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THE WHITE HOUSE

WASHINGTON

March 10, 1986

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Testimony on H.R. 4007

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

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	Karen Wilson	Take necessary action	☐
	John Roberts	Approval or signature	☐
	Frank Kalder	Comment	☐
		Prepare reply	☐
		Discuss with me	☐
		For your information	☐
		See remarks below	☐
FROM	Greg Jones	**DATE**	3/7/86

REMARKS

Please comment by March 13, 1986.

Thank you.

cc: Jim Murr

OMB FORM 4
Rev Aug 70

DRAFT

STATEMENT

OF

JAMES I.K. KNAPP
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

SUBCOMMITTEE ON CRIMINAL JUSTICE
SUBCOMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 4007

ON

MARCH 20, 1986

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice on H.R. 4007. The bill would amend the Jencks Act by inserting a provision requiring the government, upon request of a defendant, prior to trial to make available promptly to such defendant in a criminal case the name and address of each potential government witness and a copy of any statement made by the witness about the subject matter of the case in the possession of the government. The bill also includes a provision whereby the government may move for an ex parte order denying, restricting, or deferring the furnishing of this type of information about its witnesses to the defendant if the court finds that such disclosure "would constitute" an imminent danger to another person or a threat to the integrity of the judicial process.

The Jencks Act (18 U.S.C. 3500) presently provides that in federal criminal cases no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness shall be the subject of a subpoena or otherwise subject to discovery until the witness has testified on direct examination. After a government witness has so testified, the court, on motion of the defendant, must order the Government to produce any statement of the witness in its possession which relates to the subject matter as to which the witness testified. Frequently, federal prosecutors in effect waive the benefits of the Jencks Act by opening their files to defendants in advance of trial and showing them not only the names of prospective government witnesses but copies of their statements.

However, the practice is not universal and it is not followed in certain cases, typically those in which the prosecutor believes that opening his files in this manner will cause or facilitate perjury on the part of the defense or harassment of government witnesses. The provisions of section 3500 have repeatedly withstood Constitutional challenge. 1/ Moreover, in those rare instances where judges have attempted to order the Government to disclose the statements of its witnesses prior to trial over the prosecutor's objections, the Government has obtained writs of mandamus to prevent judicial usurpation of the prohibitions of the Jencks Act. 2/

Contrary to the current statute, H.R. 4007 would in essence impose an "open file" policy on each and every United States Attorneys Office and Organized Crime Strike Force Office. The Department of Justice believes that such a policy is not necessary to ensure the fairness of criminal trials. Moreover, and of primary concern, the bill would have the effect of placing witnesses in physical danger and of impairing the integrity of the judicial process -- such as by allowing the defendant to fabricate a defense through perjured testimony -- in spite of its provisions intended to prevent these matters. Consequently, the Department of Justice vigorously opposes this bill.

1/ See, e.g., Palermo v. United States, 360 U.S. 343 (1958).

2/ See, e.g., United States v. McMillen, 489 F. 2d 229 (7th Cir., 1972), cert. denied, 410 U.S. 955; and see United States v. Algie, 667 F. 2d 569 (6th Cir. 1982) (collecting cases).

As you no doubt recall, Mr. Chairman, this type of open witness list provision has been considered and rejected by the Congress in the past (and was altered from the extreme form in which it is here proposed by the full House Judiciary Committee). Specifically, in 1974, the Supreme Court promulgated certain amendments to the Federal Rules of Criminal Procedure which were originally due to become effective on August 1, 1974. However the effective date was postponed for a year -- to August 1, 1975 -- to give the Congress more time to study the amendments. 3/ Among the proposed rules was a new rule 16(a)(1)(E) which would have required the government, in similar fashion to H.R. 4007, to furnish the defendant upon his request a list of the names and addresses of all witnesses that the government intended to call in its case in chief, together with a record of their prior felony convictions. The Court's 1974 proposal, which was strongly opposed by the Department, likewise would have allowed the court to deny, restrict, or defer this type of discovery upon an ex parte showing by the government of reason to believe that a witness would be subject to physical or economic harm if his identity is revealed.

The rules as proposed by the Supreme Court were considered at some length by this Subcommittee in the 94th Congress. Particular attention was given to proposed Rule 16(a)(1)(E) relating to witness lists. Subsequently, in 1975, the full

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3/ See P.L. 93-361.

Judiciary Committee reported out a bill, H.R. 6799, which among other things modified the witness list proposal in an effort to alleviate the Department's concerns to provide that witness lists need only be turned over to the defendant three days in advance of trial. 4/ This modified witness list proposal continued to be strongly resisted by the Department and was the subject of considerable debate on the House floor. An amendment to strike out the provision that the government furnish witness lists, even though they would have to be furnished only three days in advance of trial, was narrowly defeated, 216-199. 5/

Thereafter, when the Senate considered H.R. 6799, it deleted the witness list provision from the bill. The Senate's views prevailed in the ensuing House and Senate Conference, and were

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4/ Neither the Rules amendments as proposed by the Supreme Court in 1974, H.R. 6799 in the 94th Congress, nor the bill presently before the Subcommittee, H.R. 4007, has any effect on the provisions of 18 U.S.C. 3432 which require the government to give the defendant the names of its witnesses three days in advance of the trial of a capital offense. Section 3432 is the only provision in either the federal statutes or Rules of Criminal Procedure requiring such advance notice of government witnesses. It would only be applicable in a prosecution for air piracy resulting in death under 49 U.S.C. 1472(i) or (n), since the death penalty for all other federal offenses is presently unenforceable in light of the absence of procedures needed to comport with the Supreme Court's decisions in Furman v. Georgia, 408 U.S. 238 (1972), and subsequent cases. For other offenses, like first degree murder, for which the death penalty is set out as a possible punishment but is currently barred, courts have held that a defendant is not entitled to the government's witness list in advance of trial since the offense is not "capital." See United States v. Kaiser, 545 F. 2d 467, 475.

5/ See Cong. Record, 94th Cong., 1st Sess., June 18, 1975, pp. H 5650-5658.

ultimately accepted by the House, again after debate on the witness list question. 6/

We firmly believe that the government should not be required as a general principle of statutory law to open its files to show defendants the names of witnesses who will testify against them. We are not aware of any serious claim that federal trials are presently unfair or that defendants' discovery rights are unreasonably limited. Indeed, the law now requires the giving of very ample pretrial notice to defendants. The indictment itself must contain a statement of all the essential facts. Defendants may then be given bills of particulars elaborating on the facts charged. Under Rule 16, defendants can obtain their own statements and grand jury testimony, if any, as well as copies of reports of examinations and tests, and of other books, papers, documents, and tangible objects material to the case. In the very rare case where a defendant may properly claim unfair surprise from the calling of a particular government witness, a continuance may be granted by the court.

In short, H.R. 4007 is not necessary to make federal trials more fair. On the contrary, the enactment of H.R. 4007 could make federal trials less fair. A mandatory open witness list requirement would allow unscrupulous defendants to identify government witnesses so that they could tailor their defenses and

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6/ Cong. Record, 94th Cong., 2d Sess., July 30, 1975, pp. H 7859-7865.

fabricate alibis, thus increasing the chances that an unmerited not guilty verdict would be returned. As the Subcommittee knows, the government has the heavy burden of proving guilt beyond a reasonable doubt. We fail to perceive how a person making an honest defense will be interfered with by not being told the names and addresses of the government's witnesses prior to trial. Fairness surely does not require affording defendants the opportunity to make a leisurely study of every configuration of the government's case so they can shape their tactics and defenses accordingly.

We have another, even more important, concern with a general open witness list requirement like that in H.R. 4007. Such a requirement would jeopardize the safety and lives of many government witnesses. Back in the 94th Congress, in testifying on H.R. 6799, the Department furnished the House and Senate Judiciary Committees with a document prepared by United States Attorneys detailing over 700 instances of witness intimidation, assault, or assassination arising out of all manner of prosecutions. Certainly the danger to witnesses is no less severe today than it was a decade ago and common sense indicates it is probably a lot worse. In combatting large scale drug trafficking rings, outlaw motorcycle gangs, and traditional organized crime families we often deal with persons with little regard for the lives of others and who would not hesitate to have government witnesses killed to avoid conviction. Indeed, Congress has recently recognized that the danger facing many federal witnesses is real and substantial by passing the Victim and Witness Protection Act

of 1982. Among other things, this Act greatly increased the penalties for witness tampering. 7/

Our concern with H.R. 4007 is not so much that it will make the prosecution of easy or routine cases harder, but rather that the harder cases will be made more difficult, and that complicated investigations will be somewhat less likely to bear fruit. It is in the dangerous and difficult cases that the identities of witnesses need to be kept secret for their sake and for society's. H.R. 4007 would impact most adversely on the Department's most significant cases, like those aimed at organized crime families, major narcotics traffickers, and terrorist organizations. Getting witnesses to cooperate with law enforcement is a serious problem in all types of cases. At the very least, witnesses usually have to sacrifice time and energy and are under considerable emotional strain, although these are sacrifices that society must insist upon and which a great many witnesses are willing to make, even though many of them are very concerned over possible intimidation or reprisal by the defendant. It needs no elaboration to understand why these

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7/ To be sure, the Bail Reform Act of 1984 did make it somewhat easier to place in pretrial confinement persons who pose a serious risk of obstructing justice or intimidating or harassing witnesses. But the fact that a person is in jail does not mean he cannot arrange for a witness to be assaulted or killed. In fact, major drug rings and organized crime families typically are able and willing to carry out such a despicable act to prevent one of their temporarily detained leaders from being convicted of a crime.

concerns are the most justified in precisely those cases which are the most important because the defendant represents a substantial threat to our society.

Mr. Chairman, we realize that H.R. 4007 would allow the government to seek an ex parte order to prevent the disclosure of the name of a witness if such disclosure would endanger the safety of that person or of another person or would constitute a threat to the integrity of the judicial process. But on examination this provision is at best of limited help. It may often be difficult to show why the normal rule embodied in the bill of requiring pretrial disclosure of witnesses should not be followed merely on the basis of the kind of charges against the defendant, his arrest record, or even his reputation. Certain crimes -- large scale cocaine importation by an organized gang, for example -- carry with them a higher than average likelihood that any government witness may be in considerable danger. But demonstrating that the defendants in a particular cocaine case are likely to harm witnesses may be very difficult especially if they are foreign nationals whose arrest and criminal records may not be available or accurate. 8/

8/ We realize that some states have an open file policy under which witness lists are usually made available to the defendant. Such a policy is informally in effect for at least some cases in some of our federal judicial districts. Many state prosecutors and some United States Attorneys Offices do not often have to face the hardened and ruthless types of defendants who are involved in the top priority drug and organized crime cases in many parts of the country. Because an open file policy is in

(Footnote Continued)

In closing, Mr. Chairman, permit me to address what I suspect is one of the central arguments of those who advocate an open witness list rule, namely that allowing the government not to reveal the names of its witnesses promotes an undesirable "sporting theory" of justice. Actually, we agree with the proposition that a criminal trial is not a sporting contest. What it is supposed to be, of course, is a search for the truth with the fact finder required to determine whether the defendant committed the elements of the offense as charged. That search is impaired, not advanced, if defendants are given an opportunity to harass and threaten government witnesses and to get a perfect picture of every detail of the government's case so they can manufacture a defense.

In sum, the Department of Justice believes that the provisions in H.R. 4007 would be very harmful, and, accordingly, we strongly oppose its enactment.

Mr. Chairman, that concludes my prepared statement and I would be happy to answer any questions the Subcommittee may have.

(Footnote Continued)
effect in some places is little reason for imposing such a policy on a national scale.

THE WHITE HOUSE

WASHINGTON

March 19, 1986

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Draft Testimony on S. 2162, the Anti-trust Remedies Improvements Act of 1986

Counsel's Office has reviewed the above-referenced DOJ draft testimony and finds no objection to it from a legal perspective.

ID # _____ CU

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Subject: Department of Justice draft testimony on S. 2162, the Anti-trust Remedies Improvement Act of 1986

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Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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	Referral Note:				
cmct 18	R	86/03/19		5	86/03/19 ASAP
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SPECIAL

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

March 19, 1986

LEGISLATIVE REFERRAL MEMORANDUM

SPECIAL

TO:

Department of Commerce - Joyce Smith (377-4264)
Department of State - Lee Ann Berkenbile (647-4463)
Department of Labor - Seth Zinman (523-8201)
Department of the Treasury - Carol Toth (566-8523)
U.S. Trade Representative - Lynn Johnston (395-3150)
Council of Economic Advisers
Federal Trade Commission

SUBJECT: Department of Justice draft testimony on S. 2162, the Anti-trust Remedies Improvements Act of 1986.

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 COB -- MARCH 19, 1986.
(NOTE -- The Senate Judiciary Committee has scheduled a hearing on this bill for 3/21/86. S. 2162 is one of the Administration's anti-trust reform proposals recently transmitted to the Congress jointly by Justice and Commerce.)

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

Branden Blum

for **James C. Murr for**
Assistant Director for
Legislative Reference

Enclosure

cc: Fred Fielding Karen Wilson Chuck Goldfarb
John Cooney Steve Eisner

STATEMENT OF

DOUGLAS H. GINSBURG
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 2162
THE ANTITRUST REMEDIES IMPROVEMENTS ACT OF 1986

ON

MARCH 21, 1986

Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to appear before the Committee to testify on S. 2162, the "Antitrust Remedies Improvements Act of 1986." This bill, introduced by the Chairman on behalf of the Administration, would make a number of timely and important improvements in the key antitrust remedial provisions in the Clayton Act. S. 2162 is one of four pending Administration proposals for improvements in the antitrust laws themselves; the fifth of the Administration's proposals involves amendments to the Trade Act regarding the application of the antitrust laws in industries injured by imports. I want to express our thanks to the Committee for scheduling its hearings on this first bill so quickly. I look forward to discussing the Administration's other proposals with the Committee as soon as its schedule permits.

As its title suggests, S. 2162 deals not with substantive antitrust law, but rather with the equally important issue of appropriate antitrust remedies. Businessmen and women, lawyers, economists, and of course the Members of this Committee well know the significance of remedies in antitrust or indeed any legal system. Substantive law says how people should behave; but applicable remedies determine how they will behave.

We have three kinds of antitrust remedies. Criminal prosecution is designed solely to punish and deter intentional violations. Since about 1960, and particularly in the last 10 years or so, the indictment and incarceration of individuals responsible for hard-core antitrust violations has played an extremely important remedial role in antitrust. The Department of Justice intends to see this role increased even more. We also have preventive antitrust remedies: either the federal government or a private party threatened with antitrust injury may seek to enjoin a violation before it occurs. Finally, we have compensatory remedies: private parties, the federal government, and state attorneys general as parens patriae all may sue to recover monetary damages for injuries caused by antitrust violations. All of these remedies act together to influence the behavior of those who may be accused of antitrust violations as well as those who may be doing the accusing.

Such a panoply of remedies is by no means unique to antitrust. Antitrust is somewhat unusual, however, in that significant punitive, deterrent aspects were deliberately added to its basic compensatory remedies. With a few, recently-enacted exceptions, antitrust damages are always trebled, and plaintiffs automatically are awarded attorneys' fees if they prevail. These punitive features simultaneously give potential plaintiffs strong positive incentives, and potential defendants strong negative incentives, that ordinary

compensatory remedies do not. In short, we ask our compensatory antitrust remedies to do a lot of things at the same time, and each of them--compensation, punishment, and deterrence--must be done correctly. After 90 years, there is good reason to believe that some adjustments are necessary.

For some time now, and increasingly in the past few years, the antitrust community generally and this Committee in particular have been studying and working with the antitrust damage remedies to see that they continue to provide fair compensation, deter potential defendants from doing what ought to be deterred, and give potential plaintiffs appropriate incentives to challenge what ought to be challenged. The Committee has recognized that not all antitrust violations are clear, and that the punitive aspects of our damage remedies can deter beneficial as well as anticompetitive activities. The Committee also has noted that the private interests of potential plaintiffs do not always coincide with those of the public, and that punitive damages can sometimes give plaintiffs an incentive to challenge procompetitive behavior.

Three times in the last four years, the Committee and the Congress have responded to these concerns by adjusting antitrust damage rules for specific types of cases. The Export Trading Company Act of 1982, the National Cooperative Research Act of 1984, and the Local Government Antitrust Act of 1984 all

recognized the continuing care that must be taken with a compensatory remedy that also performs a punitive, deterrent function, and accordingly in all three statutes Congress detrebled, or in one instance eliminated, antitrust damage recoveries. The Committee also has developed an extensive record on the need to modify the rules that determine the manner in which joint and several liability for antitrust damages is apportioned among the responsible parties. S. 2162 is in very substantial part a product of this experience.

S. 2162 makes several adjustments to antitrust remedies, each closely related to the others. All are intended to function together to preserve and indeed enhance a strong deterrent effect on unambiguously harmful conduct while removing undue inhibitions on potentially procompetitive activities. All continue to give potential antitrust plaintiffs appropriate incentives to challenge anticompetitive activities, while discouraging plaintiffs from using antitrust damage remedies to restrain competition.

First, S. 2162 correlates the trebling of antitrust damages to the type of injury caused by an antitrust violation. Under the bill, private plaintiffs, state attorneys general suing on behalf of consumers, and for the first time the United States as civil plaintiff, could all recover treble damages for injuries due to overcharges or underpayments by an antitrust

violator. Plaintiffs seeking to recover their profits lost as the result of an antitrust violation would be entitled to actual damages plus, for the first time, prejudgment interest on their actual damages from the date of the injury. All successful plaintiffs, of course, would continue to recover their costs, including reasonable attorneys' fees.

Second, S. 2162 provides a right of claim reduction, to counter "whipsaw" settlement tactics that can be used to undermine the just resolution of antitrust cases. Today, a plaintiff's trebled claim against non-settling defendants is reduced only by the actual amount it receives from any settling defendants. This bill would reduce the plaintiff's recovery by at least the share of its damages fairly allocable to each person that the plaintiff releases from liability. The formula for determining a fair share would be based either on sales, as in the typical price fixing case, or on relative responsibility and benefit in other cases.

Finally, S. 2162 would provide costs and attorneys' fees to prevailing defendants where private plaintiffs' conduct was "frivolous, unreasonable, without foundation, or in bad faith." With the Committee's permission, I would like briefly to outline each of these features of S. 2162.

Treble Damages and Prejudgment Interest

The treble damage remedy is an important element in antitrust enforcement. Public resources alone are not sufficient to detect and prosecute all violations. Private treble damage actions have served to help deter and redress antitrust violations since the Sherman Act was passed in 1890.

S. 2162 would preserve, and in fact enhance, the effectiveness of this important remedy. Antitrust violators that harm consumers by raising the cost of goods and services would continue to face automatic treble damage liability. For the first time, such violators would also risk treble damage actions when the United States is the victim of their violations. Such clearly anticompetitive conduct as price fixing and bid rigging for government contracts is costing the taxpayers dearly. We have more than 20 grand juries investigating such situations right now. But so long as the United States is unable to recover punitive treble damages, we cannot hope to protect the taxpayers adequately. The need for a stronger deterrent to such practices is clear.

S. 2162 would also recognize, however, that treble damages can deter a wide range of conduct that is not clearly anticompetitive and that may be quite beneficial to consumers and to our economy generally. The current punitive damage

in particular circumstances, be found to violate the antitrust laws--no matter how close the question. In so doing, they have to actually inhibit some procompetitive activities. In selectively "detrebling" damages assessed against activities that are often procompetitive, S. 2162 reflects that fact that it simply makes no legal or economic sense for a punitive remedy designed strongly to deter clearly harmful conduct like price fixing to be applied equally to ordinary, open business activities that, after a full trial on their economic effects, may or may not be found to have been anticompetitive.

The logical shortcomings of the current treble damage rule have long been recognized. Congress has considered proposals to limit the application of treble damages since at least the 1950's, when a bill was introduced to make multiple damages discretionary. In recent years, calls for one partial reform or another have been constant.

Congress has in fact now twice limited antitrust damage recovery to full compensation--actual damages plus prejudgment interest--for certain categories of conduct found to hold substantial procompetitive promise. The Export Trading Company Act of 1982 responded to concerns that treble damage liability and uncertainty over the application of the antitrust laws to export activities were combining to constrain American export trade. The National Cooperative Research Act of 1984 reflected

the same concerns as they relate to joint research and development. This Committee found that the threat of private litigation and the uncertain legal status of joint R&D efforts "may have caused many firms to abandon their plans for such efforts at the drawing board, even when the activities under consideration posed little or no actual threat to competition." 1/

The Local Government Antitrust Act of 1984 eliminated damage recovery altogether in antitrust suits challenging activity by local government entities. Once again, this Committee found that "[t]he threat of antitrust treble damage actions has caused local officials to avoid decisions that may touch on the antitrust laws even when such decisions have involved critical public services." 2/

Other proposals to modify the rule of automatic treble damages in particular antitrust actions continue to be made. Bills are presently being considered to detreble damages in cases challenging conduct involving trade or commerce with a foreign nation, and in cases that concern the licensing of intellectual property.

1/ Report of the Senate Committee on the Judiciary to Accompany S. 1841, S. Rep. No. 427, 98th Cong., 2d Sess. 3. (1984)

2/ Report of the Senate Committee on the Judiciary To Accompany S.1578, S. Rep. No. 593, 98th Cong., 2d Sess., 3. (1984)

The Administration believes that it is time to take what we have learned from the extensive and lengthy debate over the treble damage remedy and address the problem on a broader basis. Years of court decisions, scholarly comment, commissions to study the antitrust laws, Congressional hearings, and limited revisions of the law have provided the experience and guidance to fit the remedy to its proper task.

We believe that the primary goals in reforming the treble damage remedy should be to maintain the strongest incentive for plaintiffs to sue defendants who engaged in patently anticompetitive conduct, thereby punishing and deterring such conduct, and to provide a fully compensatory remedy for conduct which may or may not be anticompetitive under the circumstances, so as not to allow the threat of punitive damages to inhibit innovative competitive activity. These goals can be sought in several ways; indeed, a number of alternative approaches have been suggested. While there is no absolutely perfect approach, S. 2162 provides what we think is clearly the best way in which to define the proper scope for punitive damages in antitrust. Under S. 2162, treble damages will continue to be recoverable for injuries in the form of overcharges or underpayments by an antitrust violator. Other antitrust injuries--the plaintiff's lost business profits--will be redressed by actual damages plus prejudgment interest, unless the award of all or part of such interest is unjust in

the circumstances. We believe that this approach has a number of significant advantages.

S. 2162 properly places the weight of the punitive damage remedy on clearly harmful conduct. Covert concerted practices such as price fixing, bid rigging, divisions of markets, and allocation of customers must be strongly deterred. Suits brought by victims of these practices, often consumers or small businesses, are generally based on overcharges or underpayments. Injury in the nature of lost profits, however, may result from practices with procompetitive potential. Punitive damages for such practices, usually unconcealed, can stifle innovative, competitively beneficial behavior. A fully compensatory remedy for lost profits will not inhibit vigorous competition.

S. 2162 maintains a strong incentive for plaintiffs to detect and challenge unambiguously anticompetitive behavior but minimizes the incentive to bring suits intended to thwart competition. Persons claiming antitrust injury due to overcharges typically are consumers who are hurt by anticompetitive practices, and who are motivated by a desire to promote competition from which they, as customers, will benefit. Rivals seeking lost profits, however, may be suffering from an inability to compete effectively in the marketplace rather than from any unlawful practice. The law

should not provide them with an enhanced ability or incentive to challenge healthy, aggressive competition; by taking the punitive element out of suits by rivals, S. 2162 accomplishes this result. At the same time, it preserves a fully sufficient incentive to competitors who have actually been harmed by an antitrust violation to seek redress: a fully compensatory remedy, which means actual damages and interest thereon from the time they are injured to the time they collect their damages, nothing less. Actual damages alone do not compensate for the lost use of money from the time of injury to the time of judgment.

The issue of prejudgment interest has been studied several times in the last few years. In 1980, Congress enacted a limited right to recover prejudgment interest on the basis of dilatory conduct in treble damage actions. S. 2162 preserves this right in cases in which damages will continue to be trebled. When damages have recently been detrebled in particular contexts, however, it has been recognized that prejudgment interest should be awarded as a matter of course. S. 2162 follows the lead of the National Cooperative Research Act of 1984 in awarding prejudgment interest on actual damages from the date of injury, unless all or part of such interest would be unjust in the circumstances. S. 2162 does differ slightly by giving the court more flexibility in choosing the appropriate interest rate to best reflect a loss over a period of fluctuating rates.

S. 2162 provides certainty and can be implemented easily. The determination of when multiple damages are recoverable turns on an element of proof already required in every case: the plaintiff's damage theory. Alternative proposals to detreble for certain categories of conduct would engender lengthy litigation over the appropriate characterization of the offense charged. Indeed, the number of Supreme Court cases on the question whether particular conduct should be treated as "per se" unlawful or instead subject to the "rule of reason" is a stark reminder of the need for a distinction that is not easily manipulated in order to turn actual damage cases into punitive damage cases. Nor will an enumeration of particular types of violations suitable for one treatment or another prove stable. If counsel can mischaracterize conduct in order to raise the stakes of litigation they will do so; for example, joint purchasing arrangements may be called boycotts or joint selling arrangements price fixing. It is much more difficult, however, to mischaracterize lost profits as overcharges. The pre-litigation relationship between the parties immutably determines the plaintiff's damage theory: if it wasn't a consumer of the relevant product, it could not be overcharged for it. Thus, S. 2162 avoids the potential for abuse that conduct-oriented approaches to detrebling may create.

The remedies provided by S. 2162 are also consistent with optimal penalty theory. Overcharges clearly indicate the

societal harm caused by an antitrust violation. Lost profits are not closely related to such harm, however, and in fact may well overstate it. Overcharges also typically result from covert behavior and we can never be certain it is all being detected; treble damages provide a needed multiplier to deter volations that may not otherwise be detected.

Finally, S. 2162 promotes consumer welfare. Provable overcharges reflect the transfer of surplus from buyers to sellers that monopoly permits and competition prevents. When overcharges are proven, trebled, and recovered, we have the greatest confidence that the antitrust laws are being applied in line with their intended function, the preservation of a competitive economy.

Claim Reduction

S.2162 also addresses the issue of how best to distribute the responsibility for damages among the defendants in antitrust litigation in order to reduce perceived unfairness resulting from the current antitrust damage allocation system. The issue of antitrust damage allocation reform is, of course, a familiar one for this Committee. Proposals to amend the present scheme of allocating damage responsibility in antitrust litigation have been before the Committee continuously since

1979. 3/ The Committee has held several sets of hearings on the issue and twice reported legislation that would have provided rights of contribution and claim reduction in antitrust litigation. 4/ Thus, I will keep my remarks on the need for damage allocation reform brief.

Liability for antitrust damages is joint and several, which means that a plaintiff may sue any or all of the members of an antitrust conspiracy and collect its damages in any proportion from liable defendants. Furthermore, when a plaintiff releases a defendant from liability for damages, only the actual amount paid for the release is deducted from the plaintiff's claim against the remaining defendants. Thus, if a plaintiff enters into a settlement with any defendant for an amount that is less than the share of the plaintiff's injury caused by the settling defendant's own conduct, responsibility for the difference is shifted to the remaining defendants. The term "whipsaw settlements" has come to be applied to the deliberate use of early, "sweetheart settlements" to raise the perceived liability of nonsettling defendants to the point where they are forced to abandon even meritorious defenses and settle out of

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3/ See S. 1468, 96th Cong., 1st Sess. (1979); S. 995, 97th Cong., 1st Sess. (1981); S. 380, 98th Cong., 1st Sess. (1983); S. 1300, 99th Cong., 1st Sess. (1985).

4/ S. Rep. No. 428, 96th Cong., 1st. Sess. (1979); S. Rep. No. 359, 97th Cong., 2d Sess. (1982).

the fear of facing ruinous liability should they litigate and lose.

The extent to which either arbitrary defendant selection or whipsaw settlements have resulted in unfairness worthy of reform, and what manner of reform would be most appropriate, have been debated at length for the last 7 years. Although legal scholars have failed to reach a consensus on these questions, 5/ I believe that the exhaustive hearing record that has been developed before this Committee provides a firm basis for congressional action at this time.

After examining the record on antitrust damage allocation, we are convinced that there is a real problem to be solved, namely the use or potential use of whipsaw settlements. Plaintiffs have an obvious incentive to obtain the maximum amount they can in settlements, and the present antitrust damage allocation system encourages this incentive to the point of excess by permitting whipsaw settlements. Antitrust

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5/ See, e.g., Easterbrook, Landes, and Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Econ. 331 (1980) (costs of contribution and claim reduction probably exceed benefits); Polinsky and Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 Stan. L. Rev. 447 (1981) (claim reduction recommended over contribution or no change in existing law); Sullivan, New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution, 1980 U. Ill. L. F. 389 (contribution should be provided in non-per se cases only on a discretionary, comparative fault basis).

liability rules should encourage fair settlements, but not whipsaw settlements.

Three types of reform legislation in this area have been considered by the Committee: contribution, claim reduction, and the elimination of joint and several treble-damage liability. Contribution, which permits suits by liable defendants who have paid more than their fair shares of the plaintiff's damages against other liable defendants who have not, basically deals with perceived unfairness where plaintiffs make arbitrary choices to sue or collect damages from some but not all of those responsible for antitrust injury. On the other hand, claim reduction, which requires automatic deduction from the plaintiff's remaining claim of the fair share of its damages attributable to any person released by the plaintiff from liability, addresses the whipsaw settlement problem itself. Individual treble-damage liability (i.e. the elimination of joint and several liability), eliminates both of these problems--and more.

Over the last few years, the Department of Justice has listened to the debate on these approaches, and studied their relative effects on antitrust damage litigation. Of particular concern to the Department is the relative effect that each alternative would have on deterrence of hard-core criminal behavior, such as price fixing, and on plaintiffs' incentives

to discover and bring suit against it. I do not want to take up valuable Committee time covering old ground; just last year the Department presented a detailed statement of its concerns in this area during the Committee's consideration of S. 1300. 6/ I will, however, reiterate our belief that eliminating joint and several liability, and to a lesser extent providing a right of contribution, could reduce deterrence of price fixing and bid rigging by reducing defendants' ex ante expectations of liability from engaging in unlawful conduct. Furthermore, complicating the litigation facing plaintiffs could discourage some meritorious suits. Limiting defendants' maximum potential liability by virtually eliminating any risk of paying damages out of proportion to their market shares could allow potential miscreants to more accurately assess the costs of engaging in unlawful conduct. Of all of the proposals, claim reduction appears least likely to have these adverse effects on deterrence.

We also believe that individual treble-damage liability and contribution would increase to a greater extent than claim reduction the burden on the federal courts in resolving antitrust disputes.

6/ Statement of Charles F. Rule, Acting Assistant Attorney General for Antitrust, Before the Senate Comm. on the Judiciary Concerning S. 1300 (July 29, 1985).

To summarize, the Department believes that the record developed through congressional hearings on the antitrust damage allocation system has disclosed a problem with whipsaw settlements, and that claim reduction is an appropriate method for resolving this problem. I urge the Committee favorably to consider the claim reduction proposal in S. 2162.

Attorneys' Fees

Let me turn briefly now to those provisions in S. 2162 that deal with attorneys' fees in private antitrust cases. The bill provides for the award of costs, including a reasonable attorney's fee, to a substantially prevailing defendant upon a finding that the plaintiff has pursued baseless litigation. This provision addresses concerns that the current imbalance in antitrust law regarding the award of attorneys' fees facilitates the potential abuse of antitrust remedies.

Sections 4 and 16 of the Clayton Act entitle only prevailing plaintiffs to attorneys' fees; in general, prevailing defendants do not receive attorneys' fees. Thus, the antitrust laws embody both the English and American rules on attorneys' fees, but in a manner that discriminates between plaintiffs and defendants.

This statutory imbalance was knowing and deliberate. Private enforcement of the antitrust laws is an important

complement to government prosecution. Antitrust cases can be legally or factually complex, and Congress decided to supplement treble damage recovery with the award of attorneys' fees to provide even greater incentives to potential plaintiffs. Unfortunately, the attorneys' fees imbalance also creates a potential for abuse. This abuse may take the form of a "strike suit" filed primarily to extract a settlement from a defendant for something less than the defendant's anticipated litigation costs, or a potentially lengthy injunctive suit by a rival to convince a competitor to abandon its plans to compete aggressively rather than incur substantial legal costs. Such actions undermine the purposes of private enforcement and increase the costs that litigation imposes on society generally.

S. 2162 recognizes the possibility of such abuse by awarding costs, including attorneys' fees, to substantially prevailing defendants if the plaintiff's conduct has been "frivolous, unreasonable, without foundation or in bad faith." This standard is most familiar to the Members of this Committee: it is the same standard used by Congress when it recently decided to award attorneys' fees to prevailing defendants in the National Cooperative Research Act of 1984.

Indeed, Congress has on more than one recent occasion recognized and responded to the potential for abuse of the antitrust process by creating the possibility of attorneys' fee

awards to prevailing defendants in such circumstances. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 permits recovery of attorneys' fees by a prevailing defendant in a state parens patriae case upon a showing that the suit was brought "in bad faith, vexatiously, wantonly, or for oppressive reasons." 7/ The Export Trading Company Act of 1982 awards attorneys' fees to prevailing defendants as a matter of course. 8/ And as indicated above, in its most recent consideration of this issue in the National Cooperative Research Act, Congress decided to permit recovery of attorneys' fees by a prevailing defendant in cases challenging joint research and development upon a showing that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith. 9/ In reporting this standard, based on the Supreme Court's Christiansburg Garment decision, 10/ the NCRA conferees expressed their belief that it would "achieve the desired goal of protecting law-abiding defendants from baseless and bad faith attacks while ensuring that private enforcement of the antitrust laws is not deterred." 11/ We concur in this assessment, and recommend that this carefully drawn provision be made applicable across-the-board in private antitrust cases.

7/ 15 U.S.C. 15c(d)(2).

8/ 15 U.S.C. 4016(b)(4).

9/ 15 U.S.C. 4304(a)(2).

10/ Christiansburg Garment vs. EEOC, 434 U.S. 412 (1978).

11/ H.R. Rep. 98-1044, 98th Cong., 2d Sess. 15 (1984).

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To summarize, Mr. Chairman, keeping our antitrust remedies true to their purpose as substantive antitrust law evolves and experience accumulates is an extremely important task. Congress has already made some progress along these lines. We believe, however, that the time for an industry-by-industry, or activity-by-activity approach to the treble damage remedy has passed, and that now is the time to make comprehensive, integrated, but by no means radical or unprecedented adjustments to the remedial provisions of the Clayton Act.

Mr. Chairman, this concludes my prepared statement. I would be happy to address any questions the Committee may have.

THE WHITE HOUSE

WASHINGTON

March 20, 1986

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Testimony on Litigation Abuse Reform

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

ID # _____ CU

WHITE HOUSE
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Name of Correspondent: Richard Willard

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Subject: DOJ Testimony on Litigation Abuse Reform

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Cust 18	Referral Note: R	96/03/20		S	96/03/24
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DRAFT

STATEMENT

OF

RICHARD K. WILLARD
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

SENATE JUDICIARY COMMITTEE

CONCERNING

LITIGATION ABUSE REFORM

ON

MARCH 26, 1986

Mr. Chairman and members of the Committee:

The Department of Justice appreciates the opportunity to appear before the Senate Committee on the Judiciary to discuss the liability insurance crisis and the need for meaningful reforms of our tort civil justice system. Senator McConnell and others have proposed legislation that attempts to address these difficult issues. While the Administration is continuing to study S.2046, many of its provisions propose constructive answers to our current problems.

In my June 11, 1985 testimony before this Committee on S.1254, Senator Grassley's contractor indemnification bill, I identified two clear reasons why government contractors and other commercial manufacturers were alarmed about products liability and commercial risk exposure. Those reasons are the innovative theories of tort liability applied by many courts and the enormous growth in the size of awards being granted by many juries and courts. These troubling trends in the tort system are not confined to government contractors or to products liability cases, but have generated uncertainty and instability in almost every facet of the liability insurance marketplace and have contributed significantly to the current liability crisis.

As this Committee has already heard, and other members of Congress are undoubtedly becoming aware, liability insurance premium rates have increased by up to 1000 percent, if not

more. Often, coverage is unavailable at any price; the results to business, municipalities and individuals are devastating. The liability crisis affects virtually every segment of American society -- manufacturers, professionals, small businesses, municipalities and nonprofit organizations. Many believe that tort reform and insurance availability are the most important issues facing commerce today.

The Cause of the Problem

While everyone agrees that the high cost or unavailability of liability insurance is a major crisis facing American society, not everyone agrees on the cause of the problem.

Some groups have been before Congress -- most notably the National Insurance Consumer Organization and the trial lawyers -- to suggest that the current crisis stems from the insurance industry's own greed and shortsighted underwriting policies. They would assert that the current price increases are simply insurance industry efforts to recoup past losses suffered as a result of insurance industry mismanagement.

Others contend that the problem is cyclical and will disappear when low interest rates rise. Still others agree with Ralph Nader, who has testified before Senate and House committees that the entire crisis or problem is a hoax, a conspiracy by the insurance industry to use the legislatures to further defraud the insurance consumer.

Let me start by saying that the history of the insurance industry has been cyclical. And it is also true that some of the current increases in liability insurance costs are the result of past competition for premium income as well as the recent sharp decline in interest rates. However, while it seems likely that the insurance industry will be able to work its way out of its present economic straits, it is very unclear whether more favorable market conditions and more deliberative underwriting practices will significantly alleviate the long-term insurance availablity and affordability problem. Early indications are that insurers will continue to avoid areas that present a high risk of tort liability and, in those areas where insurance is offered, uncertainty about present and future liability will continue to dictate high premiums. It is becoming apparent that the insurance availability/affordability crisis is but one symptom of the dislocations and problems generated by a malfunctioning tort system. What is called for is a cure for the disease, not a treatment for the symptom.

The Administration strongly believes that the essence of the problem is the outrageous tort decisions of the last few years in which courts, driven by plaintiff lawyers, have brought about a vast expansion of civil liability and an enormous increase in the size of damage awards. Our civil justice system is no longer seeking to impose liability based upon traditional

doctrines of fault. Rather, the system seeks to compensate plaintiffs at the expense of those who have the resources to absorb the costs.

I would like to discuss four specific developments in tort law that deserve particular attention, and perhaps legislative redress, whether at the federal of state level.

1. The movement toward no-fault liability

As I have stated in earlier testimony before this Committee, fault has been the centerpiece of tort law since the days of the industrial revolution. It assigns liablity based on the reasonableness of the actor's conduct or activity, distinguishing socially beneficial, from socially harmful, conduct. Stated differently, without basing tort law on the concept of fault, we risk punishing those who do good -- whether by cleaning up a toxic waste site or by manufacturing a childhood vaccine. In effect, without fault, tort liability becomes nothing more than a judicially imposed insurance scheme.

2. Undermining Causation

The gradual undermining of the requirement of causation through a variety of questionable doctrines and practices, has been used to shift liability to "deep pocket" defendants even

though their actions did not contribute to the underlying injury or had only a limited or tangential affect.

While the attack on the requirement of causation cannot be attributed to any single innovation, one principal vehicle has been the expanded use of joint and several liability. The doctrine of joint and several liability allows the plaintiff to recover the full judgment from any one of several defendants, rather than collect from each one individually according to his degree of fault. The practical effect is that "deep pocket" defendants guarantee the recovery of huge judgments rendered by sympathetic juries, even in situations where they have been found only slightly at fault.

This application of the doctrine of joint and several liability is a radical departure from its originally intended application in cases where multiple defendants were in "concert of action"[cite Prosser]. Unfortunately, modern courts have shown an increasing willingness to apply joint and several liability as a viable means of securing a financially sound source from which to recover.

3. <u>The explosive growth in noneconomic and punitive damages</u>

Another identified problem area is the explosive growth in the <u>damages</u> awarded in tort lawsuits, particularly with regard

to noneconomic awards, such as pain and suffering or punitive damages.

A recent report by Jury Verdict Research, Inc. indicates that the average medical malpractice jury verdict increased from $220,018 in 1975 to $1,017,716 in 1985 -- an increase of 363%. Average product liabilty jury verdicts during this same period increased from $393,580 to $1,850,452, an increase of 470%.

Interestingly, much of this increase can be attributed to a remarkable growth in verdicts above $1 million. The same study notes that in 1975, there were three million-dollar medical malpractice verdicts and nine million-dollar product liability verdicts; by 1984, the number of medical malpractice million-dollar verdicts had grown to 71 and the number of products liability million-dollar verdicts to 86. This is an increase of over 1200% in the number of such verdicts.

While it is not possible to quantify precisely how much of these awards are for nonecomonic damages, it appears that noneconomic damages, such as awards for pain and suffering and punitive damages, are a substantial factor. These types of damages are inherently unconstrained and subjective, and, therefore, are subject to dramatic inflation and wide variation. That is, in two cases involving similarly injured plaintiffs, because of the existence of these types of subjective damages, there is little chance that the two will receive comparable awards. The outcome and size of a particular

award or settlement is becoming based more on the defendant's perceived ability to pay rather than the extent of the injury to the plaintiff.

4. Excessive Transaction Costs

Finally, another serious problem of the tort system that should be noted is its extraordinarily high transaction costs.

It appears increasingly difficult to afford justice in this country. In fact, some would argue that the system, intended to benefit the injured and to do justice for all, only benefits the lawyers and is reserved for those who can afford it.

A study of liability cases from asbestos-related injuries by the Rand Corporation's Institute for Civil Justice indicates that out of every dollar paid out by the asbestos manufacturers and their insurers, an average of 62 cents is lost to

attorneys' fees and litigation expenses.[1] Rand found that a typical asbestos court case results in a cost of $380,000. Of this, $125,000 is for legal defense fees, $114,000 is for legal fees paid by the plaintiff. It is difficult to justify such exorbitant costs, particularly when these costs are usually borne by the seriously injured or the innocent consumer through higher prices for goods and services.

These are four major areas in tort law where reform is necessary. Senator McConnell and others in the Congress have demonstrated a willingness to address the problem. We, at the Justice Department, look forward to working with this Committee to cure this disease and relieve its symptoms.

That concludes my testimony, I will be pleased to answer any questions you might have.

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[1] J. Kakalik, P. Ebener, W. Felstiner, G. Haggstrom & M. Shanley, Variations in Asbestos Litigation Compensation and Expenses xviii (1984). These costs, of course, include both plaintiffs' and defendants' litigation expenses. In comparing the costs attributable to plaintiffs' litigation expenses it is useful to remember that defendants incur such costs whether or not they prevail, and, indeed may incur substantial costs defeating even clearly frivolous claims.