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# WHITE HOUSE
# CORRESPONDENCE TRACKING WORKSHEET

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Date Correspondence Received (YY/MM/DD) 1 1

(GR)

**Name of Correspondent:** James C. Mum

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

**Subject:** Dept. of Commerce draft bill: The Antitrust Reform Act of 1985

**ROUTE TO:** | **ACTION** | **DISPOSITION**

| Office/Agency (Staff Name) | Action Code | Tracking Date YY/MM/DD | Type of Response | Code | Completion Date YY/MM/DD |
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| CU HOLL | ORIGINATOR | 85102/24 | | | 1 1 |
| | Referral Note: DDI | | | | |
| CU AT 18 | A/D | 85102/27 | | S | 85103/06 |
| | Referral Note: DDI | | | | |
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| | NO ACTION NECESSARY | | | | 1 1 |
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 22, 1985

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

Department of Justice
Federal Trade Commission
Council of Economic Advisers
Department of State
U.S. Trade Representative
Department of the Treasury

SUBJECT: Department of Commerce draft bill, "The Antitrust Reform Act of 1985."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than March 8, 1985

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: Fred Fielding
Mike Driggs
John Robinson
Lehmann Li
Steve Galebach
Mike Horowitz
Mike Esposito
Karen Wilson
Barry Anderson

A BILL

DRAFT

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

SHORT TITLE

SEC. 1. This Act may be cited as the Antitrust Reform Act of 1985.

REPEAL

SEC. 2. Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) is repealed.

DRAFT

STATEMENT OF PURPOSE AND NEED
REPEAL OF SECTION 7
OF THE CLAYTON ACT

The purpose of this bill is to repeal section 7 of the Clayton Act. Section 7 is founded on economic theory that is now outdated, and it imposes unnecessary costs on society and impediments to U.S. industrial competitiveness that are not tolerable in today's global market.

The repeal of section 7 would remove antitrust barriers to mergers except those that violate the restraint of trade and antimonopoly provisions of sections 1 and 2 of the Sherman Act. A merger would have to be proven to be an actual restraint of trade or attempt at monopolization to be deemed illegal. Accordingly, repeal of section 7 would permit substantial latitude for U.S. firms to merge. In declining industries it would facilitate across-the-board restructuring and rationalization.

At the same time, protections for the consumer against collusive behavior would remain intact. Among these are the prohibitions against agreements in restraint of trade, such as price fixing and division of markets, found in section 1 of the Sherman Act, the antimonopoly provisions of section 2 of the Sherman Act, as well as the unfair competition provisions of the Federal Trade Commission Act. This change in our antitrust laws would permit U.S. firms to compete more successfully in domestic and world markets, thus enhancing our balance of trade and preserving jobs for U.S. workers. Consumers in this country would also benefit in many instances from lower prices made possible through greater productive efficiency.

The original section 7 of the Clayton Act became law in October, 1914. In December, 1950, it was broadened to include acquisitions of "assets." As presently amended, Section 7 prohibits one corporation ("person") from obtaining the stock or assets of another, "where in any line of commerce in any section of the country, the effect ... may be substantially to lessen competition, or tend to create a monopoly." (Emphasis added.) Thus, section 7 attacks mergers in their incipiency that might create firms that would eventually violate other provisions of the antitrust laws.

Changes in Economic Theory

Section 7 is based on economic theory prevalent early in this century and still prevailing at the time of the Congressional

debates on the 1950 amendment. The two major tenets of that theory were:

(1) that high levels of concentration within an industry, or large firm size, leads to collusive pricing policies by nominal competitors. This harms consumers by allowing the firms to raise prices and lower output to levels different than would prevail in a competitive marketplace; and

(2) that the economic benefits a firm gains through "economies of scale" diminish as firms continue to grow. Therefore, economies of scale rarely, if ever, justify high concentration levels within an industry.

Operating from these premises, Congress sought to curb industrial concentration in its incipiency by regulating mergers. Members of Congress became convinced that extremely large firms are inimical to the public interest because of their limited efficiency and their supposed tendency -- due to size or concentration per se -- to foster collusive pricing.

The two major tenets of economic thought embodied in section 7 of the Clayton Act have been discredited by the weight of economic research done since the enactment and amendment of that provision. By contrast, this extensive study and analysis shows:

-- that the relationships between profitability and firm size or industry concentration observed in earlier economic studies are most often caused by the comparatively greater efficiency of larger firms in many industries rather than by collusion among competitors;

-- that economies of scale do not necessarily reach a definable point of diminishing returns, and that a primary reason for most industrial mergers is to achieve such economies where they are available; and

-- that there is no economic evidence to justify the differential treatment of firm size achieved through mergers from that achieved by internal company growth.

Government prohibition of many potentially efficiency-producing mergers necessarily imposes societal costs by forcing U.S. industry and the public to forego the benefits of achievable cost savings. At the same time, enforcement of Section 7 of the Clayton Act imposes heavy costs on both the Government and private parties. No net benefits have been demonstrated to justify the imposition of these costs. A particularly unjustified and anomalous result of section 7 of the Clayton Act is the distinction it causes between the treatment under our antitrust

laws of company growth resulting from mergers and that which occurs from internal expansion. For example, a company planning to expand by adding a new plant would have no antitrust barriers if it chose to build the plant, but would face antitrust review if it sought to buy the identical plant from another company. The economic evidence shows that in many cases expansion through merger is the most cost- effective option for a company or an industry. Section 7 of the Clayton Act is also an impediment to the competitiveness of U.S. firms vis-a-vis the firms of our major foreign competitors. These firms, which are not subject to the restrictions of laws like Section 7 of the Clayton Act, are permitted to merge to achieve substantial economies of scale in production and distribution.

Changes in the Strength of International Competition

At the time of the enactment and later amendment of the Clayton Act, U.S. firms did not face today's fierce competition from foreign firms in U.S. and global markets. Over the last three decades, however, a variety of factors have caused such competition to become commonplace. Following World War II, the productive capacity of the United States relative to the rest of the industrial world gave this country the ability to compete successfully in almost every market and product area. Over time, however, the industrial economies of Europe and Japan rebuilt, recovered, and began to increase their market share relative to the United States in virtually every product category and geographic market, including the U.S. itself. Some developing countries have also built their industries to levels that now challenge us in a number of products and markets.

Competition in the international marketplace, as in any marketplace, sets a premium on efficiency in both production and distribution. The United States no longer enjoys the dominance in international trade that once allowed us to compete successfully despite having required our industries to forego significant potential efficiencies. Nor can we afford to assume -- with no supporting evidence -- that increases in company size achieved through mergers rather than internal growth should be singled out for uniquely restrictive regulation.

The place of the U.S. economy in the pattern of world trade has also changed radically. In 1890, for example, imports into this country totaled only $789 million. Today our annual imports total about $250 billion. Since 1976, our trade deficits have grown progressively worse, exceeding $100 billion in the aggregate over the four years from 1978 to 1981. By 1983, however, these deficits had risen to the $100 billion level on an annual basis. In the face of these trends, increased U.S. exports have become essential to our economic health. For example, between 1970 and

1980 exports alone created 850,000 new jobs in manufacturing -- 80 percent of all new manufacturing jobs.

Because of these major changes in the international marketplace, there is a need for our nation to discard policies that inhibit innovation and productivity growth. It is axiomatic that the competitiveness of our products in world markets depends upon our ability to take advantage of new technology to offer new products, and upon the use of that technology to improve our productivity. Innovation and productivity are the keys to offering attractive products at competitive prices in world markets. Our nation's rate of growth in productivity has declined steadily from a 3.1 percent average annual rate for private business in the 1948-1968 period to 2.2 percent from 1968 to 1973, and to only 0.6 percent between 1973 and 1980. During this last period, we actually experienced declines in productivity in 1978, 1979 and 1980. These statistics are especially significant when compared to similar figures for our major trading competitors. While our growth rate in gross domestic product per employee was only 0.3 percent from 1973 to 1980, comparable figures for Japan and West Germany were 3.5 and 2.9 percent.

The statistics set our above point to a major transition in the world economy that demands flexibility in the structuring of U.S. industry to meet foreign competition. Domestic basic industries face foreign competitors that have lower costs. In the circumstances that existed in 1950, efficiency losses that might result from a strict anti-merger policy might have been an acceptable price to pay for a lessening of the risks of anticompetitive effects from mergers. But the world has changed. Today the primary risk to consumer welfare is the possible imposition of trade restraints, which would result in far higher prices than might result from increased concentration. United States firms should not be foreclosed from engaging in mergers on the general theory that they <u>may</u> harm competition, since in many if not most cases, after-merger firms can achieve substantial economies of scale in both production and distribution.

Under the changed economic conditions of today's global market, section 7 of the Clayton Act is an impediment to the competitiveness of U.S. firms with those of the countries that are our major competitors. These firms, unhampered by the restrictions of laws like section 7 of the Clayton Act, are free to merge to achieve substantial economies of scale. U.S. firms should no longer be placed at this disadvantage.

For these reasons, section 7 of the Clayton Act should be repealed.

Major Features of the Bill

Section 1 provides that the Act may be cited as the "Antitrust Reform Act of 1985".

Section 2 repeals section 7 of the Clayton Act (15 U.S.C. 18).

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

DRAFT

Honorable George Bush
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

Enclosed are six copies of a draft bill entitled "The Antitrust Reform Act of 1985," together with a statement of purpose and need.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this legislation to the Congress and that it is in accord with the Administration's program.

Sincerely,

Secretary of Commerce

Enclosures

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of
Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed are six copies of a draft bill entitled "The Antitrust Reform Act of 1985," together with a statement of purpose and need.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this legislation to the Congress and that it is in accord with the Administration's program.

Sincerely,

Secretary of Commerce

Enclosures

THE WHITE HOUSE

WASHINGTON

June 20, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY

FROM: JOHN G. ROBERTS, JR.
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: State Draft Testimony on S. 397, the "Foreign Trade Antitrust Improvements Act of 1985"

Counsel's office has reviewed the above-referenced proposed testimony. On page 10, the witness suggests that "Congress might reasonably decide to rule out the use of [treble] damages against foreign entities..." The proposed Department of Justice testimony on this same bill details, at pages 13-14, the problem with such an approach. The two sets of testimony should be made consistent.

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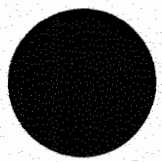

**Name of Correspondent:** James C. Nunn

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

**Subject:** DOS draft testimony on S. 397, the "Foreign Trade antitrust Improvements act of 1985"

**ROUTE TO:** **ACTION** **DISPOSITION**

| Office/Agency (Staff Name) | Action Code | Tracking Date YY/MM/DD | Type of Response | Code | Completion Date YY/MM/DD |
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| CU H&L | ORIGINATOR | 85/06/20 | | | / / |
| | Referral Note: | | | | |
| CU AT 18 | Z | 85/06/20 | | S | 85/06/20 3PM |
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

June 20, 1985.

LEGISLATIVE REFERRAL MEMORANDUM

TO: Department of Commerce - Mike Levitt (377-3151)
Department of Justice - Jack Perkins (633-2113)
Federal Trade Commission
Council of Economic Advisers
U. S. Trade Representative

SUBJECT: State draft testimony on S. 397, the "Foreign Trade Antitrust Improvements Act of 1985"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

3:00 P.M. TODAY, JUNE 20, 1985. (Note: The Senate Judiciary Committee has scheduled a hearing on S. 397 for tomorrow. Justice Department testimony was circulated for review earlier today.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: F. Fielding
J. Cooney
K. Wilson
J. Barie
P. Jacobs
C. Goldfarb
M. Driggs
D. Ginsburg

June 21, 1985

TESTIMONY OF
ABRAHAM D. SOFAER, LEGAL ADVISER
DEPARTMENT OF STATE
ON S. 397

DRAFT

I am delighted to appear before this distinguished Committee today to testify on behalf of the Department of State on S. 397, "The Foreign Trade Antitrust Improvement Act of 1985." We appreciate this opportunity to present the Department's views to the Committee.

As Senator DeConcini noted when he introduced this legislation, the antitrust laws provide important protection to the free marketplace of the United States. Nevertheless, the application of the antitrust laws to foreign commerce, and in. particular the suits filed by private attorneys general, have repeatedly sparked controversy and friction between the United States and its trading partners. The State Department welcomes S. 397 as a constructive effort to resolve problems that have arisen from private antitrust suits which challenge the activities of foreign corporations. We support its goals and believe that it correctly focusses on the two major problems in this area: the unwillingness of courts to dismiss suits, particularly without extensive discovery and the availability of treble damages to private plaintiffs. We oppose the bill's specific proposals, however, because they inject purely political judgments into judicial consideration of both the jurisdiction and the damage issues.

The Sherman Act's prohibitions on anticompetitive conduct apply to contracts and conspiracies, as well as to monopolies and attempts to monopolize, in U.S. commerce "with foreign nations." Although early cases, such as American Banana Co. v. United Fruit Co. (decided in 1909), did not view the Sherman Act as applying to activities in foreign territory, the Sherman Act's reach in more recent years has been expanded to activities of foreign corporations in foreign territory which have "effects" on U.S. commerce (see United States v. Aluminum Co. of America (1945)). In 1982, the "effects" test was statutorily defined to include "substantial, direct and reasonably foreseeable effects."

Over the years, numerous public and private antitrust suits have been brought against foreign entities alleging violations of our antitrust laws from their activities in international commerce. These have repeatedly generated problems in foreign relations. Perhaps the most celebrated early case was the oil cartel investigation by the Justice Department in the 1940s and early 1950s. That investigation eventually raised such intense international concerns that for national security reasons President Truman directed the Justice Department to close it. In more recent years, foreign government protests have been raised over other government cases, such as the 197_ North Atlantic Ocean Shipping case. The most serious concerns, however, have been expressed over private cases, such as

the Westinghouse and TVA uranium cases [complete cites], Zenith Radio Corp. v. Matsushita Elec. Indus. Co., and Laker Airways v. Pan American World Airways Inc.

The tensions in our economic relations with other governments from antitrust cases, and particularly private cases, have several causes:

First, U.S. assertion of jurisdiction under the "effects" doctrine is objectionable to some foreign governments as a matter of principle.

-- While the United States takes the view that it may assert jurisdiction where it has reasonable links to conduct or persons violating our laws, most other nations hold more restrictive views of jurisdiction. Other governments generally place more weight on the territorial aspects of jurisdiction. For example, the Government of the United Kingdom, one of our largest trading partners and closest allies, strongly supports a strict territorial view, particularly regarding economic and business matters.

-- Many international antitrust cases involve international commerce in which foreign sovereigns have substantial interests of their own. They believe that in light of their claimed interests and prerogatives such conduct should not be subject to unilateral regulation by the U.S., particularly through challenges in our courts by private litigants. The Government of Canada expressed this view in the Uranium litigation, arguing that U.S. courts should not take

jurisdiction over a suit brought by private parties since the challenged conduct was undertaken pursuant to Canadian government policy directives.

-- Foreign governments such as the United Kingdom also regard certain subjects, notably international transportation, as so inherently affecting the interests of more than one country that they can be regulated only by international agreement. They strongly object to what they regard as the unilateral exercise of U.S. antitrust jurisdiction over these matters. In 1983, partly in response to foreign government complaints, U.S. laws governing international shipping were amended essentially to eliminate treble damages claims in this area.

Second, U.S. antitrust laws often prohibit conduct that is legal in other countries, or even encouraged there.

-- The Government of Japan has informed U.S. courts that it mandated the minimum price and market allocation agreements which have been at issue for some twelve years in the Matsushita case.

-- Numerous other governments, including Australia and the United Kingdom encouraged the price setting involved in the North Atlantic Shipping Cases.

-- Most foreign governments encourage price agreements among airlines in international aviation. Therefore, many governments protested strenuously the Civil Aeronautics Board's 1980 "IATA Show Cause Order" withdrawing antitrust immunity

under which airlines participated in IATA price setting conferences. After more than a year of negotiations, the United States agreed in a Memorandum of Understanding torestore limited antitrust immunity in exchange for pricing concessions from the members of the European Civil Aviation Conference.

-- As noted above, the Government of Canada objected to the so-called Uranium cases, because the challenged price fixing activities of Canadian companies had been openly encouraged by the Canadian Government.

Third, our courts have been excessively unwilling to dismiss and to grant motions for summary judgment without extensive discovery.

Discovery American style has a bad reputation here in the U.S. It is especially objectionable to other governments because it is time consuming, expensive, burdensome and frequently calls for production of documents from their territories. A few cases demonstrate this problem.

-- In Timberlane, the District Court did not rule on defendants' motions to dismiss for seven years after the court of appeals remanded the case for additional discovery and a weighing of interests under its "jurisdictional rule of reason" test.

-- The Matsushita case, now before the Supreme Court, has been pending for 12 years and discovery has been ongoing during much of that time.

Objections to the extensive pretrial discovery entailed in these cases has led foreign governments to take steps to impede antitrust suits. Australia, Canada, France and the UnitedKingdom have enacted broad blocking statutes. The French statute is so broad that it could be read to prevent automatically the production of any evidence from France for use in a lawsuit in the U.S. More concretely, in the Uranium cases, the Canadian Supreme Court refused to order the production of evidence sought under letters rogatory. And in the Laker case, the United Kingdom has twice invoked the Protection of Trading Interests Act to prevent the production of oral or written evidence from its territory even by U.S companies.

Fourth, foreign governments object strenuously to the availability of treble damages to private plaintiffs.

The existence of private attorneys general is unique to the United States. In principle, foreign governments regard as odious the delegation to private parties of the capacity to trigger punitive remedies in this sensitive area where they have significant interests. In practice, they object that their corporations may be subject to crippling damage awards or forced to settle for unwarranted amounts. In Laker, for example, the British Government has said that it has been forced to postpone its planned privatization of British Airways because of the pending litigation and British Airways' inability to estimate the cost of settlement or damages.

These concerns have led other governments to register strong diplomatic protests in the U.S. in various cases, including most recently Matsushita and Laker. Some governmentshave taken stronger steps. Australia, Canada and the United Kingdom have enacted statutes providing for "clawback" of awards that exceed actual damages. As I have already noted, the U.K. has twice invoked its blocking statute in the Laker litigation and in the same case has denied requests by U.S. airlines for permission to produce U.K.-located documents.

The Administration has worked to manage these problems through bilateral and multilateral antitrust arrangements. We have agreed to bilateral measures with Canada, Australia, and the Federal Republic of Germany. The U.S. also complies with the notification and consultation guidelines for antitrust investigations issued by the OECD Restrictive Business Practices Committee. These arrangements, however, address directly public antitrust enforcement actions. Domestic action through legislation is needed to deal with the frictions created by private antitrust actions.

The Department's principal reservations about the bill's major proposals relate to the nature of the task it assigns to the federal courts in dealing with jurisdiction and treble damages. It's key directive on jurisdiction states:

...the court shall enter a judgment dismissing such action whenever it determines that the interests of the United States served by the actions are outweighed by the interests of one or more foreign nations adversely affected by the action."

As this bill is drafted, there are no guidelines or qualifications as to the kinds of national interests to be weighed or as to how they are to be weighed. This formulation would invite the courts to make national interest and foreign relations determinations for the United States and other countries involved that are essentially political and properly for the political branches under our system of government.

In fact, I do not equate the formulations in the present bill with the approach actually taken in Timberlane. If the Committee wishes to support the approach taken in Timberlane, S. 397 should be redrafted. Timberlane does not say that jurisdiction depends upon a finding that the interests of one nation outweigh the interests of the other. It calls for a more concrete weighing of United States and foreign law on contacts and interests; the foreign impacts identified in Timberlane are hereby weighed along with many other, judicially manageable and relatively objectifiable considerations. All of these go into an assessment, not of what state has greater interests, but of the reasonableness of the exercise of jurisdiction in the overall context.

The Timberlane opinion suggests the following approach. First, the court is to determine if the restraint's effect on the foreign commerce of the United States was "of such a type and magnitude so as to be cognizable as a violation of the Sherman Act". Then, the question is:

> As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?

Application of concepts of comity and fairness are traditional judicial tasks, familiar to courts in a variety ofcontexts, especially choice of law and forum non conveniens decisions. These concepts include weighing a variety of factors, among which conflicting laws and policies of the various jurisdictions are just a part. In fact, Judge Hand apparently had choice-of-law in mind when he articulated the effects doctrine in his 1945 Alcoa opinion. Precise balancing of the interests of the United States against those of foreign states is, on the other hand, a relatively recent suggestion and one which has been subjected to some cogent criticism, for example by Judge Wilkey in his recent Laker opinion. I share his doubts as to whether it is a judicially manageable standard.

My office is considering what alternatives or modifications to S. 397 might improve the bill. We have not yet formulated

precise suggestions; but I do believe that more traditional judicial doctrines and approaches may offer more manageable guidance and assistance to the courts.

-- For example, much of this bill's purpose might be accomplished by requiring more specific pleading at the outset of the substantiality of the effects involved in a private case.

-- Other possibilities might be drawn from the factors suggested by contemporary choice of law and forum non conveniens analysis without imposing unstructured balancing of U.S. and foreign interests.

-- With respect to treble damages, Congress might reasonably decide to rule out the use of such damages against foreign entities, or could limit them to covert conduct, such as secret price fixing. Another idea that might help is to require a losing plaintiff who insists on seeking treble damages to pay all of each defendant's attorneys' fees.

-- Eliminating treble damages in "rule of reason" cases might take care of a certain portion of the difficulties, although it would not address cases involving foreign government-supported cartels.

In sum, Mr. Chairman, the United States needs to apply its laws extraterritorially to some degree. But, when we do so, we must manage the reach of our laws with care and sensitivity. The Congress and the Executive branch have substantial responsibility for assuring that this is done. While the courts have an important role to play, they should not be given essentially political tasks. I welcome this legislative initiative to address the problem and I would be pleased, together with the Department of Justice and other agencies, to work with the bill's sponsors to see if some revised proposals could be devised to meet our common concerns.

THE WHITE HOUSE

WASHINGTON

June 20, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY

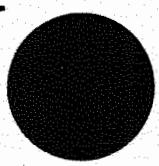
FROM: JOHN G. ROBERTS, JR.
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Draft Testimony on S. 397, the Foreign Trade Antitrust Improvements Act of 1985

Counsel's office has reviewed the above-referenced proposed testimony, and finds no objection to it from a legal perspective.

ID # CU

# WHITE HOUSE
# CORRESPONDENCE TRACKING WORKSHEET



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**Name of Correspondent:** James Munn

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

**Subject:** DOJ draft testimony on S. 397, the Foreign Trade Antitrust Improvements Act of 1985

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| | Referral Note: | | | | |
| CU AT 18 | R | 85/06/20 | | S | 85/06/20 2 PM |
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EXECUTIVE OFFICE OF THE PRESIDENT
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WASHINGTON, D.C. 20503

SPECIAL

June 20, 1985

**LEGISLATIVE REFERRAL MEMORANDUM**

TO: Department of Commerce - Mike Levitt (377-3151)
Department of State -Bill Farrah (632-0430)
Federal Trade Commission
Council of Economic Advisers
U.S. Trade Representative

SUBJECT: DOJ draft testimony on S. 397, the Foreign Trade Antitrust Improvements Act of 1985

**The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.**

**Please provide us with your views no later than**
2:00 P.M. TODAY, JUNE 20, 1985. (NOTE: The Senate Judiciary Committee has scheduled a hearing on S. 397 for tomorrow. The State Department is also expected to testify -- its testimony will be circulated for review upon receipt.)

**Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.**

James C. Murr /for
Assistant Director for
Legislative Reference

Enclosure

cc: F. Fielding
J. Cooney
K. Wilson
J. Barie
P. Jacobs
C. Goldfarb
M. Driggs
D. Ginsburg

STATEMENT OF

CHARLES F. RULE
ACTING ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING S. 397,

"THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985"

ON

JUNE 21, 1985

Mr. Chairman and Members of the Committee:

It is a pleasure to be here today to provide the views of the Department of Justice concerning S. 397, the "Foreign Trade Antitrust Improvements Act of 1985." This bill is a thoughtful attempt to deal with some of the problems that may arise in application of our antitrust laws to conduct that is in some way "foreign." The Department of Justice believes the bill is a good starting point for serious consideration of these issues. Nevertheless, for the reasons I will explain this morning, we cannot support its enactment.

The antitrust laws are essential to the proper functioning of the free enterprise system on which this nation depends. The invisible hand of the marketplace, free from unnecessary private and governmental interference, can be counted on to serve the interests of consumers and producers alike. Economic liberty goes hand-in-hand with political liberties. Moreover, free markets yield the range of products and services consumers most desire and give businesses the correct incentive to put scarce resources to their most productive use. Our free market system also spurs economic growth and technological innovation by rewarding those individuals who devise and produce "new and better mousetraps." By preserving the ability of market forces to work their will, free of unwarranted restraints, the antitrust laws contribute importantly to our nation's welfare.

In order to be effective, the antitrust laws must be able to reach some foreign conduct--for example, an international

cartel of private producers must not be able to inflict its higher prices on United States consumers with impunity just by holding its meetings abroad. Thus, the Sherman Act by its terms reaches anticompetitive restraints in the foreign as well as the domestic commerce of the United States. Over the years differing interpretations of the circumstances in which those laws apply to foreign conduct have evolved. The courts have, however, consistently recognized that the antitrust laws' purpose of protecting competition in our markets cannot be achieved without reaching foreign as well as domestic conduct. 1/ As our economy becomes more interdependent with the economies of other nations, the importance of this principle in protecting our economy increases. At the same time, the likelihood that application of our antitrust laws may lead to conflicts with our trading partners grows correspondingly. In an interdependent economic world, the prospect that conduct will be subject to scrutiny by more than one nation is substantial. Furthermore, as interdependence increases, any line dividing "foreign" and "domestic" commerce becomes increasingly blurred.

While they do not arise frequently, conflicts with our trading partners arising from the application of our antitrust laws to foreign commerce may impose significant costs. They

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1/ United States v. Aluminum Co. of America ("Alcoa"), 148 F.2d 416 (2d Cir. 1945).

may harm our foreign relations beyond the particular case at issue. They have created hostility to American antitrust enforcement, even among those who share our basic competition goals. Hostility has lead to retaliatory responses--such as "blocking" and "claw back" legislation--that may affect our ability to enforce our antitrust laws. Unnecessary international acrimony over competition policy benefits no one.

S. 397 represents a serious attempt to deal with the important problem of how the United States antitrust laws should deal with private antitrust litigation that arises out of disputes involving United States international trade. It would address the problems I have identified with four substantive provisions. First, the bill would require courts hearing private antitrust claims involving foreign commerce to resolve the issue of subject matter jurisdiction at an early stage of the proceeding.

Second, the bill would require a court to dismiss a private antitrust suit challenging foreign or transnational conduct if the court concluded that the interests of a foreign nation predominated over those of the United States. In effect, this provision would codify the jurisdictional "balancing test" adopted by a number of federal appeals courts--although rejected by others--during the last decade. 2/ If requested by

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2/ See, e.g., Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 614 (9th Cir. 1976)(balancing test applied); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287,

Footnote Continued

the court, the Attorney General would be required to give the government's views as to the effect of the suit on the interests of the United States and of any affected foreign government. The ultimate decision, however, would be left entirely to the courts.

Third, the bill would allow the courts to apply the doctrine of forum non conveniens to antitrust cases involving foreign commerce. Some courts have refused to apply the doctrine in antitrust cases. 3/ This refusal is contrary to the doctrine's application in almost all other areas of substantive federal law.

Fourth, the bill would require the courts to award single, rather than treble, damages if it appeared that such "detrebling" would substantially reduce any adverse impact of the suits on a foreign nation's interest. Again, if requested, the Attorney General would be required to provide the view of the Executive Branch.

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2/ Footnote Continued

1297-98 (3d Cir. 1979)(balancing test applied). But see In Re Uranium Antitrust Litigation, 617 F.2d 1248, 1254-56 (7th Cir. 1980)(balancing test rejected). See generally Restatement (Second) of the Foreign Relations Law of the United States § 40 (1965); Restatement (Revised) of the Foreign Relations Law of the United States §§ 402, 403 (Tent. Draft No. 2, 1981).

3/ Industrial Investment Development Corp. v. Mitsui Co., 671 F.2d 876 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983); see also El Cid, Ltd. v. New Jersey Zinc Co., 444 F. Supp. 845, 846 n.1 (S.D.N.Y. 1977); but see Laker Airways, Ltd. v. Pan American World Airways, 568 F. Supp. 811 (D.D.C. 1983).

S. 397 reflects a thoughtful effort to deal with a difficult set of cases. It endeavors to minimize foreign relations frictions arising out of private antitrust suits that have international implications by reducing the threat of treble damages. 4/ It seeks to eliminate costly delay and enhance efficiency by providing for the early resolution of jurisdictional questions. It seeks to promote fairness and reduce uncertainty by recognizing the principle of forum non conveniens and by specifying the situations in which a court must dismiss private antitrust suits affecting foreign commerce. In short, S. 397 very commendably attempts to devise solutions to the problems arising out of private antitrust lawsuits that implicate United States and foreign interests. For the reasons I will set out this morning, however, the Department of Justice cannot support the bill.

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4/ The most serious foreign relations strains from enforcement of American antitrust laws arise from private treble damage suits, not from government enforcement actions. As the bill's sponsor, Senator DeConcini, has recognized, the Executive Branch already carefully evaluates comity and foreign relations considerations in relevant enforcement matters. Most of our trading partners acknowledge that the Department of Justice and the Federal Trade Commission do a fairly good job of taking legitimate foreign interests into account in cases with international aspects. Private plaintiffs, however, have a different, and narrower, set of motivations and interests than do government antitrust agencies. Thus, private plaintiffs may initiate cases even if, in an ultimate reckoning of relative United States and foreign interests, those cases should not be brought. Moreover, our trading partners judicial systems' do not authorize private treble damage antitrust suits (only public authorities may initiate such litigation). Accordingly, our trading partners find it hard to accept that they should be subject to the costs and risks associated with private antitrust litigation.

Let me briefly discuss the provisions that would require courts to expedite consideration of jurisdictional issues, and that would make the forum non conveniens doctrine applicable in these cases. Although we support the intent of both of these provisions, we do not believe that they are likely to have a very significant practical effect. Early decisions on jurisdiction would help to minimize conflicts caused by those cases in which the United States has the fewest legitimate interests and foreign governments the most. It is important to recognize, however, that jurisdictional issues may be difficult to resolve at the beginning of cases in which the same facts, or closely intertwined facts, may go both to the merits and to jurisdiction. Substantial discovery may be necessary to resolve many of the issues. Thus, we suspect it has been as much the nature of the issues presented as any disinclination on the courts' part to dispose of litigation on jurisdictional grounds that has protracted some of the more contentious international cases.

We also support, in principle, the extension of the forum non conveniens doctrine to antitrust cases that involve foreign commerce. We see no reason why the courts should consider themselves entirely foreclosed from concluding, in appropriate cases, that a foreign court would be a preferable forum for litigating the claims asserted in a U.S. antitrust case, consistent with the standards set out in the Supreme Court's

1981 decision in Piper v. Reyno. 5/ It must be recognized, however, that foreign courts may be unavailable for, or unhospitable to, private causes of action of the kind represented by U.S. antitrust litigation. The Supreme Court has made it clear that dismissal on the ground of forum non conveniens should not be denied because the foreign forum's law is less advantageous than U.S. law. The Court also has stressed, however, that if a foreign tribunal provides a "clearly inadequate" remedy, a district court may conclude that dismissal would not be in the interests of justice. 6/ We assume that the forum non conveniens provisions of S. 397, if enacted, would be interpreted consistent with this limitation, as well as other aspects of the Supreme Court's Piper v. Reyno decision.

The other two provisions of S. 397--"jurisdictional balancing" and "detrebling"--raise more fundamental and troubling questions. They address the right problem, namely, that private antitrust treble damage actions involving international commerce can interfere with our foreign relations and, in particular circumstances, may not be consistent with United States foreign policy interests. These provisions, however, raise questions of a very basic nature about the proper roles of the Executive and Judicial Branches, as well as

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5/ Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

6/ Id. at 254.

about the balancing of United States and foreign economic interests. We do not believe S. 397's open-ended delegation to the courts of responsibility for weighing the relative importance of policies and interests of our government against those of other governments is the proper legislative response to the foreign policy concerns arising out of private antitrust litigation.

Beginning with the Ninth Circuit Court of Appeals' 1976 Timberlane decision, 7/ a number of courts have adopted--at least in principle--an "interest balancing" approach to resolve competing U.S. and foreign interests implicated in private antitrust suits with international ramifications. Under this approach, a variety of factors are to be examined by the court in deciding whether jurisdiction should be asserted or whether, conversely, foreign interests in the subject matter of the suit so predominate that U.S. antitrust jurisdiction should not be exercised. This balancing exercise may encompass factors ranging from concrete and readily ascertainable ones, such as the nationality of the parties, to such complex and political considerations as the impact of the litigation on the foreign relations of the United States. While the consideration of factors that are specific to the particular facts and parties of a case and that do not involve political issues is

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7/ Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

unobjectionable, the courts' exercise of foreign policy decisionmaking is very troublesome.

A number of thoughtful commentators--ranging from foreign governments to some of our own courts--have criticized this judicial balancing approach as delegating to the courts a role they are inherently ill-equipped to perform. 8/ They point out that institutional limitations on the judicial process make it impossible for a court to determine objectively whether foreign interests outweigh the United States interests implicated in litigation. Moreover, they argue that because the Constitution grants the Executive Branch sole responsibility for conducting our foreign relations, separation of powers considerations indicate that the Executive Branch should make the political and foreign policy judgments required to balance the American and foreign government interests in a particular case.

We fully agree with these commentators. In some--one would hope rare--instances, the balancing that is appropriate to an antitrust case may involve sensitive political issues that have little or nothing to do with the facts of a particular controversy. Moreover, under a jurisdictional balancing approach, there will be situations in which United States and foreign interests will simply be at loggerheads. Instructing a court to consider both interests will not provide a ready solution in such cases.

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8/ See, e.g., Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 948-55 (D.C. Cir. 1984); In Re Uranium Litigation, 480 F. Supp. 1128, 1148 (N.D. Ill. 1978).

We believe Judge Wilkey's thoughtful opinion in the private Laker litigation 9/ correctly stated that the courts are simply the wrong place, under our Constitution's allocation of responsibilities and competences, to engage in a balancing of conflicting U.S. and foreign economic policies and philosophies. Moreover, such balancing by unelected federal judges who are likely to have little experience or expertise in the area of foreign relations may exacerbate rather than alleviate tensions between the U.S. and our trading partners, who may be disappointed and frustrated by a perception that a court has failed to respond to their concerns. The inappropriateness of this judicial role would be compounded by legislative provisions leaving the courts free to ignore Executive Branch guidance once it is given. Thus, we believe that it would be most unwise to codify the Timberlane approach as a legislative solution to these serious problems, at least in the open-ended way proposed in S. 397.

The jurisdictional balancing test actually should be broken down into three components--the first two could generally be performed by the judiciary, while the third should be the province of the Executive Branch. First, under existing law a court must determine whether conduct being scrutinized has "direct, substantial and reasonably foreseeable effects" on

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9/ Laker Airways, Ltd. v. Sabena Belgian World Airlines, Id.

United States domestic or import commerce. 10/ Only if such effects are found should the inquiry continue. Second, assuming the initial jurisdictional hurdle has been surmounted, the court may weigh a variety of fact-specific considerations having no foreign relations or political overtones. They include the nationality of the parties, the extent to which enforcement by either state can be expected to achieve compliance, the extent to which there is an explicit purpose to harm or affect American commerce, the foreseeability of such an effect, the relative significance of effects on the United States as compared with those elsewhere, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. If a weighing of these factors suggests jurisdiction should not be asserted, the inquiry ceases.

It is the third step of the balancing test that allows the courts to balance the interests of the foreign nation against those of the U.S. and otherwise to consider the effect of an antitrust action on foreign relations interests, and it is this step that the Department finds objectionable. If private treble damage actions are to be dismissed at this stage--and we recognize that such dismissals may be appropriate in extraordinary circumstances--we believe that it is the

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10/ Foreign Trade Antitrust Improvements Act of 1982, § 402, 15 U.S.C. § 6(a)(1) (1982).

Executive, not the Judicial, Branch that should make that final determination.

Generally the first two steps should resolve most jurisdictional disputes without requiring the courts to balance political considerations. If a jurisdictional balancing test consisted solely of these two steps and if the list of factors to be balanced in step two were explicitly and inclusively spelled out to avoid any foreign relations or other political considerations, the test might be acceptable. However, to the extent the test goes beyond well-defined metes and bounds of these first two steps to consider foreign policy factors, we believe that is the Executive Branch that should perform this final step.

I would like to address now the last provision of S. 397 that would allow courts to reduce available awards in private antitrust actions from treble to actual damages--so called, "debtrebling." A serious problem with this provision is similar to that connected with the jurisdictional balancing test. Namely, the bill would delegate to the courts the essentially political role of assessing the nature and strength of a foreign sovereign's interests in the outcome of the litigation. Under S. 397, detrebling would depend solely on the foreign interests involved. No consideration whatsoever could be given to the often substantial United States interests in preventing, deterring, or punishing the conduct at issue.

Moreover, detrebling would be done on a case-by-case basis that might lead to uneven results across courts. More significantly, the bill would provide detrebling even though the U.S. received no quid pro quo from the affected foreign nation.

S. 397's detrebling provision has additional shortcomings. First, because foreign firms would be the primary (if not the only) beneficiaries of detrebling, the provision is subject to the criticism that it would provide an unfair competitive advantage to foreign firms at the expense of their American competitors. This concern is particularly acute during the current period of intensified international competition.

Second, the detrebling provision is entirely different from the approach of recently enacted detrebling measures, such as those that relate to export trade and joint research and development. Those initiatives have been based on the notion that there is a specific category of potentially desirable conduct that is "overdeterred" by the possibility of treble damages, and that conduct has been specified in legislation. In contrast, S. 397 would apply to any conduct--regardless of its potential to harm United States consumers and United States commerce--so long as the conduct involved foreign commerce. Some such conduct, such as naked price fixing and other covert cartel agreements among competitors, is unequivocally harmful and should continue to be subject to the treble damages remedy.

Third, the Administration is awaiting the outcome of a Georgetown University study on treble damages to determine whether and in what form comprehensive detrebling reform legislation is appropriate. The Administration believes that the current rule of across-the-board, automatic treble damages is likely having adverse effects, not just on foreign relations but, more importantly, on the overall economic vitality and efficiency of the U.S. economy as well. Unless the Georgetown study indicates that private treble damages are not deterring efficient, potentially procompetitive conduct, the Administration believes a comprehensive reexamination of antitrust remedies in general and treble damages specifically is called for.

We recognize that detrebling has the potential for substantially alleviating friction with our trading partners resulting from the application of the antitrust laws. Nevertheless, for the reasons I have explained, we do not believe that S. 397 offers a desirable solution to the treble damages problem. Detrebling in foreign antitrust cases would more appropriately be considered in the context of comprehensive legislation. Congress might also consider the use of detrebling in the context of negotiated bilateral agreements. This approach would recognize that if we are to cede the use of important antitrust enforcement provisions in deference to a foreign government's interests, that government should reciprocate by recognizing that we, too, have important interests at stake.

In summary, S. 397 represents a timely approach to important challenges that face United States antitrust policy and provides a good starting point from which to address those challenges. Nonetheless, this measure has serious drawbacks, and we strongly counsel against its adoption. Not the least of those drawbacks is that it would solve the problems I have described by instructing our courts to make essentially political judgments in a manner that is inconsistent with the proper constitutional allocation of responsibilities within our government. Therefore, while we strongly oppose enactment of S. 397, we hope that it will provide needed impetus for developing and considering alternative approaches. We are committed to work with the Congress toward developing appropriate solutions to the serious problems that this bill addresses.

Mr. Chairman, that concludes my prepared remarks. I would be happy to respond to any questions you or other members of the Committee may have.