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10/15
THE WHITE HOUSE
WASHINGTON

*antitrust
file*

TO:

JGR

FROM:

RAH
Richard A. Hauser
Deputy Counsel to the President

FYI:

COMMENT: _____

ACTION:

*The old early warning system
is almost gone in action.
Pls. identify a contact in
Burbank's file to receive these
alerts. Thanks*



U.S. Department of Justice
Office of
The Deputy Attorney General

Washington, D.C. 20530

October 11, 1985

To: Richard A. Hauser

From: Jay *[Signature]* Stephens

Attached is a memorandum advising your Office of action taken by the Antitrust Division regarding AT&T.

Attachment



U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

October 11, 1985

MEMORANDUM FOR THE COUNSEL TO THE PRESIDENT

Subject: Report to the District Court on AT&T
Decree Compliance

Information Memorandum

On Tuesday, October 15, 1985, the Antitrust Division plans to file with the U.S. District Court for the District of Columbia a report on our investigation of AT&T's compliance with certain provisions of the consent decree in United States v. AT&T. The investigation involved AT&T's processing of business customer orders for long distance service. The investigation disclosed that AT&T failed to exercise reasonable care in processing these orders and as a result submitted to local telephone companies hundreds of thousands of erroneous "primary interexchange carrier" (PIC) designations.

We could have brought suit alleging that AT&T's conduct constituted a violation of the consent decree, but the outcome of such a suit would not be certain, because it is not entirely clear that we could convince the court that AT&T's conduct violates the specific language of the decree. Ultimately, we decided not to file suit because AT&T has: (a) already taken corrective action; (b) has agreed to pay a fine of up to \$1 million per day for each day it does not meet certain specific commitments for corrective action contained in a letter to the Department; and (c) acknowledged that the decree should be interpreted to impose a standard of reasonable care for the PIC designation process.

It is possible that the other long distance carriers may complain that we should have taken punitive action against AT&T. However, criminal action was not an option because we concluded that AT&T's conduct was not willful. The arrangement that we ultimately made with AT&T is quicker and almost certainly more effective than any relief we would be likely to obtain in a civil action. We also are in a far better position to go to court if there are any future problems.


Douglas H. Ginsburg
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

December 20, 1985

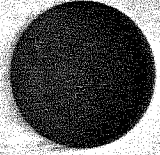
MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: JOHN G. ROBERTS 
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Joint EPC/DPC Decision Memoranda:
Antitrust Law Revisions and Aids

Counsel's Office has reviewed the above-referenced decision memoranda, and finds no objection to them from a legal perspective.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET



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

Name of Correspondent: Dave Chew

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

Subject: Joint EPC/DPC Decision memoranda; Antibrust Law Revisions + aids

ROUTE TO:	ACTION	DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response Code	Completion Date YY/MM/DD
<u>CUHOLL</u>	ORIGINATOR	<u>85, 12, 20</u>		<u>1 1</u>
<u>cuat 18</u>	Referral Note: <u>B</u>	<u>85, 12, 20</u>	<u>S</u>	<u>85, 12, 24</u>
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	Referral Note:	<u>1 1</u>		<u>1 1</u>
	Referral Note:	<u>1 1</u>		<u>1 1</u>

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- I - Info Copy Only/No Action Necessary
- C - Comment/Recommendation
- R - Direct Reply w/Copy
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to be used as Enclosure
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- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments: _____

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WHITE HOUSE STAFFING MEMORANDUM

DATE: 12/20/85 ACTION/CONCURRENCE/COMMENT DUE BY: 12/24/85

SUBJECT: JOINT EPC/DPC DECISION MEMORANDA: ANTITRUST LAW REVISIONS & AIDS

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	<input type="checkbox"/>	<input checked="" type="checkbox"/>	McFARLANE	<input checked="" type="checkbox"/>	<input type="checkbox"/>
REGAN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	OGLESBY	<input checked="" type="checkbox"/>	<input type="checkbox"/>
MILLER	<input type="checkbox"/>	<input type="checkbox"/>	RYAN	<input type="checkbox"/>	<input type="checkbox"/>
BUCHANAN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	SPEAKES	<input type="checkbox"/>	<input checked="" type="checkbox"/>
CHAVEZ	<input checked="" type="checkbox"/>	<input type="checkbox"/>	SPRINKEL	<input checked="" type="checkbox"/>	<input type="checkbox"/>
CHEW	<input type="checkbox"/>	<input checked="" type="checkbox"/>	SSVAHN	<input checked="" type="checkbox"/>	<input type="checkbox"/>
DANIELS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	THOMAS	<input checked="" type="checkbox"/>	<input type="checkbox"/>
FIELDING	<input checked="" type="checkbox"/>	<input type="checkbox"/>	TUTTLE	<input type="checkbox"/>	<input type="checkbox"/>
HENKEL	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
HICKS	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
KINGON	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
LACY	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS: Please provide any comments/recommendations by Tuesday, December 24th. Thank you.


RESPONSE:

THE WHITE HOUSE
WASHINGTON

RECEIVED
DEC 19 1985

December 19, 1985

MEMORANDUM FOR THE PRESIDENT

FROM: ALFRED H. KINGON 

SUBJECT: Antitrust Law Revisions and AIDS Program

Attached are the two decision memoranda reflecting the Joint EPC/DPC meeting.

There were unanimous recommendations on both issues and you can sign the last page of each memorandum after reading.

Attachments

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR THE PRESIDENT

FROM: THE DOMESTIC POLICY COUNCIL

SUBJECT: Acquired Immune Deficiency Syndrome (AIDS)

Issue - What should the federal government do to deal with the problem of AIDS?

Background - Acquired immune deficiency syndrome (AIDS) is a very serious, apparently always fatal disease caused by a virus. The incidence of AIDS cases is increasing steadily in the United States. More than 15,000 persons have been diagnosed with the disease since 1981, and more than half of them have died. A much larger number of persons is known to be infected with the virus. The incubation period, during which a person is infected but does not have obvious disease, may last for several years. Infected persons may be capable of transmitting infection to others for many years, even though they may be free of symptoms. Virus infection is known to be transmitted through sexual contact, through equipment used to administer intravenous drugs of abuse, through contaminated blood or blood products and from infected mothers to infants. No effective vaccine or therapy exists.

AIDS and the Federal Government - In the past four years, the Department of Health and Human Services has been the major focus of AIDS activities in the federal government. The AIDS research effort has been progressively accelerated and has yielded extensive information on AIDS and the virus that causes it.

This research has yielded extensive information on AIDS and the virus that causes it. A test for AIDS virus antibody has been developed and licensed. Blood banks are using it to screen potential blood donors, to reduce the possibility of transmission of the virus. The Department of Health and Human Services is developing a series of recommendations for reducing the risk of contracting AIDS. While awaiting the development of AIDS drugs and vaccines, major effort is focused on public information and education to reduce the risk of the spread of the AIDS virus.

The Department of Defense has begun testing all potential recruits for AIDS virus antibody, and counseling and excluding from the military those testing positive. Also, the Department of Defense will test all active duty personnel, in a priority order, over the next year. Those who test positive will be evaluated to determine whether they are ill. If so, they may be processed for discharge. If not, they will be retained, but their deployment may be restricted.

Other departments and agencies have the following AIDS activities under consideration:

- o Department of Education -
Serving as an information resource for state and local education officials.
- o Department of Justice, Bureau of Prisons -
Isolating inmates with AIDS and AIDS related complex; testing some or all inmates for AIDS virus antibody.
- o Department of State -
Testing personnel, on a voluntary basis, for AIDS virus antibody, with counseling and assignment restrictions for those who test positive.
- o Veterans Administration -
Augmenting health resources to care for veterans with AIDS.

The cost of AIDS to the federal government has risen from \$5.5 million in FY 1982 for research in HHS, to about \$400 million in FY 1986 for all federal AIDS activities.

Conclusions

- o AIDS is a major epidemic public health threat.
- o The number of AIDS cases will continue to increase.
- o There are long-term hopes for drugs and vaccines against AIDS, but none is immediately at hand.
- o Major effort should focus on prevention, to inform and to lower risks of further transmission of the AIDS virus.

Recommendation - The Council unanimously recommends the following steps:

- o Urging federal agencies and state and local governments to take all necessary steps to lessen the risks of the spread of AIDS, including timely dissemination of accurate information on AIDS.
- o Emphasizing that, for the general welfare of society, AIDS must be dealt with as a major public health problem. This could be done through the publication of a special report on AIDS, and enhanced public information efforts.


Decision

The Council recommends that you approve these steps.

Approve Council Recommendation _____

Disapprove Council Recommendation _____

Further Discussion Required _____



Edwin Meese III
Chairman Pro-Tempore

THE WHITE HOUSE

WASHINGTON

December 16, 1985

MEMORANDUM FOR THE PRESIDENT

FROM: THE DOMESTIC POLICY COUNCIL
THE ECONOMIC POLICY COUNCIL

SUBJECT: Antitrust Review

Since the enactment of our major antitrust laws, the Sherman Act of 1890 and the Clayton Act of 1914, the world has changed considerably. Early in this century the "global economy" was unheard of. Today, the global economy is a reality, a reality to which U.S. business and the U.S. Government must adjust. That adjustment should include refining our antitrust laws to reflect the dynamics of world trade.

The Domestic and Economic Policy Councils have reviewed our antitrust laws, seeking to refine and adjust those laws not only to the integrated world economy, but also to reflect the increasing economic and legal sophistication regarding mergers and antitrust restrictions. This memorandum outlines for you several recommendations that the Councils believe will enhance the vigor and competitiveness of American businesses, while continuing to protect American consumers and businesses from unfair practices, including monopolies, cartels, and price fixing.

ECONOMICS AND ANTITRUST

The economic thinking that dominated antitrust legislation and enforcement through much of this century was that "big is bad." Any action toward greater concentration within an industry was attacked as a threat to competition and free trade.

Over the past decade, thinking has changed. Europe and Japan, with our help, have gained a formidable share of the world market and foreign competitors have made substantial inroads into the U.S. domestic market. In part because of increased diversity and heightened competition in global markets, economic thinking about the potential effects of mergers and other efforts by American firms to achieve greater efficiency has become more sophisticated: big is no longer viewed as necessarily bad and most mergers are supported as pro-competitive, helping businesses to achieve greater efficiency and consumers to enjoy lower prices.

Two of your appointments to Federal appellate Courts, Judges Robert H. Bork and Richard A. Posner, have pioneered a trend toward taking economic factors into greater account in antitrust

cases. This thinking improves upon the early 20th century antitrust philosophy by encouraging pro-competitive mergers and cooperative business arrangements, while continuing to guard against anti-competitive abuses that harm consumers and business alike.

Your Administration has captured the increasingly sophisticated economic thinking in the Justice Department's Merger Guidelines, which serve as a guide to Federal antitrust enforcement for the courts and the private sector. The Justice Department also has sought to promote an economically rational approach to antitrust by reforming government case selection criteria, filing briefs in private lawsuits, and issuing public pronouncements.

PROBLEMS IN ANTITRUST

Even with these significant advances in antitrust policy, more remains to be done.

- o Our antitrust statutes, as opposed to enforcement policies, have not been reformed to reflect changes over the years in antitrust thinking. Current policies and judicial trends could be reversed by the discretionary action of future administrations.
- o Current remedies for injuries in antitrust cases provide automatic damages that are three times the amount of the injury. These treble damage provisions were written into the law to deter anticompetitive behavior and encourage private vigilance against harmful cartel agreements, which are typically reached by competitors acting in secret. However, automatic treble damages also encourage frivolous law suits and unjustified settlements.
- o The antitrust statutes occasionally pose a disincentive to firms contemplating mergers to improve their competitiveness. The test applied to mergers, while made much clearer under the Merger Guidelines, still remains uncertain and poses a barrier to some firms. Moreover, the Guidelines do not prevent private parties from suing to prevent mergers.

RECOMMENDATIONS

The Domestic and Economic Policy Councils have developed a series of recommendations for refining the antitrust laws by:

- o Detrebling antitrust damages, except in cases of overcharges or underpayments and otherwise "fine-tuning" the antitrust remedies;
- o Amending the Clayton Act to strengthen and clarify the wording of the statutory standard for mergers and codify the principles embodied in the Justice Department's Merger Guidelines;

- o Establishing a limited antitrust merger exemption as an alternative remedy under Sections 201-203 of the Trade Act of 1974 for domestic industries injured by imports;
- o Lifting unnecessary restrictions on interlocking corporate directorates; and
- o Clarifying the factors courts should use in deciding whether to exercise jurisdiction in antitrust cases involving foreign commerce.

Detrebling and other Remedies Improvements

As mentioned earlier, treble damages can have positive effects in deterring and apprehending violators of our antitrust laws. However, trebling can also have serious anticompetitive side effects. Firms may shy away from practices such as aggressively lowering prices or innovative distributional practices because of the fear of treble damages. In addition, businesses may use the threat of treble damages to inhibit their more successful rivals.

The practice of awarding treble damages poses additional problems. Because each defendant is jointly and severally responsible for all defendants' damages, there is a strong incentive for defendants to settle rather than defend their actions, for fear that their co-defendants will settle first, leaving them with a disproportionate share of the damages should they be found liable.

In addition, successful plaintiffs in antitrust cases are awarded attorneys' fees, which encourages antitrust suits. Successful defendants, however, do not receive attorneys' fees. This imbalance creates incentives for antitrust litigation and an incentive to settle, sometimes without regard to the merits of the case.

The Domestic and Economic Policy Councils offer three proposals for refining the application of treble damages:

1. Treble damages should only be awarded in cases involving overcharges or underpayments;
2. The plaintiff's claim for damages in an antitrust suit should be reduced by the share of damages fairly allocable to any person released from liability; and
3. Attorneys' fees should be awarded to successful defendants in cases that are judged to be "frivolous, unreasonable, without foundation, or in bad faith."

Mergers and Acquisitions

The Councils also propose to clarify and improve the antitrust statutes by amending the Clayton Act to:

1. Strengthen the language of the statutory standard governing mergers to require a "significant probability" of harm rather than continue to test mergers under the current "may tend to" (or incipency) formulation;
2. Clarify that the harm to be avoided is increases in prices to consumers; and
3. Codify the principles of the Justice Department's Merger Guidelines.

Import Relief

Sections 201-203 of the Trade Act of 1974 authorize the President to provide a domestic industry relief from foreign imports if the International Trade Commission (ITC) finds that an increase in imports is the substantial cause of actual or threatened injury to the domestic industry. Current relief measures include: tariffs, duties, quotas, and orderly marketing arrangements.

The Councils propose that the list of relief measures be expanded to include a partial antitrust exemption for mergers and acquisition in domestic industries injured by imports. The exemption would be for a limited period of time, up to five years.

The Councils believe there are two reasons for including the antitrust exemption in the range of relief options: (1) in the face of foreign competition significant enough to cause an injury finding under Section 201, the threat of collusion among domestic firms resulting from a merger is sufficiently small to justify a more liberal standard; and (2) the antitrust exemption would be a non protectionist alternative to the other possible relief measures.

Interlocking Directorates

Section 8 of the Clayton Act prohibits a person from serving on the board of one or more corporations competing with another, however remotely. This absolute restriction causes much frustration as potential directors of diversified companies are repeatedly disqualified as directors after discovery of insignificant competitive overlaps.

The Councils propose to amend Section 8 of the Clayton Act to exempt interlocks where competitive overlaps are de minimus as measured by sales of the same product or sales in the same market. The Councils also propose to raise the threshold for Federal law prohibition of interlock from situations where either company has \$1 million in equity to situations where both companies have at least \$10 million in equity. These proposals would remove an unwarranted and bothersome restriction and provide greater certainty with regard to permissible corporate directors.

Jurisdiction in Foreign Commerce Cases

Our trading partners and allies have expressed some consternation at the application of the Sherman Act to the international arena. They believe that this application of our antitrust law interferes with their domestic policies and objectives and represents an unwarranted intrusion upon their sovereignty. The United States has reserved the option to exercise jurisdiction over some international conduct because of its effect on our commerce.

The Councils propose that our antitrust laws be amended to require courts to dismiss private suits when, in light of specified factors, the exercise of jurisdiction would be unreasonable. Some of the factors to be considered would include: the nationality of the parties involved; the significance of the alleged violation to U.S. consumers and competitors; the presence of an intention to harm U.S. consumers and competitors; and the degree of conflict between U.S. and foreign law.

LEGISLATION OUTLOOK

The Councils unanimously agreed upon each of these proposals. We believe they are reasonable and important advances in antitrust law and enforcement.


We must caution that some of these proposals may arouse significant opposition and, in fact, spawn counter-proposals inconsistent with your Administration's policies. Nevertheless, we can also expect substantial support for some if not all of these proposals.

RECOMMENDATION

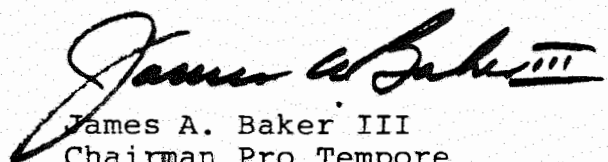
The Domestic and Economic Policy Councils unanimously recommend that the Administration forward legislation incorporating all of the proposed changes in antitrust law.

Approve _____

Disapprove _____



Edwin Meese III
Chairman Pro Tempore
Domestic Policy Council



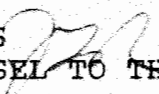
James A. Baker III
Chairman Pro Tempore
Economic Policy Council

THE WHITE HOUSE

WASHINGTON

January 16, 1986

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS 
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Draft Department of State Report on Proposed
Amendment to S. 397, the "Foreign Trade Antitrust
Improvements Act of 1985"

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

**WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET**

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De Adair

Name of Correspondent: James C. Murr

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

Subject: Draft Department of State Report on Proposed Amendment to 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	Completion Date YY/MM/DD
<u>CUHOLL</u>		<u>ORIGINATOR</u>	<u>8610114</u>	<u>IR</u>	<u>1 1</u>
		Referral Note:			
<u>CUAT18</u>		<u>R</u>	<u>8610114</u>	<u>IR</u>	<u>S 8610123</u>
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**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503**

January 13, 1986

LEGISLATIVE REFERRAL MEMORANDUM

378609CW

TO:

Department of Justice
Department of Commerce
Council of Economic Advisers
U.S. Trade Representative
Department of Transportation
Federal Trade Commission

SUBJECT: Draft Department of State report on proposed amendment to 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 January 24, 1986.

(NOTE -- Justice and State testimony on S. 397 was cleared for a Senate Judiciary Committee hearing on June 21, 1985.)

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


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

Enclosure

cc: Fred Fielding Karen Wilson Chuck Goldfarb Sue Thau
 John Cooney Jim Barie Penny Jacobs

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

to S. 317, the "Foreign
Trade Antitrust Improvements
Act of 1985."

Dear Senator DeConcini:

Thank you for the opportunity to comment on your amendment. I am pleased to be able to state that the Administration affirmatively supports the adoption of legislation providing an appropriate standard for U.S. courts to apply in deciding whether to exercise jurisdiction in foreign commerce cases. We also believe that reform is required in the field of private antitrust remedies, including treble damages, but that this should be addressed, at least initially, across the board, not just in the foreign commerce context. Thus, while we support the goals of your legislation and believe it alleviates some of the concerns we expressed earlier, we continue to have some reservations about its specific language. Against this background, let me offer our views on each of your proposed revisions.

First, you have proposed that Sections 2(b) and 3(b), providing for early judicial determination of motions on jurisdiction, permit discovery on the merits for good cause shown while such motions are under consideration. We agree. Early decisions on jurisdiction would help to minimize conflicts caused by those cases in which the United States has the fewest interests. However, as the Justice Department pointed out in its June testimony, facts relating to jurisdiction may be intertwined with those relating to the merits, so discovery may be necessary.

Second, your revisions of Section 3 meet some, but not all of our concerns. By listing specific factors, the revised bill no longer requires courts to attempt to determine by a simple balancing test when another country's interests outweigh those of the United States and to dismiss whenever that test is met. However, we believe that the list should be exclusive and should be limited to the following:

- (1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad,
- (2) the nationality of the parties and the principal place of business of corporations,
- (3) the presence or absence of a purpose to affect United States consumers or competitors,

(4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad,

(5) the existence of reasonable expectations that would be furthered or defeated by the action, and

(6) the degree of conflict with foreign law.

This guidance to the courts should be sufficient. Moreover, we believe that the legislation ought not to refer to a general "jurisdictional rule of reason" the existence, nature and contents of which are controversial. No need exists for such a controversy to be imported into the statute. It would suffice to enunciate a statutory rule for the antitrust area, e.g, by requiring the courts to dismiss when they conclude that "the exercise of jurisdiction by the United States would be unreasonable in light of consideration of the following exclusive factors."

Eliminating the requirement for the Attorney General to appear at a court's direction to comment on the foreign relations impact of a private suit is an improvement in the bill.

We have serious reservations, however, about your new proposed statutory requirement of dismissal upon Executive Branch certification that the action will interfere with the foreign relations of the U.S. I recognize that this was an effort to accommodate certain of our concerns stated at your June hearings. However, a statutory provision allowing the Executive to compel dismissal of cases for diplomatic reasons upon certification by the Attorney General would probably generate diplomatic problems in private cases from which they might otherwise have remained absent and exacerbate them in others should the Executive decline to exercise its discretion to compel dismissal. Such a provision might result in preempting the jurisdictional adjudication by which such matters ought to be decided as a general rule. Thus, we would recommend its deletion.

Finally, regarding the proposed revision of Section 5 on detrebling damages, the Administration believes that the treble damage provisions of the antitrust laws should be modified as a whole, not simply as they apply to foreign commerce. We plan to introduce legislation shortly in order to accomplish this.

I appreciate the opportunity to comment and I look forward to working with you further on this important matter.

Sincerely yours,

Abraham D. Sofaer

United States or of any state or municipality in connection with the defection attempt of Mironlav Medvid, including, but not limited to 18 U.S.C. 241, 18 U.S.C. 242, 18 U.S.C. 1201, 18 U.S.C. 1505, 18 U.S.C. 2, 18 U.S.C. 3, 18 U.S.C. 371, or any other statute, regulation, or procedure promulgated pursuant to the laws of the United States, or any state law or local ordinance.

(3) Whether there have been any additional instances in which persons asking the United States for asylum have been returned to the Soviet Union or other Communist nations in violation of the laws of the United States or any state or municipality thereof, or any regulation or procedure promulgated thereunder.

(4) What changes in the laws of the United States should be adopted to more adequately protect the constitutional, statutory, and moral rights of persons asking the United States for asylum.

Sec. 3. (a) To enable the special panel to make the investigation and study authorized and directed by this resolution, the Senate hereby empowers the special panel as an agency of the Senate (1) to employ and fix the compensation of such clerical, investigatory, legal, technical, and other assistants as it deems necessary or appropriate; (2) to sit and act at any time or place during sessions, recesses, and adjournment periods of the Senate; (3) to hold hearings for taking testimony on oath or to receive documentary or physical evidence relating to the matters and questions it is authorized to investigate or study; (4) to require by subpoena or otherwise the attendance as witnesses of any persons who the special panel believes have knowledge or information concerning any of the matters or questions it is authorized to investigate and study; (5) to require by subpoena or order any department, agency, officer, or employee of the executive branch of the United States Government, or any private person, firm or corporation to produce for its consideration or for any use as evidence in its investigation and study any books, correspondence, communications, document, papers, physical evidence, records, recordings, tapes, or materials relating to any of the matters or questions it is authorized to investigate and study which they or any of them may have in their custody or under their control; (6) to make to the Senate any recommendations it deems appropriate in respect to the willful failure or refusal of any person to appear before it in obedience to a subpoena or order, or in respect to the willful failure or refusal of any person to answer questions or give testimony in his character as a witness during his appearance before it, or in respect to the willful failure or refusal of any officer or employee of the executive branch of the United States Government or any person, firm or corporation to produce before the panel any books, correspondence, documents, financial records, papers, physical evidence, records, recordings, tapes, or materials in obedience to any subpoena or order; (7) to take depositions and other testimony on oath anywhere within the United States or in any other country; (8) to procure the temporary or intermittent services of individual consultants, or organizations thereof, in the same manner and under the same conditions as a standing committee of the Senate may procure such services under section 202(i) of the Legislative Reorganization Act of 1946; (9) to use on a reimbursable basis, with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, the services of personnel of any such department or agency; (10) to use on a reimbursable basis or otherwise with the prior consent of the chairman of any other

of the Senate committees or the chairman of any subcommittee of any committee of the Senate the facilities or services of any members of the staffs of such other Senate committees or any subcommittees of such other Senate committees whenever the special panel or its chairman deems that such action is necessary or appropriate to enable the special panel to make the investigation and study authorized and directed by this resolution; (11) to have access through the agency of any members of the special panel, chief majority counsel, minority counsel, or any of its investigatory assistants jointly designated by the chairman and the ranking minority member to any data, evidence, information, report, analysis, or document or papers relating to any of the matters or questions which it is authorized and directed to investigate and study in the custody or under the control of any department, agency, officer, or employee of the executive branch of the United States Government having the power under the laws of the United States to investigate any alleged criminal activities or to prosecute persons charged with crimes against the United States which will aid the special panel to prepare for or conduct the investigation and study authorized and directed by this resolution; and (12) to expend to the extent it determines necessary or appropriate any moneys made available to it by this resolution and to make the investigation and study it is authorized by this resolution to make.

(b) Subpoenas may be issued by the special panel acting through the chairman or any other member designated by him, and may be served by any person designated by such chairman or other member anywhere within the borders of the United States. The chairman of the special panel, or any other member thereof, is hereby authorized to administer oaths to any witnesses appearing before the committee.

(c) In preparing for or conducting the investigation and study authorized and directed by this resolution, the special panel shall be empowered to exercise the powers conferred upon committees of the Senate by section 6002 of title 18 of the United States Code or any other Act of Congress regulating the granting of immunity to witnesses.

Sec. 4. The special panel shall have authority to recommend the enactment of any new congressional legislation which its investigation considers is necessary or desirable to safeguard the rights of persons asking the United States for asylum.

Sec. 5. The special panel shall make a final report of the results of the investigation and study conducted by it pursuant to this resolution, together with its findings and its recommendations as to new congressional legislation it deems necessary or desirable, to the Senate at the earliest practicable date, but no later than one year after the effective date of this resolution. The special panel may also submit to the Senate such interim reports as it considers appropriate. After submission of its final report, the special panel shall have three calendar months to close its affairs, and on the expiration of such three calendar months shall cease to exist.

Sec. 6. The expenses of the special panel under this resolution shall not exceed \$300,000, of which amount not to exceed \$25,000 shall be available for the procurement of the services of individual consultants or organizations thereof. Such expenses shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the special panel. The minority members of the special panel shall have one-third of the professional staff of the special panel (including minority coun-

sel) and such part of the clerical staff as may be adequate.

AMENDMENTS SUBMITTED

DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, EDUCATION, AND RELATED AGENCIES APPROPRIATION, 1986

HOLLINGS (AND OTHERS) AMENDMENT NO. 1323

Mr. HOLLINGS (for himself, Mr. ZORINSKY, Mr. WEICKER, Mr. MATTINGLY, Mr. BUMPERS, Mr. HEFLIN, and Mr. RUDMAN) proposed an amendment to the amendment of the House to the amendment of the Senate numbered 134 to the bill (H.R. 3424) making appropriations for the Departments of Labor, Health and Human Services, Education, and related agencies for the fiscal year ending September 30, 1986, and for other purposes, as follows:

At the end of the amendment insert:
Notwithstanding any other provision of this Act, none of the funds appropriated in this Act may be made available to the National Endowment for Democracy.

APPLICATION OF ANTITRUST LEGISLATION TO INTERNATIONAL COMMERCE

DeCONCINI AMENDMENT NO. 1324

(Ordered referred to the Committee on the Judiciary.)

Mr. DeCONCINI submitted an amendment intended to be proposed by him to the bill (S. 397) to amend the Sherman Act and the Clayton Act to modify the application of such Acts to international commerce, as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:
That this Act may be cited as the "Foreign Trade Antitrust Improvements Act of 1985".

Sec. 2. Section 7 of the Sherman Act (15 U.S.C. 6a) is amended by—

- (1) inserting "(a)" before "This Act"; and
- (2) adding at the end thereof the following new subsection:

"(b) Whenever a motion to dismiss for lack of subject matter jurisdiction under this section shall be made in any action under the antitrust laws, the judge designated to hear and determine the case shall, except for good cause shown, hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in the action."

Sec. 3. The Clayton Act (15 U.S.C. 12 et seq.) is amended by adding after section 20 the following new section:

"Sec. 21. (a) Notwithstanding any other provision of the antitrust laws or any provision of any State laws similar to the antitrust laws, in any action brought by any person or State under the antitrust laws or similar State laws which involves trade or

commerce with a foreign nation, the court shall enter a judgment dismissing the action as to all parties whenever it determines that the jurisdictional rule of reason requires such dismissal. In determining whether to dismiss the action, the court shall consider, as appropriate and without limitation except as provided in this Act, such factors as—

"(1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad,

"(2) the nationality of the persons involved in or affected by the conduct,

"(3) the presence of absence of a purpose to affect United States consumers or competitors,

"(4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad,

"(5) the existence of reasonable expectations that would be furthered or defeated by the action,

"(6) the degree of conflict with foreign law or foreign economic policies, and

"(7) the effect of the exercise of jurisdiction on international commerce.

"(b) Whenever a motion to dismiss pursuant to the jurisdictional rule of reason is made under this section, the court shall, after such discovery or other proceedings directly related to the motion as the court deems appropriate, and except for good cause shown, hear and determine such motion before conducting or permitting the parties to conduct any further proceedings in the action. The court shall notify the Attorney General upon the filing of any such motion and invite the views of the United States as to proper disposition of the motion.

"(c) If, in any action brought subsequent to the date of enactment of this section by any person or State under the antitrust laws or similar State laws and involving trade or commerce with a foreign nation, the Attorney General certifies to the court that the action will interfere with the conduct of the foreign relations of the United States, then the court shall enter a judgment dismissing the action as to all parties."

Sec. 4. Section 12 of the Clayton Act is amended by—

(1) inserting "(a)" before "That suit"; and

(2) adding at the end thereof the following:

"(b) The doctrine of *forum non conveniens* shall be applicable in any suit, action, or proceeding under the antitrust laws that involves trade or commerce with a foreign nation, and nothing contained in this section or any other venue provision applicable to such suits, action, or proceedings shall be construed to prevent dismissal of such suits, actions, or proceedings on the ground of *forum non conveniens*."

Sec. 5. The Clayton Act is amended by adding after section 4H the following:

"Sec. 4I. (a) Notwithstanding sections 4 and 4C, and in lieu of the relief provided for in such sections, and notwithstanding any provision of any State law providing damages for conduct similar to that forbidden by the antitrust laws, any person or State entitled to recovery on a claim under such section or provision shall recover (1) the actual damages sustained by such person or, in the case of a claim under section 4C, the total damage as described in subsection (a)(1) of such section, (2) interest calculated at the rate specified in section 1961 of title 28, United States Code, on such actual damages or the total damage as specified in subsection (d) of section 4 of the National Cooperative Research Act of 1984 (15 U.S.C. 4303(d)), and (3) the cost of suit attributable to such claim, including a reasonable attor-

ney's fee, if such claim results from conduct occurring in the course of trade or commerce with a foreign nation and the court determines that—

"(A) the exercise of jurisdiction over the claim would be more consistent with the jurisdictional rule of reason if the claim were limited to actual damages or total damage as provided herein, and

"(B) the antitrust enforcement interest of the United States would not be substantially impaired if the claim were limited to actual damages or total damage as provided herein. In determining whether limiting the claim to actual damages or total damage renders the exercise of jurisdiction more consistent with the jurisdictional rule of reason, the court shall consider, as appropriate and without limitation except as provided in this Act, the factors specified in section 21(a) of this Act. In determining the effect of the limitation to actual damages or total damage on the antitrust enforcement interest of the United States, the court shall consider, as appropriate and without limitation except as provided herein, such factors as the nature of the violation claimed, the availability of governmental criminal or civil proceedings, the likely effect on the plaintiff's prosecution of the action if the claim is limited to single damages or total damage, and the existence of other private plaintiffs.

"(b) Whenever a motion to limit damages is made under this section, the court shall, except for good cause shown, hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in the action. The court shall notify the Attorney General upon the filing of any such motion and invite the views of the United States as to the proper disposition of the motion."

Mr. DeCONCINI. Mr. President, I am introducing today an amendment in the nature of a substitute to the Foreign Trade Antitrust Improvements Act of 1985, a bill designed to ameliorate the serious economic and political problems that can and do arise when the United States applies its antitrust laws to international trade and commerce. The amendment incorporates several clarifications and modifications to reflect the very useful testimony of the witnesses at the hearing on June 21, 1985, before the Senate Judiciary Committee and the consultations among interested parties that have taken place since the hearing. The modified bill that I introduce today was the subject of further hearings before the Senate Judiciary Committee on October 15, 1985, at which time it received the strong endorsement of leading U.S. business groups including the U.S. Chamber of Commerce and the Business Roundtable.

At the June 21 hearing, my proposed legislation was subject to thoughtful, extensive scrutiny by the representatives of the Departments of State and Justice, the international and antitrust sections of the American Bar Association, and the private international antitrust bar. In addition, written submissions were received from the Federal Trade Commission and the Bar Association of the City of New York. Finally, Mr. President, I have continued to receive formal and infor-

mal communications of support and constructive criticism from individuals in the business, governmental, academic, and private legal sectors, both in the United States and abroad. From all these sources, I drew many useful insights that were incorporated into the modified bill that was the subject of the October 15 hearing.

From everything I have heard, I think it is clear that there is strong and widespread agreement with my judgment that the Congress should act to reduce the conflicts between the United States and its trading partners over private antitrust enforcement. Reducing such conflicts is in the interests of the United States and of U.S. corporations doing business internationally, for reasons that I have set forth in my statements before this body on February 6, 1985, when I first introduced this legislation, and on February 27, 1985, when I shared with you the initial favorable reactions to the bill. Everything that I have been told strengthens my conviction that we are on the right track with this bill, that it is in fact long overdue, and that we should press forward to complete the legislative process and secure its enactment.

In my judgment, Mr. President, the bill that I reintroduce today solves the problems identified in the original bill and accommodates the legitimate concerns of the administration witnesses at the June 21 hearing—without in any way lessening the effectiveness of the bill. Indeed, as the strongly supportive testimony at the October 15 hearing confirms, the revised bill I introduce today is a better bill, not just a compromise. It is my hope and expectation that this new draft, as revised and clarified, will gain the active support of the administration. In this connection, it is my particular hope that the current review of antitrust legislation by the Cabinet councils on domestic and economic policy will cause the administration to focus on the problems addressed by my bill and the desirability of a solution along the lines that I have proposed.

The major modifications and clarifications in the Foreign Trade Antitrust Improvements Act of 1985 that I reintroduce today may be summarized as follows:

First, in sections 2(b), 3(b), and 5(b), providing for early judicial determination of motions based on the substantive provisions of these sections, I have adopted the suggestion of the Bar Association of the City of New York that while there should be a presumption favoring a stay of proceedings on the merits until these motions are decided, for good cause shown the court should be permitted to allow discovery on the merits to proceed during the pendency of the motion or motions. This change will reduce the temptation of defendants to file unmeritorious motions to dismiss or limit damages simply as a tactic to prevent the plaintiff from ob-

taining discovery on the merits that will be less effective if delayed—as where plaintiff faces the imminent loss of needed testimony or documents.

Second, several important changes have been made in the substantive provisions of section 3, providing courts with the authority to dismiss private antitrust damage actions that unnecessarily create international conflicts. To begin with, I have rephrased the operative jurisdictional test to rest explicitly on the “jurisdictional rule of reason” that is well recognized even if not always applied, in American antitrust jurisprudence. This change has the advantage of making it clear that the bill’s “balancing test” requires consideration not only of the foreign interests that may be affected by the private antitrust action but also the U.S. interest in promoting an efficient international trading system in which U.S. nationals engage in mutually beneficial commerce with foreign firms. This interest will be served by promoting the international system values inherent in the traditional concept of “comity,” such as fairness to parties engaged in international trade, protection of justified expectations, efficiency in business decision-making and dispute resolution, and the like.

Next, I have purged the balancing test of any suggestion that the court, in applying the applying the jurisdictional rule of reason should consider any foreign policy issues that are the exclusive province of the executive branch. This result has been accomplished by giving examples of the factors to be considered by the court in deciding whether to exercise jurisdiction over a private antitrust case involving international commerce. The factors specified are drawn principally from the *Timberlane* decision and Kingman Brewster’s seminal discussion in 1958; excluded are the more “political” considerations added in *Mannington Mills*, as well as the too narrow formulations of the relevant foreign interests in the 1965 Restatement of U.S. Foreign Relations Law. I trust that this will satisfy the concerns of State and Justice over the judicial branch intruding into questions of foreign relations for which the executive branch is responsible.

Consistent with the foregoing clarifications, the role of the Attorney General in private antitrust cases affecting foreign national interests should be somewhat different from what was provided in the original draft of the bill. With the balancing test depoliticized and focused on the traditional legal concept of comity, the court will not require the assistance of the Attorney General in applying the test. Such assistance should, however, be offered by the Justice Department as a matter of discretion more frequently than is now its practice, and the bill thus provides in section 3 for the court to invite the United States to express

its views on motions to dismiss on comity grounds. On the other hand, where political foreign policy considerations dictate that jurisdiction should not be exercised, the executive branch should play the decisive role. In such a case what is required from the Attorney General is a certification that the executive branch has determined that the action will interfere with the conduct of U.S. foreign relations and ought therefore to be dismissed. A new subsection provides for such certification and dismissal.

Third, section 5, the detrebling provision, continues in the revised bill to perform the vital function of mitigating the impact on the international trading system of antitrust damage actions that raise substantial comity issues but do not quite meet the requirements for outright dismissal under section 3. Section 5 remains, therefore, a carefully limited step toward harmonizing the U.S. antitrust enforcement scheme with the competition laws of our trading partners and allies, who strongly object to our treble damage remedy. As redrafted, however, section 5 attacks the problem in a somewhat different way.

Revised section 5 contains, in addition to clarifying and conforming changes, two principal changes consistent with its basic purpose. One is that as redrafted, section 5 now provides that in considering detrebling the court should address the basic question of whether, even when it is reasonable for the court to permit the action to go forward, it is more reasonable that the action go forward only for compensatory, not punitive, damages. The factors that are relevant to determining whether the action would better satisfy comity requirements if it were detrebled are essentially the same factors that are relevant in applying the jurisdictional rule of reason, and the redrafted bill makes a cross-reference to section 3 at the appropriate point in section 5.

The other major change in section 5 is the addition of a new provision authorizing the court to refuse to detreble if to do so would substantially impair U.S. antitrust enforcement interests. Some of the factors bearing on this determination are specified in the text of the bill. I believe that limiting private antitrust actions to actual damages in cases raising substantial comity issues will, in the great majority of such cases, not significantly impair any U.S. enforcement interest, and I believe that in applying the specified factors and other appropriate considerations the courts will come to the same conclusion.

Fourth, the language of both sections 3 and 5 has been clarified to remove any possible doubt about the equal applicability of these sections to United States as well as foreign defendants. If an action is to be dismissed under the jurisdictional rule of reason, it is to be dismissed as to all defendants, United States as well as

foreign. If the action is to be limited to single damages, it is to be so limited as to all defendants, United States as well as foreign. That was, I submit, the clear purport of the original text of the bill, but I am happy to put the question entirely to rest in this revision.

Let me mention one further technical point on this same subject, because the modification that I am about to note represents the one change in the bill that I introduce today as compared with the version that was the subject of the October 15 hearing. At the hearing the U.S. Chamber of Commerce drew attention to the fact that including the nationality of the parties as a factor to be considered in operating the jurisdictional rule of reason might in some cases enable a plaintiff to avoid a dismissal by omitting as defendants foreign corporations that were in fact involved in the conduct being challenged. I have dealt with this point by eliminating any reference to the nationality of “parties” and providing instead that the court should consider, among other things, the nationality of the “persons involved in or affected by the conduct” constituting the alleged violation—thus making it clear that it is the national connections of the persons or companies who engaged in the conduct about which the plaintiff complains, not the plaintiff’s choice of defendants in the action, that is relevant to the court’s determination as to whether to accept jurisdiction.

Mr. President, this last point about avoiding any possible discrimination against U.S. corporate defendants leads me to conclude by emphasizing the important benefits that will accrue to U.S. companies doing business internationally and thus to U.S. economic interests if the Foreign Trade Antitrust Improvements Act is enacted into law. At the present time, the overbroad exercise of U.S. jurisdiction in private antitrust cases subjects U.S. firms and their foreign subsidiaries and affiliates to added risks and unnecessary uncertainty about the legal consequences of their business conduct abroad. Moreover, United States “extraterritoriality” angers our trading partners and contributes to a climate of international opinion in which U.S. business interests are too often considered fair game for retaliatory or discriminatory legal action by foreign governments. And because the U.S. antitrust enforcement interest is so attenuated in so many of these cases, we get virtually nothing in return for all the trouble we cause ourselves. It is time for our courts to exercise a little judicial restraint in applying U.S. antitrust to international commerce, so that we do not unnecessarily burden U.S. companies’ efforts to compete, for the good of the United States, in foreign and international markets. ◉