agreement itself forbade the mine operators to lease any of their coal lands to nonunion operators and to buy or sell coal mined by companies paying less favorable wage rates than those set out in the Wage Agreement.

In support of antitrust exemption for arrangements of this sort, including the union promise to impose the same terms on the rest of the industry, the United Mine Workers pointed to the Supreme Court's statement in Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940): "Since in order to render a labor combination effective it must eliminate the competition from nonunion made goods * * * an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."

The Supreme Court, however, thought UMW counsel was reading too much into the Apex decision. The Court recognized that the labor exemption is available to collective-bargaining agreements on wages "not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit." Moreover, the union is free "as a matter of its own policy" to seek the same wages from all other employers in the industry.

But not every agreement resulting from union-employer negotiations is automatically exempt simply because it involves a compulsory subject of collective bargaining. "A union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." Moreover, the Supreme Court could see nothing in national labor policy that conflicts with this restriction on union-employer agreements. "The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant."

In a footnote to his opinion for the Court, Mr. Justice White recognized the right of the union, acting unilaterally, to "adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. * * * Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency."

In a concurring opinion joined by Justices Black and Clark, Mr. Justice Douglas read the opinion of the Court as saying (1) that a union may not agree on a wage scale that exceeds the financial ability of some employers to pay when that agreement is made for the purpose of forcing some employers out of business and (2) that "an industry-wide agreement containing those features is prima facie evidence of a violation."

JEWEL TEA CASE

Those three justices dissented in the Jewel Tea case, where the Court split three ways in sustaining the Amalgamated Meat Cutters' business-hours limits for Chicago grocery stores. Again Mr. Justice White announced the judgment of the Court, but his opinion was joined only by the Chief Justice and Mr. Justice Brennan. No claim was advanced in the Supreme Court that the Meat Cutters had conspired with some employers against others. The only issue was "whether the marketing-hours restriction * * * is so intimately related to wages, hours and working conditions that the union's successful attempt to obtain that provision through bona fide, arms-length bargaining in pursuit of its own labor union policies * * * falls within the protection of the national labor policy." His answer was that national labor policy "places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work."

A suggestion by Jewel Tea Co. that grocery stores could remain open in the evening without infringing the Meat Cutters' interests was rejected by Mr. Justice White. He was satisfied that there was evidence to support the district court's finding that meat could not be sold in the grocery stores after 6 p.m. unless the members of the meat cutters—or someone else doing their work—remained after that hour.

Justices Douglas, Black, and Clark viewed the Chicago marketing hours situation as union coercion of an employer into an agreement that prevents the employer from using convenience of shopping hours of a means of competition. And they regarded the union's collective agreement with the Chicago grocery stores as itself evidence of a conspiracy to impose the marketing-hours restriction on the complaining grocery chain by means of a strike threat.

Justices Goldberg, Harlan, and Stewart dissented in Pennington but concurred in the Court's judgment extending antitrust exemption to the marketing-hours agreement. They viewed both these cases as "refusals by judges to give full effect to congressional action designed to prohibit judicial intervention via the antitrust route in legitimate collective bargaining." And the Court's opinion in Pennington raised for them the possibility of judges and juries' "making essentially economic judgments in antitrust actions by determining whether unions or employers had good or bad motives for their agreements on subjects of mandatory bargaining."

UNION REACTION

The Pennington and Jewel Tea opinions have been subjected to extended study and analysis by labor lawyers, especially labor union counsel. Counsel for the Industrial Union Department of the AFL–CIO told member unions that the decisions "reversed a universally held assumption as to the scope of the labor exemption, pointing to a conclusion in the 1955 report of the Attorney General's National Committee to Study the Antitrust Laws that the antitrust laws apply only to union activities involving "direct control of the market."

Among the consequences IUD counsel saw in the decisions, "one of the most alarming * * * is that they leave for determination by a trial judge or jury the question of whether a union (or an employer for that matter) should be held liable for treble damages under the Sherman Act." The question whether a union, in seeking to negotiate uniform contracts throughout an industry, is acting on its own or pursuant to an agreement with some of the employers is one that must be answered on the basis of all the circumstances of the case "as interpreted in the light of the particular prejudices and economic philosophy of the fact finder." An inference was drawn from the Jewel Tea case that, had the trial court found no relationship between hours of work and marketing hours, antitrust exemption would have been denied the marketing-hours restriction. Convinced that the effects of the two decisions upon labor union activities "will be adverse," IUD counsel held out hope that the rule applied by the court "may be narrowed in future litigation" on the sufficiency of the evidence to show an unlawful conspiracy and the type of collective-bargaining contract terms that can be said to violate the Sherman Act.

IUD counsel also perceived in the decisions significant consequences for employers, for they read the opinions as subjecting not unions but the collective-bargaining process to the antitrust laws. Obviously, employers are liable equally with the union for any employer-union conspiracy in restraint of trade. And, while unions remain free to seek uniform labor standards throughout any particular industry, employers may not do so either by unilateral request to the union or by inter-employer agreement. If employers in an industry agree among themselves as to the union wage demands they will accede to, and thereby prevent the union from obtaining a satisfactory agreement, it may be that the union has an antitrust remedy, the IUD lawyers suggested. For example, if an association of employers initiates a lockout in response to a strike called against only one member employer, IUD counsel think there are "interesting possibilities for suits by the locked-out employees based on an antitrust theory rather than the unfair labor practice remedy which has previously been pursued."

CONCLUSIONS

Supreme Court decisions on the scope of labor's antitrust exemption are necessarily resolutions of a conflict between two basic national policies. If the Sherman Act's goal of unfettered price competition were the only Congressional policy to be implemented, some of the principal activities of labor unions would have to be outlawed because they reduce or eliminate price competition reflecting variations in labor costs. In a series of statutes including Section 6 of the Clayton Act, the Norris-LaGuardia Act, the National Labor Relations Act, the Fair Labor Standards Act, and the Davis-Bacon and Walsh-Healey Public Contracts Act, however, Congress has articulated a policy that this sort of price competition is to be sacrificed in the interest of industrial peace and a measure of economic security for the working man.

Until the decision in the Pennington case, labor lawyers thought the Apex and Allen-Bradley opinions had established three clear principles: (1) that restraints relating to wages, hours, and working conditions are not subject to the Sherman Act even when accomplished by a combination of unions and employers; (2) that restraints on the marketing and pricing of goods do violate the Sherman Act when accomplished by a combination of unions and employers; and (3) that pricing and marketing restraints imposed by a union acting alone are within the exemption spelled out in Section 6 of the Clayton Act.

There seems to be little doubt that the opinion in the Pennington case revises the first of these principles. Some labor lawyers are concerned about the impact the decision may have upon collective bargaining in industries where multi-employer negotiations prevail and unions have sought uniform standards with some success. Of particular significance, in their view, are the Court's statements suggesting that a union-employer conspiracy violating the Sherman Act can be proven, as in other antitrust cases, by indirect or circumstantial evidence. Alerted by the dissenting opinion of Mr. Justice Goldberg, they fear that the Court's reasoning permits a jury to infer a conspiracy to drive out marginal producers merely from discussions at the bargaining table about the competitive effect wage rates may have on other employers in the industry.

There are both antitrust and labor lawyers who feel that the new decisions upset a balance between labor law and antitrust law and create uncertainty and confusion for the future. They point to the three-way division among the justices as proof of the uncertainty and note also that antitrust law, which prevailed in these decisions, is less definite and clear, in general, than labor law.

The uncertain state of the law is illustrated by a disagreement that prevails among lawyers over the present antitrust status of the "most favored nation" clauses negotiated in some industries. Although there are antitrust lawyers who do not think the court has condemned that type of arrangement, at least one expert in labor law has labeled them "clearly illegal." Counsel for the IUD was not sure where these clauses stand.

They advised unions "to make no agreements with any employers as to what kind of agreements * * * the union will negotiate with other employers." They were sure that it would be illegal to place in an agreement with one group of employers a commitment by the union not to grant more favorable conditions to any competing employer.

The view has also been expressed that unions may now be ill advised to campaign for uniform labor standards even on a unilateral basis. After all, an unwritten union assurance that other employers will not be given more favorable terms falls into the same category as a written agreement.

As a practical matter, the real hazard for unions seeking uniform labor standards and the employers they deal with would seem to lie in the threat of treble-damage suits by disgruntled marginal producers or recalcitrant employer-association members. That is the type of litigation that can go to a jury on the issue whether a conspiracy is to be inferred from the content of a multi-employer agreement and the history of negotiations leading up to it. Injunctions are issued by judges sitting without juries, operate only prospectively, and leave the union free to seek the same objectives by unilateral action, as did the injunction finally entered in the Allen-Bradley case.

Another noteworthy aspect of the Pennington decision is its relationship to the development of automation. What the Court has told the coal-mining industry is that the marginal producers economically incapable of switching to automation cannot be foreclosed, by prior agreement in the rest of the industry, from at least trying to resist imposition of union wage scales and to offer, through use of cheaper labor, some price competition to the larger modernized mines.

The two decisions have also been described as further manifestations of two trends in the Court's decisions: (1) a tendency to give broader application to the antitrust laws and (2) a reaction against the economic power that has been acquired by labor unions—a reaction seen in other decisions last term such as American Ship Building Co. v. NLRB, 380 U.S. 300, 33 U.S. Law Week 4273, and NLRB v. Brown, 380 U.S. 278, 33 U.S. Law Week 4285. As signs of the second trend, the decisions can be expected to reduce congressional interest in pending bills that would subject labor unions to the antitrust laws.

INDIVIDUAL MINORITY VIEWS OF SENATOR STROM THURMOND

While I fully concur in the minority views, I feel it necessary to add my separate views in opposition to this legislation. Like much purported "consumer interest" legislation enacted during recent years, the Antitrust Improvements Act of 1976 has a high-sounding but misleading label.

In the noble name of "antitrust improvements," the committee majority would create new legal machinery that would in fact be unfair to business, costly to the consumer, and a grave threat to our heritage of due process and protection from Federal Government interference in business.

It is particularly disturbing that the majority ignores that enacting this legislation will create very serious constitutional problems involving denial of due process.

This bill improves nothing. On the contrary, its enactment would wreak havoc on the American economy, including large and small businesses alike, as well as on the administration of the Nation's judicial system. So great is this potential threat that no less an authority than Erwin Griswold, former dean of the Harvard Law School and Solicitor General of the United States, has deemed it appropriate to critically question the constitutionality of major areas of the bill.

Indeed, Senator Burdick offered amendments to hopefully make the proposal constitutional and legal. Those amendments having failed, he now opposes title IV because it is unconstitutional and as reflected in his "Individual Views."

My fundamental objection to this legislation is that, beneath the facade of "improvements" and "consumer interests," it really assumes that private business is an economic evil, endangering "our democratic institutions and personal freedoms."

That is the awesome charge contained in title I of the bill. It is the premise on which the entire bill is based. I could not disagree more with the negative antibusiness philosophy reflected in that general policy statement.

In my opinion, the foremost threat to "our democratic institutions and personal freedoms" this election year is not the American free enterprise system as title I implies. Rather, it is the legislation enacted over the years which has placed ever-increasing power and authority in Government hands to regulate Americans in every facet of our daily lives.

The worst of such regulatory legislation has been enacted in the name of "protecting" or "improving" citizens' rights and interests against the alleged depredations of the private sector of the American economy. That is the case with the instant bill.

American consumers enjoy the benefits of the most abundant, efficient, and competitive economy on the face of the globe. Ours is an economic system that advances "our democratic institutions and personal freedoms" to the envy of peoples throughout the world.

Nevertheless, in focusing only on some purported problems in our national economy, this bill unfairly seeks to make our free enterprise system a political scapegoat. Toward that end, title I alleges that "anticompetitive practices" in business and industry are a root cause of unemployment and inflation. The clear implication is that the provisions of this bill represent a step in the direction of curing those ills.

Such polemics confound rather than enhance general public understanding of the complexity of the country's current economic problems. Specifically, the broad charges made and implied in title I conveniently overlook the fact that to a large extent those problems are the result of the high cost of Government itself; a cost, let me submit, which has been made all the greater over the years by the development of just such legislative "improvements" as are embraced by this bill.

Moreover, the burden placed on the system by ill-conceived but resoundingly titled "consumer interest" legislative measures and bureaucratic devices have compounded rather than cured the country's economic ills. Indeed, in many important areas, they have created economic ills where none previously existed.

If enacted into law, the majority-approved bill would assume a first-rank position in that onerous category of "consumer interest" legislation. Its provisions would not only inhibit the expansion of the national economy when that economy is on the upswing, but title IV in particular would place a potentially crushing burden on our Federal court system at a time when the administration of criminal and civil law and justice is in crisis because of an already existing court overload.

This last point was tellingly made by Prof. Milton Handler in his critiques of the majority-approved bill. Professor Handler pointed out that "any court unlucky enough to be chosen as the forum for a State *parens patriae* action would have no option but to adjudicate the claims brought before it, however numerous and minuscule they might be.* * * Not only will this enterprise consume lifetimes of judicial energy, but the result will be meaningless for the consumers themselves, since the expense of litigating, including attorneys' fees, will exceed their maximum possible recoveries."

Title IV lies at the heart of the bill's potential for abuse of the judicial process—though invitations to abuse abound in titles II, III, and V as well. This title is the ultimate mockery of the term "consumer benefit." The "benefit" it promises would in fact not inure to consumer plaintiffs but to antitrust lawyers who would be awarded a veritable bounty hunter's license to file unlimited liability actions, based on obscure and uncertain antitrust theories, against every size and species of private firm.

There seems to be a widespread misconception that the legislation is directed only against giant corporations. Private firms and business entities *of all kinds*, including those in the professions, could be sued under title IV. For that matter, labor organizations which have a partial antitrust exemption would also be subject to suits under title IV, in the same manner as corporate entities.

In brief, title IV poses a potential threat to every segment of the American economy, excepting only, as I stress once again, the legal antitrust trade. For lawyers specializing in that trade, title IV represents a bonanza and boom in prospective business.

What is especially illusory about this title is its theoretical improvement of extending to the State attorney general power to file suits for alleged antitrust violations. How far we have departed from the Founding Fathers' conception of the Constitution, when Congress presumes to give State officials authority which the States already have. Have we progressed so far in our view of the Federal Government as the dispenser of all powers, as to forget the fact that under the Constitution the States, if they desire, have their own authority to enact and enforce State laws regarding price-fixing and other antitrust violations within their boundaries?

It is unnecessary for the Federal Government to empower State attorneys general to proceed in Federal court to protect consumer interests. If the States, through their executive and legislative branches, believe their State attorneys general should be empowered to file suits of the kind described in title IV, then laws to that end should be enacted on the State level, authorizing suits in State, rather than Federal, courts.

President Ford on March 17 made quite clear, in opposing the concept of *parens patriae* in this type of legislation, that this was a State matter best left to the States.

In addition, and recognizing that the vast majority of State attorneys general are honest and conscientious public servants, we cannot ignore that in most States the office is political and elective. Stated bluntly, title IV proposes to dispense broad and hitherto unknown powers to use the Federal court system to State officials subject to political motivations and pressures.

It is a regrettable fact that abuse of existing powers held by some State attorneys-general has in past years been a blot on the administration of justice. A former attorney general of Alabama was sentenced to 8 years in prison for abusing the powers of his office to extort payoffs, by threatening to bring suit under various laws he enforced. A former attorney general of New Mexico has been indicted for similar abuses of his office.

A former attorney general of Washington was accused of accepting a bribe, by virtue of being paid nearly $1 million in fees for handling an antitrust suit on behalf of government entities while holding office. He was acquitted, the court finding that he was authorized to "practice law" while in office. While he was prosecuting the suit, in the courts and in the headlines, he ran unsuccessfully for Governor.

With this in mind, it is incumbent on Congress to consider title IV's potential for abuse. To those familiar with these cases, where State attorneys-general have abused their powers, sometimes by extorting money from business corporations, sometimes by threatening to file suits, that potential poses frightening possibilities.

As for the bill's provisions permitting large antitrust treble-damage actions to be filed by State-hired private lawyers, we have seen in recent years how the abuse of the judicial system in the filing of professional malpractice suits has assumed dimensions of a major national scandal. This situation has become so bad that in some areas of the country, doctors have launched what has been called a legal counterattack against unscrupulous legal malpractice practitioners.

Even without title IV's revolutionary proposals, the entrepreneurs of the antitrust bar have come up with horrifying devices to sustain their litigation. Just recently, a national magazine* described how one attorney proposes to pay his so-called expert witnesses on a contingent basis, and even more outlandishly, to pay for his ongoing expenses by arranging to sell shares in the possible recovery. Apparently it will make no difference that the "shareholder" gambling on a share of the damages was never in fact damaged himself. This "visionary" attorney is reported to be proposing a whole new stock market for lawsuits.

Title IV offers such private practitioners tempting new possibilities to ply their trade. The committee majority has given its stamp of approval to what amounts to an Antitrust Lawyers Full Employment Act. But if the provisions of that act are read carefully, it will be found that there is little, if any, benefit within it accruing to those lawyers' consumer-clients.

This bill, as I stated at the time it was reported favorably by the majority, is a cruel hoax on the consumer. The "damages" to be recovered will typically amount to a few dollars, perhaps but a few pennies, per person—no one seriously expects individual consumers to go through the administrative bother of trying to collect these small sums. After the lawyers skim their fees off the top, the bulk of the booty will apparently be distributed at the discretion of the judge, unless there is some State law setting up an appropriate general welfare program to be funded by the proceeds of such litigation.

In the worst sense, this is blackmail litigation. Few firms could afford the risk of losing a judgment in the billions, even if totally convinced of their innocence, and so these massive suits will have to be settled. In a well-known case, a group of drug companies was faced with claims which, according to one judge's theory, could have reached $4 billion, or more. So they settled, with all the plaintiffs but one, for about 5 percent of that amount—$200 million, of which some $40 million has gone to the lawyers. One plaintiff State insisted on taking the case to court for a ruling on the merits—and the court found there had been *no violation of the antitrust laws*. But because of the risk of an adverse ruling, the companies had already paid $200 million as insurance against bankruptcy. As could have been predicted, the bulk of the settlement money earmarked in these suits for consumers has gone unclaimed; apparently, the amounts are individually too small to bother with.

Thus, not only does the consumer fail to benefit from such suits, but as history has demonstrated, the high costs of settling or defending them will invariably be passed on to the customer.

Titles II, III, and V suffer equally grave defects, by rejecting established due process safeguards and granting unnecessary and potentially abusive powers to government officials.

Title II would authorize an unprecedented inquisitorial power in the Department of Justice, tailored uniquely for use against businessmen. These powers could be used not only to prepare for Government

*Time, May 3, 1976.

antitrust suits, but also to gather information for use in bureaucratic and administrative agency proceedings. Moreover, title II grants these powers and simultaneously withholds or dilutes traditional due process rights to adequate representation by counsel, to inspect one's own testimony for accuracy, and to challenge the interrogator's authority in a court of law.

Would S. 1284's supporters approve such powers in the hands of the FBI or the IRS? What gives the Antitrust Division a superior right to such powers?

Title V would allow the Government to stop at will, and effectively kill, virtually any business acquisition or merger, by turning completely on its head our time-honored judicial principle that the Government must prove its case before it can restrict the citizens' freedom of action. Instead, the Alice-in-Wonderland title V would force the defendant to demonstrate that the Government could *not* prove its case.

The hodgepodge of title III would inject the Federal authorities and the Federal courts into the most local business practices, ferreting out local transactions alleged to merely "affect" interstate commerce. It would further help the lawyers who file antitrust treble damage suits, by unleashing them against local businesses and local trade practices. It would further overload the court system by assigning priority status to any case, government or even private suit, designated a "complex antitrust case." The majority does not explain how this priority is to rank alongside the dozen or more different types of cases, including criminal cases, which recent legislation has also decreed should take precedence over everything else on the court's docket.

In conclusion, let me refer again to the analysis of *parens patriae* made by Professor Milton Handler in his statement before the committee. Professor Handler raised the following series of questions, covering all titles of the bill:

> "Is it constructive and wise," he asked, "in this critical period to launch an all-out war against our major corporations in the guise of preventing and eliminating oligopoly?"
>
> Is it in the national interest to threaten business with the forfeiture of its assets in the event the antitrust laws are violated? (Small business is particularly vulnerable.)
>
> Is it conducive to good relations with our western allies to require their companies to violate their laws in order to satisfy the discovery demands of the litigants in our courts?
>
> Is it productive of effective law administration to shatter the secrecy that historically has shrouded the processes of the Grand Jury?
>
> Is it wise to throttle the merger process with restrictive procedures that violate our principles of fair play and justice?
>
> Is it right, and consistent with the precepts of due process, to give retroactive application to drastic changes in the law, in effect posing *ex post facto* penalties of astronomical dimension on our business units?
>
> Can we safely ignore the mounting crisis of the Federal courts by increasing the workload without a correlative in-

> crease in the number of judges and supporting personnel?
>
> What happens to our society if we add the last straw which breaks the camel's back and brings about a collapse of the judicial system?
>
> Are the benefits of *parens patriae* and class actions to consumers worth the cost which we surely will have to pay for these devices? Are there no available more effective and less costly remedies for safeguarding the consumer's interest?

These are questions ominously raised by the provisions of this "improvements" legislation. They are not satisfactorily answered.

I therefore join with other members of the minority in opposing its enactment into law, in the hope that the Senate will reject the recommendations of the majority and in doing so truly serve the interests of the country's consumer-citizens.

STROM THURMOND.

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