93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-1463

ANTITRUST PROCEDURES AND PENALTIES ACT

OCTOBER 11, 1974.—Committeed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 782]

The Committee on the Judiciary, to whom was referred the bill (S. 782) to reform consent decree procedures, to increase penalties for violation of the Sherman Act, and to revise the Expediting Act as it pertains to Appellate Review, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Antitrust Procedures and Penalities Act".

CONSENT DECREE PROCEDURES

SEC. 2. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 16), is amended by redesignating subsection (b) as (i) and by inserting immediately after subsection (a) the following:

"(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the

United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

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

"(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

"(5) a description of the procedures available for modification of such proposal; and

"(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

"(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

"(i) a summary of the terms of the proposal for the consent judgment,

"(ii) a summary of the competitive impact statement filed under subsection (b),

"(iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

"(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

"(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

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

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

"(f) In making its determination under subsection (e), the court may—

"(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

"(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the

views, evaluations, or advice of any individual, group or agency of government with respect to any aspect of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

"(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

"(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

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

"(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

"(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding."

PENALTIES

SEC. 3. Sections 1, 2, and 3 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1, 2, and 3), are each amended by striking out "fifty thousand dollars" whenever such phrase appears and inserting in each case the following: "five hundred thousand dollars if a corporation, or, if any other person, one hundred thousand dollars".

EXPEDITING ACT REVISIONS

SEC. 4. (a) The first section of the Act of February 11, 1903 (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the "Expediting Act", is amended to read as follows:

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

(b) Section 2 of the Act of February 11, 1903 (15 U.S.C. 29; 49 U.S.C. 45), commonly known as the Expediting Act, is amended to read as follows:

"SEC. 2. (a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and

monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. An appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28, United States Code, but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28, United States Code.

"(b) An appeal from a final judgment entered in any action specified in subsection (a) shall lie directly to the Supreme Court if the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such certificate shall be filed within 10 days after the filing of a notice of appeal. When such a certificate is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) deny the direct appeal and remit the case to the appropriate court of appeals, which shall then have jurisdiction to hear and determine such case as if the appeal and any cross appeal in such case had been docketed in the court of appeals in the first instance pursuant to subsection (a).".

APPLICATION OF EXPEDITING ACT REVISIONS

SEC. 5. (a) Section 401(d) of the Communications Act of 1934 (47 U.S.C. 401(d)) is repealed.

(b) Section 3 of the Act entitled "An Act to further regulate commerce with foreign nations and among the States", approved February 19, 1903 (32 Stat. 849; 49 U.S.C. 43), is amended by striking out the following: "The provisions of an Act entitled 'An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three,' shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission".

EFFECTIVE DATE OF EXPEDITING ACT REVISIONS

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

COMMITTEE ACTION

Your Committee, acting through its Monopolies and Commercial Law Subcommittee, held four days of hearings from September 20, 1973 to October 3, 1973, on three bills relating to Antitrust Procedures and Penalties, the first of which was introduced in the House on July 11, 1973 by Chairman Rodino. The Subcommittee received oral and written testimony in those hearings from over fifteen witnesses including Members of Congress, the Deputy Assistant Attorney General for Antitrust, the ex-Chairman of the Federal Trade Commission, and numerous experienced and informed spokesmen for diverse industries, the private and public antitrust bars, public interest groups, and judicial procedures specialists.

On March 12, 1974 the Subcommittee recommended S. 782 with amendments to the Full Committee by voice vote.

On October 8, 1974, the House Judiciary Committee, by voice vote without objection, ordered reported S. 782, the Antitrust Procedures and Penalties Act, with one amendment in the nature of a substitute, the language of which is the text of H.R. 17063. During hearings and mark-up by the Monopolies and Commercial Law Subcommittee, H.R. 9203 had been the proposed legislation considered: H.R. 17063 represented the amended version thereof, introduced by Chairman Rodino upon the unanimous agreement of the Members of the Monopolies Subcommittee. S. 782 was passed unanimously by the Senate (92–0) on July 18, 1973. H.R. 17063 differed from S. 782 in numerous respects most of which were either technical and conforming changes or a redesignation of sections within the bill; however, several significant additions and deletions were made to S. 782 as passed the Senate by the House Committee on the Judiciary.

Purposes

The purposes of S. 782 are to enact legislative and oversight changes to settlements of Government civil antitrust cases with provisions applicable to all parties in interest, namely, the Attorney General, the public, federal district courts, and defendants; to increase maximum allowable fines in Sherman Act cases (15 U.S.C. 1 et seq.); and, to make a variety of changes in the Expediting Act (15 U.S.C. 28, 29) applicable to Government civil antitrust cases and to two other laws incorporating present Expediting Act procedures (47 U.S.C. 401(d) and 49 U.S.C. 43–45) to improve or to accelerate the trial and appeal of public antitrust cases.

Cost

The bill does not authorize appropriations for procedures enacted. Revisions to consent decree procedures for the Justice Department and federal district courts, except for costs of publishing public notice of pending proposals for a consent decree, do not entail procedures by these agencies not already authorized or for which added manpower or other new resources are necessary. Increases in fines for Sherman Act violations will increase federal revenues but on a case by case determination for which, therefore, an overall estimate is not possible. Changes in judicial procedures for the movement of filed cases to trial and for appeals in public civil antitrust cases are based, in part, on the expectation that a significant conservation of judicial and of Justice Department resources and expenditures will occur.

General Statement and Analysis

The bill is composed, essentially, of three separate sections which are directed at different aspects of enforcement and application of antitrust laws by federal agencies and institutions: the first Section relates to procedures for settlements of Government civil antitrust cases; the second Section increases fines allowable for Sherman Act violations; and, the third Section improves pre-trial and appellate procedures in public civil antitrust cases.

I. CONSENT DECREE PROCEDURES

As an annual average since 1955, approximately 80 percent of antitrust complaints filed by the Antitrust Division of the Department of Justice are terminated by pre-trial settlement; in two years during the 1955–1972 period, 100 percent of all judgments in public antitrust cases resulted from utilization of the consent decree process. Given the high rate of settlement in public antitrust cases, it is imperative that the integrity of and public confidence in procedures relating to settlements via consent decree procedures be assured. The bill seeks precisely to accomplish this objective and focuses on the various stages of consent decree procedures, including that process by which proposed settlements are entered as a court decree by judicial action.

Ordinarily, defendants do not admit to having violated the antitrust or other laws alleged as violated in complaints that are settled. The antitrust laws express fundamental national legal, economic, and social policy. Present law, 15 U.S.C. 16(a), encourages settlement by consent decrees as part of the legal policies expressed in the antitrust laws. Consent decrees, unlike decrees entered as a result of litigation, are not available as prima facie evidence against defendants in public antitrust cases in subsequent private antitrust cases. The bill preserves these legal and enforcement policies and, moreover, expressly makes judicial proceedings brought under the bill as well as the impact statement required to be filed prior thereto inadmissible against defendants of the public antitrust action in subsequent antitrust actions, if any. Various abuses in consent decree procedures by the Antitrust Division and by district courts are, however, sought to be remedied as a matter of priority since as the Senate Report on the bill, Senate Report No. 93–298, aptly observed, "by definition, antitrust violators wield great influence and economic power." (p. 5).

The first three subsections of the bill, subsections 2(b)–(d), require the filing of an impact statement by the Justice Department along with each proposal for a consent judgment offered by it to a federal district court; provide mechanisms for notifying the public of such filings; and, allow public comment thereon and Justice Department responses thereto within a specified period. In each of these areas, the Department of Justice presently, as a matter of internal policy only, has applicable procedures. When a proposal for a consent judgment is submitted to a district court: the defendant agrees that the proposal, as filed, becomes binding and final on it within thirty days and that during this period, it may not withdraw its consent; but, the Government retains the right to withdraw its consent to entry of the decree at any time during the thirty-day period. This Justice Department "30-day" policy is relatively new, being introduced by former Attorney General, the late Robert F. Kennedy, who was responding to a critical 1959 Report by the House Antitrust Subcommittee that issued as a result of House Resolution 107 of the 85th Congress and hearings during the 85th and 86th Congresses in which nearly 4,500 pages of testimony on consent decree procedures were received. In the 1959 Report, the House Antitrust Subcommittee concluded, "The consent decree practice has established an orbit in the twilight zone between established rules of administrative law and judicial procedures." The bill, in this respect, is designed to substitute "sunlight" for "twilight" and

to regularize and make uniform judicial and public procedures that depend upon the Justice Department's decision to enter into a proposal for a consent decree. Moreover, the extant 30-day policy period is expanded by legislation to 60-days as a response to criticisms that 30-days are insufficient for meaningful public analysis and comment of both antitrust complaints and proposed consent decrees, especially in those situations where, despite Congressional criticism, the Justice Department negotiates both the complaint and the proposed settlement thereof and files them simultaneously in a district court.

Similarly, present Justice Department policy calls for the issuance of a press release on the date on which a proposed consent decree is filed that: advises the public of the terms of the proposed settlement; describes the actions allegedly violative of the antitrust laws as expressed in the complaint; and, invites public comment during the 30-day period. The bill requires the Justice Department to file an impact statement with each of its proposals for a consent judgment containing:

(1) The nature and purpose of the proceedings;

(2) A description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) An explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be thereby, and the anticipated effects on competition of such relief;

(4) The remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) A description of the procedures available for modification of such proposal; and

(6) A description and evaluation of alternatives to such proposal actually considered by the United States.

Your Committee agrees with S. Rept. No. 93-298, "The bill seeks to encourage additional comment and response by providing more adequate notice to the public," (p. 5) but stresses that effective and meaningful public comment is also a goal. The United States, therefore, is charged with publishing a notice, at least 60 days prior to the effective date of the consent judgment's becoming finalized and for 7 days over a 2-week period in newspapers of general circulation, containing:

(1) A summary of the terms of the proposal for the consent judgment,

(2) A summary of the competitive impact statement filed:

(3) And a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

During the 60-day period, in addition, the United States is required to publish in the Federal Register its impact statement and its responses to written comments received concerning the proposed consent judgment. The legislation clearly prohibits a shortening of this 60-day period unless the cognizant district court so orders after it has been shown: (1) Extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest.

The fourth and fifth subsections of the bill, Sections 2(e) and (f), relate entirely to judicial practices and procedures upon the submission to it of a proposal for a consent judgment and compliance by the Justice Department with procedures set forth in the first three subsections of the bill. One of the abuses sought to be remedied by the bill has been called "judicial rubber stamping" by district courts of proposals submitted by the Justice Department. The bill resolves this area of dispute by requiring district court judges to determine that each proposed consent judgment is in the public interest. Your Committee agrees with S. Rept. No. 93-298's evaluation of this legislative requirement set forth in Section 2(e) of the bill:

> The Committee recognizes that the court must have broad discretion to accommodate a balancing of interests. On the one hand, the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option. It is not the intent of the Committee to compel a hearing or trial on the public interest issue. It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible. Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized. Only where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so.
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> Nor is Section 2(e) intended to force the government to go to trial for the benefit of potential private plaintiffs. The primary focus of the Department's enforcement policy should be to obtain a judgment—either litigated or consensual—which protects the public by insuring healthy competition in the future. The Committee believes that in the majority of instances the interests of private litigants can be accommodated without the risk, delay and expense of the government going to trial. For example, the court can condition approval of the consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private plaintiffs which will assist in the effective prosecution of their claims. (pp. 6-7)

Your Committee wishes to emphasize, in addition, that: (1) the public does have an interest in the integrity of judicial procedures incident to the filing of a proposed consent decree by the Justice Department and the case law in this regard is not disturbed; (2) case law that district courts cannot compel entry of proposed consent judgments if the Justice Department resists such entry, and vice versa, is also not intended to be disturbed; and (3) legislative guidelines flowing from legislative oversight activity are appropriate even though actual entry of the proposed consent judgment is an exercise of judicial power. Added legislative intentions in this regard are; (1) to foreclose future disputes following entry of the proposal as a consent judgment concerning decree language or the intentions of the parties, *U.S.* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); (2) to

facilitate, thereby, future modifications to consent judgments under appropriate judicial procedures that may become necessary, *U.S.* v. *Armour & Co.*, 402 U.S. 673 (1971); and (3) in merger case settlements, to insure that district courts adhere to Supreme Court directions, "not only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by the Congress," *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

Section 2(f) is permissive in language whereby added legislative guidelines for the exercise of judicial discretion are provided. It is not the intention of your Committee in any way to limit district courts to techniques enumerated therein. Nor it is intended to authorize techniques not otherwise authorized by law. The legislative language, however, is intended to isolate further and, thereby, to preclude factors identified as contributing to the rise of the so-called abuse of "judicial rubber stamping".

The sixth subsection of the bill, Section 2(g) is the only provision made applicable to defendants in public civil antitrust cases. Not later than 10 days following the date of the filing of a proposal for a consent judgment by the Justice Department, defendants are required to describe all communications made by them or on their behalf but only in connection with cases sought to be settled by a consent decree. The only communications with any officer or employee of the Government exempted from such requirements of this subsection are those made by counsel of record for defendants who meet alone with members of the Department of Justice. The limited exemption provided reflects a balancing test judgment distinguishing "lawyering" contacts of defendants from their "lobbying contacts". Numerous contacts by counsel of record with antitrust enforcers occur as an incident to the filing of a case: these, and these alone, are excepted from disclosure. A "lobbying" contact includes a communication to antitrust enforcers by counsel of record accompanied by corporate officers or employees; or by attorneys not counsel of record whether or not they are accompanied by officers or employees of defendants or prospective defendants in those situations in which a simultaneous filing of a complaint and a proposed settlement occurs. Although recognizing the difficulties of legislating legal ethics confining communications by counsel of record to "lawyering" and not "lobbying," your Committee intends to provide affirmative legislative action supporting the fundamental principle restated by the Supreme Court in the 1973 *Civil Service Comm'n* v. *Letter Carriers* decision, "[It] is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it if confidence in the system of representative Government is not to be eroded to a disastrous extent."

The seventh subsection of the bill expresses the Congressional judgment that impact statements required by and judicial proceedings that may result from enactment, shall be inadmissible in an action for damages, either by the government or by private parties. The subsection is also expressive of present law that consent judgments in public civil antitrust cases cannot be used as prima facie evidence of an antitrust violation in private antitrust actions.

II. INCREASING SHERMAN ACT FINES

The second main section of the bill, Section 3, increases maximum allowable fines for violations of the Sherman Act from $50,000 to $100,000 for individual and non-corporate business enterprises; and to $500,000 for corporations. The last time that these fine provisions were increased was in 1955. Near unanimous witness' testimony was received during hearings that revisions upward were long overdue. Indeed, some witnesses testified that fine ceilings sought were still too low since profits from antitrust violations can run into billions of dollars; and, since, by comparison, the Common Market imposes fines for antitrust violations in amounts up to 10 percent of the gross annual sales volume of the defendant. Later during the same day that your Committee approved the bill, President Ford called upon the Congress to increase fines for antitrust violations by corporations to $1 million.

III. EXPEDITING ACT REVISIONS

The third main Section of the bill, Section 4, contains three major substantive revisions to the Expediting Act of 1903.

The first such subsection, Sec. 4(a), relates to pre-trial procedures and eliminates present provisions for convening three-judge courts upon the filing of public civil antitrust cases. Provided, instead, are measures whereby, upon the filing of a certificate by the Attorney General that the case is of general public importance, district court judges or chief judges of district courts are empowered to facilitate and to speed up pre-trial procedures, including assignment of the case for trial at the earliest practicable date. Present relevant law has been criticized as obstructing rather than expediting the movement of antitrust cases from filing to trial. The bill is intended to eliminate potential and alleged clogs on antitrust litigation in this regard.

The second major revision to the Expediting Act in this part of the bill contains two important provisions. First, intermediate appellate review for district court rulings on government motions for pre-trial injunctions is provided, a procedure of particular importance in merger cases. Under present law, such denials are interlocutory in nature and not reviewable until after trial. Judicial porcedures for private antitrust cases, enacted much later than judicial procedures in public cases, presently provide for the pre-trial review that the bill would establish for government cases. In addition to restoring a balance between public and private pre-trial procedures, the Committee relied upon considerable testimony of witnesses during hearings that enactment would possibly conserve substantial enforcement resources and, in view of the legal issues in merger cases, obviate the need for some trials if such pretrial intermediate appellate review were enacted. Secondly, present law governing post-trial appeals of government civil antitrust cases is changed so that appeals from judgments of the district court will lie to the courts of appeals embracing the district in which the case was brought except as expressly provided in the bill.

The third main revision to the Expediting Act contained in this part of the bill creates an exception to post-trial appellate procedures for litigated government civil antitrust cases: a certificate may be filed with the Supreme Court stating that immediate consideration of

the appeal by the Supreme Court is of general public importance in the administration of justice, whereup the Supreme Court may either: (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) deny the direct appeal and remit the case to the appropriate court of appeals, which shall then have jurisdiction to hear and determine such case as if the appeal and any cross appeal in such case had been docketed in the court of appeals in the first instance.

The exception provided for possible direct Supreme Court post-trial review of litigated government civil antitrust cases reflects legislative recognition of the Attorney General's responsibilities to coordinate national antitrust enforcement policies and the necessary discretion incident to this legislatively imposed responsibility; and, that public antitrust cases differ in nature sufficiently from private antitrust cases and concerns to warrant providing the Attorney General with possible direct Supreme Court post-trial review in appropriate cases. Moreover, the legislative conferral of discretion in post-trial appeals on the Attorney General is expected to increase vigorous enforcement of the antitrust laws by the Department of Justice. It will, also, provide opportunity for real appellate review of cases not worthy of direct Supreme Court review, both those cases never appealed for that reason as well as those appealed but summarily disposed of by the Supreme Court.

Purpose of Amendment

In Section 2(b) of the bill, two express references to three portions of the Freedom of Information Act, 5 U.S.C. § 552, in the Senate bill were not included in the Committee amendment. By deleting the piecemeal incorporation of the Freedom of Information Act it was intended to insure that, except for disclosures required by the bill, Freedom of Information Act case law, substantive and procedural, was not disturbed. In addition, the Freedom of Information Act intended to relate to the public's need for information from certain agencies and does not purport to deal with the need of the courts or of the Congress for information from those agencies. Thus reference to the Freedom of Information Act here would not only be inappropriate but would confuse the legislative history of that Act with regard to its general applicability.

In section 2(e) of the bill, the Committee made one other noteworthy change. As originally expressed, district courts were charged with determining that the entry of a proposal for a consent judgment was "in the public interest as defined by law." The four words, "as defined by law" were deleted: as a recognition that the content of the phrase, "public interest," is a product of judical construction in the context of particular statutes, as evidenced by the lack of definition of the "public interest" in legal dictionaries and encyclopedias; to clarify the intention not to change case law construing the "public interest" in cases involving the antitrust laws or antitrust provisions of other laws; and to provide illumination and consistency in the usage of the phrase, the "public interest," in section 2(f)(5) of the bill. Preservation of antitrust precedent rather than innovation in the usage of the phrase, "public interest," is, therefore, unambiguous. The

original phrase either referred to "all law" and was too general or referred to "antitrust law" and was too narrow in that the policy of the antitrust laws as such would not admit of compromises made for non-substantive reasons inherent in the process of settling cases through the consent decree procedure. See, for example, *U.S.* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); *U.S.* v. *Armour & Co.*, 402 U.S. 673 (1971).

Wherever appearing in the bill, your Committee has substituted the word, "competitive" for the word, "public" in the phrase, "public impact statement" because: (a) the antitrust laws protect and promote competition; (b) the expertise the Antitrust Division is charged by the Congress with institutionalizing focuses on "competitive" effects; (c) ambiguities arising from the usage of "public impact" in environmental case law and statutes are foreclosed; (d) current proposals for inflationary "impact statements" might otherwise be thought to be adopted which they are not except to the extent that the analysis of or the prediction of competitive effects in antitrust law traditionally entail inflationary considerations; and (e) the substitutions refine and emphasize legislative purposes and guidelines for the contents of the "impact statement" mandated by the bill.

In subsection 2(e)(2) of the bill, one of the two legislative and judicial oversight guidelines expressed in permissive language in that Section, further clarification of legislative intentions regarding the district court's possible consideration of the impact of the entry of the proposed consent decree upon the public and upon individuals is provided by the addition of the words, "including consideration of the public benefit, if any, to be derived from a determination of the issues at trial." The addition accommodates further the interplay of legislative guidelines with inherent judicial discretion. The words, "if any," are added in recognition of the fact that among the diverse types of cases filed under the antitrust laws, there are some that, on their face and through a judicial examination of complaint and proposed consent judgment, clearly do not require such a determination of impact by courts. The added language expresses, further, the intentions of not replacing one mechanical procedure with another of a similar nature; of emphasizing the truism that in examining proposed settlements of particular cases, case by case judicial scrutiny is necessary; and, of insuring that, in remedying the abuse of judicial rubber stamping of proposed consent decrees, flexible judicial procedures evolve.

Language is added to Section 2(g) of the bill to insure that no loopholes exist in the obligation to disclose all lobbying contacts made by defendants in antitrust cases culminating in a proposal for a consent decree: only communication by counsel of record alone with the Attorney General or employees of the Department of Justice alone are excepted from reporting requirements. Conversely, communications by counsel of record alone with officers or employees of all government agencies other than the Department of Justice are intended to be within disclosure requirements.

Both the Senate bill and the Committee amendment agree that the Expediting Act provision insuring direct appeal to the Supreme Court in every government antitrust case wherein equitable relief is sought should be amended so that only cases of general public importance in the administration of justice may be appealed directly to the

Supreme Court while other cases may be appealed to the appropriate court of appeals. However, the Senate bill and Committee amendment disagree as to what is the best mechanism for determining what cases are cases of general public importance in the administration of justice. The Senate bill provides that the "district judge who adjudicated the case," upon application of either party, would make that determination. The Committee amendment provides that the Attorney General would make that determination.

The Committee chose that mechanism because of the special expertise of the Attorney General in administering the antitrust laws. Although the Senate bill would recognize that expertise in the Attorney General at the trial stage in providing that he may certify that the case is "of general public importance" which should be expedited, it has not equally recognized the Attorney General's expertise at the appellate stage. The Committee amendment, in contrast, recognizes the Attorney General's expertise equally at both stages. It does so in the belief that the Attorney General is in the best position to know how a given case affects other cases pending in other district courts or cases that he plans to file at a later date. The district judge is not in that position and since the Attorney General's certification will of necessity be subjected to judicial scrutiny by the Supreme Court, the Committee believed it would be unnecessarily cumbersome to require the approval, as well, of the district judge. Moreover, as a matter of policy, the Committee intends that cases certified by the Attorney General as cases of general public importance in the administration of justice which the Supreme Court believes to be such be heard by that Court. In short, if the Attorney General and the Supreme Court agree, the district judge's view should not be an obstacle to direct review. Also, by mandating that only the "district judge who adjudicated the case" can enter the order to be reviewed by the Supreme Court, an unintended loophole was created: upon the death or other disability of the adjudicating judge, the opportunity for direct review is automatically foreclosed. Amendments to provide the participation of district judges other than the district judge who adjudicated the case would be illusory: no substitute for the experience gained in "deciding" the case could be legislated. Finally, the Committee was not persuaded as to the merits of the provision in the Senate bill whereby the defendant might request the district judge to certify the case for direct review. The Committee was of the opinion that a party by being sued did not become as expert as the Attorney General in determining the importance of the particular case to the whole of antitrust enforcement.

Both the Senate bill and the Committee amendment agree that once the mechanism for certification becomes operative and the case comes before the Supreme Court on direct review, the Supreme Court may hear the case or remit it to the appropriate court of appeals. It should be emhapsized that the fact that the Supreme Court is accorded this option does not mean that the Supreme Court is intended to have a free and absolute discretion to hear or not hear a case on direct review. The Committee was well aware that under current law—Section 1254 of title 28, U.S. Code, which is not affected by this legislation—either party may by-pass the court of appeals and seek direct review by the Supreme Court. The Committee does not intend to duplicate or dis-

place that law through its amendment. Section 1254 does bestow on the Supreme Court an unqualified discretion to hear or not hear a case. The Committee amendment does not. It is intended that the Supreme Court hear cases on direct review that are of general public importance in the administration of the antitrust laws. Moreover, it is anticipated that the Supreme Court will accord the certification of the Attorney General due weight in view of his special expertise.

The Committee amendment recognizes that public antitrust cases are unlike other federal cases, that they have an impact on the economic welfare of this nation, and that consequently they should be treated accordingly.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Section 5 of the Act of October 15, 1914

Sec. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and publish by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

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

(3) an explanation of the proposad for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for the consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b),

(iii) and a list of the materials and documents under subsection (b), which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

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

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

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

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspect of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

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

(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendent shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

[(b)] *(i)* Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right

of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

ACT OF JULY 2, 1890

AN ACT To protect trade and commerce against unlawful restraints and monopolies

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding [fifty] *five hundred thousand dollars if a corporation, or, if any other person, one hundred* thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempts to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding [fifty] *five hundred thousand dollars if a corporation, or, if any other person, one hundred* thousand dollars, or by imprisonment not exceeding oneyear, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and an State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding [fifty] *five hundred thousand dollars if a corporation, or, if any other person, one hundred* thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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ACT OF FEBRUARY 11, 1903

AN ACT To expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [That in any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, 'An Act to regulate commerce', approved February 4, 1887, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is plaintiff, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which the case is pending (including the District of Columbia). Upon receipt of the copy of such cerificate, it shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.]

SECTION 1. In any civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, or any other Acts having like purpose that have been or

hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with such court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

[SEC. 2. In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.]

SEC. 2. (a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. An appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28, United States Code, but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254 (1) of title 28, United States Code.

(b) An appeal from a final judgment entered in any action specified in subsection (a) shall lie directly to the Supreme Court if the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such certificate shall be filed within 10 days after the filing of a notice of appeal. When such a certificate is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) deny the direct appeal and remit the case to the appropriate court of appeals, which shall then have jurisdiction to hear and determine such case as if the appeal and any cross appeal in such case had been docketed in the court of appeals in the first instance pursuant to subsection (a).

SECTION 401 OF THE COMMUNICATIONS ACT OF 1934

TITLE IV—PROCEDURAL AND ADMINISTRATIVE PROVISIONS

JURISDICTION TO ENFORCE ACT AND ORDERS OF COMMISSION

SEC. 401. (a) * * *

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[(d) The provisions of the Expediting Act, approved February 11, 1903, as amended, and of section 238(1) of the Judicial Code, as amended, shall be held to apply to any suit in equity arising under Title II of this Act, wherein the United States is complainant.]

SECTION 3 OF THE ACT OF FEBRUARY 19, 1903

SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper order, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction. [The provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.]

ADDITIONAL VIEWS OF MR. HUTCHINSON

My additional views are confined to the first portion of S. 782, which deals with consent decree procedures. Generally, this reform would require the Department of Justice to publish a competitive impact statement in the Federal Register and receive public comment and the defendant to reveal its "lobbying" contacts, all of which is to enable a court to determine whether a proposed consent decree is in the "public interest."

These provisions might appear to satisfy those who believe that the Department of Justice is not to be trusted in exercising its prosecutorial discretion to settle antitrust cases. However, it should be pointed out that that discretion can be abused equally by refusing to file a complaint or by trying a case to completion. But such abuses are not reached by this legislation, presumably because an expansion of the legislation to cover such situations would more clearly expose the defect of the solution that is embraced.

That defect is simply that to require federal courts to determine whether a consent decree is in the public interest is to transfer an "executive" question to the courts for resolution. The question for the court will be whether the Department of Justice has exercised its prosecutorial discretion well or, perhaps, as well as possible. The question will *not* be whether the Department has violated some legal standard. For none is established by this legislation. Rather, the court is given a plenary and unqualified authority to re-decide an executive decision.

In our system of separated powers, the courts are to decide only "judicial" questions. Functionally, courts enforce executive and legislative decisions unless they violate a superceding legal standard, in which case they enforce that standard. But under our system, courts do not determine what is wise or good for the American people. Such determinations are reserved for the executive and legislative branches, which are answerable to the people.

When a court reviews the exercise of prosecutorial discretion, it will find itself in a thicket of administrative considerations. It will have to decide how well the Department is utilizing its resources to enforce the antitrust laws, how important the legal issues are to future cases, how strong or how weak the Department's case is, how much time and manpower the particular case would consume if tried to completion, how much that trial would preclude other antitrust enforcement efforts, how much of the relief prayed for in the complaint would the Department obtain through the decree, and how much time would be saved by the entry of the decree. These administrative considerations, although they may involve legal questions, do not constitute, in my opinion, a *judicial* question.

If it is assumed that it is necessary for someone to review the Department's exercise of prosecutorial discretion to determine whether it is in the public interest, it does not follow that the federal courts, limited by the Constitution to deciding judicial questions, are the appropriate reviewing agencies.

Under the Consttution, it is the Chief Executive who is charged with the responsibility of reviewing and guiding the enforcement of the laws. It is he who is charged with taking care that the laws be faithfully executed.

Congress likewise has an oversight responsibilty to see how the laws are enforced in order to determine if new laws are needed. It was just such an exercise of responsibility by the House Committee on the Judiciary in its report on the Consent Decree Program of the Department of Justice in 1959 that prompted the Department to initiate reforms in its program.

Thus the actions of the Department of Justice are not without their checks within the two branches responsible to the people. Consistent with that, I endorse those provisions that permit greater public knowledge of the Department's consent decree activities. But I do not agree with those provisions which suggest that the question of whether those activities are wise or good for the people, even in particular cases, is a judicial question.

EDWARD HUTCHINSON.

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