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DISTRIBUTIONS OF STOCK PURSUANT TO ORDERS ENFORCING THE ANTITRUST LAWS

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HEARING

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 8847, S. 2013, 2266

A BILL TO AMEND THE INTERNAL REVENUE CODE OF 1954 SO AS TO PROVIDE THAT CERTAIN DISTRIBUTIONS OF STOCK MADE PURSUANT TO ORDERS ENFORCING THE ANTITRUST LAWS SHALL NOT BE TREATED AS DIVIDEND DISTRIBUTIONS BUT SHALL BE TREATED AS A RETURN OF BASIS AND RESULT IN GAIN ONLY TO THE EXTENT BASIS OF THE UNDERLYING STOCK IS EXCEEDED

SEPTEMBER 18, 1961

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DISTRIBUTIONS OF STOCK PURSUANT TO ORDERS ENFORCING THE ANTITRUST LAWS

WEDNESDAY, SEPTEMBER 13, 1961

U. S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to notice, at 10:25 a.m., in room 2221, New Senate Office Building, Senator Harry Flood Byrd (chairman) presiding.

Present: Senators Byrd, Kerr, Long, Smathers, Douglas, Gore, Talmadge, McCarthy, Hartke, Fulbright, Williams, Carlson, Bennett, and Butler.

Also present: Evelyn R. Thompson, assistant chief clerk.

The CHAIRMAN. The committee will come to order.

Now before the committee is H.R. 8847.

(The bill referred to, H.R. 8847, follows:)

[H.R. 8847, 87th Cong., 1st sess.]

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL To amend the Internal Revenue Code of 1954 so as to provide that certain distributions of stock made pursuant to orders enforcing the antitrust laws shall not be treated as dividend distributions but shall be treated as a return of basis and result in gain only to the extent basis of the underlying stock is exceeded

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [That (a) subchapter o of chapter 1 of the Internal Revenue Code of 1954 (relating to gain or loss on disposition of property) is amended by adding at the end thereof the following new part:

["PART IX—DISTRIBUTIONS PURSUANT TO ORDERS ENFORCING THE ANTITRUST LAWS

["SEC. 1111. Distribution of stock pursuant to order enforcing the antitrust laws.

"SEC. 1111. DISTRIBUTION OF STOCK PURSUANT TO ORDER ENFORCING THE ANTITRUST LAWS.

["(a) SCOPE OF SECTION.

["(1) SHAREHOLDERS TO WHICH APPLICABLE.—The term 'shareholder' as used in this section does not include corporations which may be allowed a deduction for dividends received under the terms of section 243 or section 245, but includes personal holding companies as defined in section 542.

["(2) DISTRIBUTIONS TO WHICH APPLICABLE.—The term 'distribution' as used in this section applies only to a distribution to a shareholder to which section 301 (as modified by this section) applies.

["(b) EFFECT ON DISTRIBUTEES.—

["(1) DISTRIBUTION OF DIVESTED STOCK.—For purposes of this section, the term 'distribution of divested stock' means a distribution by a corporation (referred to in this section as the 'distributing corporation') to a shareholder, with respect to its stock held by such shareholder, of stock which, when distributed to the distributee, is divested stock (as defined in subsection (g)).

["(2) AMOUNT OF DISTRIBUTION.—Notwithstanding the provisions of section 301, the amount of a distribution of divested stock shall be the fair market value of such divested stock.

[“(3) TREATMENT OF DISTRIBUTION.—Notwithstanding the provisions of section 301, a distribution of divested stock shall be applied against and reduce the adjusted basis of the stock with respect to which the distribution is made. That portion of the distribution, if any, which is in excess of such adjusted basis shall be treated as gain from the sale or exchange of property.

[“(4) DISTRIBUTIONS TO AVOID FEDERAL INCOME TAX.—Paragraph (3) shall not apply to a[illegible]ansaction one of the principal purposes of which is the distribution of the earnings and profits of the distributing corporation or of the corporation whose stock is distributed, or both.

[“(5) STOCK.—For purposes of this section, the term ‘stock’ includes rights to fractional shares.

[“(c) BASIS TO DISTRIBUTEES.—

[“(1) DIVESTED STOCK.—Notwithstanding the provisions of section 301, the basis of the divested stock in the distributee’s hands shall be its fair market value.

[“(2) STOCK OF DISTRIBUTING CORPORATION.—After a distribution of divested stock, the basis of the stock with respect to which such distribution was made shall be its adjusted basis immediately prior to such distribution, reduced (but not below zero) by the amount of the distribution.

[“(d) EARNINGS AND PROFITS OF DISTRIBUTING CORPORATION.—Notwithstanding section 301, section 312, and section 316, the earnings and profits of the distributing corporation shall not be diminished by reason of any distribution of divested stock to which subsection (b) applies.

[“(e) DEFINITION OF ANTITRUST ORDER.—For purposes of this section, the term ‘antitrust order’ means a judgment, decree, or other order of a court or of a commission or board in a suit or proceeding under the Sherman Act (26 Stat. 209; 15 U.S.C. 1–7) or the Clayton Act (38 Stat. 730; 15 U.S.C. 12–27), or both, to which the United States or such a commission or board is a party.

[“(f) DEFINITION OF COURT.—For purposes of this section, the term ‘court’ means a court or a commission or board issuing an antitrust order.

[“(g) DEFINITION OF DIVESTED STOCK.—For purposes of this section, the term ‘divested stock’ means stock meeting the following requirements:

[“(1) the stock is the subject of an antitrust order entered after January 1, 1961, which—

[“(A) directs the distributing corporation to divest itself of such stock by distributing it to its shareholders (or requires such distribution as an alternative to other action by any person); and

[“(B) specifies and itemizes the stock to be divested; and

[“(C) directs that the divestiture of such stock shall be completed within a specified period which the court finds, in view of the exigencies of the particular case, will accomplish such divestiture as speedily as the circumstances permit; and

“(2) the court finds—

[“(A) that the divestiture of such stock (as described in paragraph (1)(A)) is necessary or appropriate to effectuate the policies of the Sherman Act, or the Clayton Act, or both; and

[“(B) that the application of subsection (b) is required to reach an equitable antitrust order in such suit or proceeding;

but no stock shall be divested stock if the court finds that its divestiture is required because of an intentional violation of the Sherman Act, or the Clayton Act, or both.”

[(b) The table of parts for subchapter o of chapter 1 of the Internal Revenue Code of 1954 is amended by adding at the end thereof the following:

[“Part IX. Distributions pursuant to orders enforcing the antitrust laws.”

[(c) The amendments made by this section shall apply only with respect to distributions of divested stock (as defined in section 111(b)(1) of the Internal Revenue Code of 1954, as added by subsection (b) of this section) made after January 1, 1961.

That (a) subchapter O of chapter 1 of the Internal Revenue Code of 1954 (relating to gain or loss on disposition of property) is amended by adding at the end thereof the following new part:

"PART IX—DISTRIBUTIONS PURSUANT TO ORDERS ENFORCING THE ANTITRUST LAWS

"SEC. 1111. DISTRIBUTION OF STOCK PURSUANT TO ORDER ENFORCING THE ANTITRUST LAWS.

"(a) GENERAL RULE.—Notwithstanding sections 301, 312, and 316, a distribution of divested stock (as defined in subsection (f)), to a qualifying shareholder (as defined in subsection (b)), to which section 301(c)(1) would, but for this section, apply, shall be a distribution which is not out of the earnings and profits of the distributing corporation for purposes of this subtitle.

"(b) QUALIFYING SHAREHOLDER.—For purposes of this section, the term 'qualifying shareholder' means any shareholder other than a corporation which may be allowed a deduction under section 243, 244, or 245 with respect to dividends received.

"(c) SPECIAL RULES.—

"(1) DISTRIBUTIONS TO AVOID FEDERAL INCOME TAX.—Subsection (a) shall not apply to any transaction one of the principal purposes of which is the distribution of the earnings and profits of the distributing corporation or of the corporation whose stock is distributed, or both.

"(2) STOCK.—For purposes of this section, the term 'stock' includes rights to fractional shares.

"(d) DEFINITION OF ANTITRUST ORDER.—For purposes of this section, the term 'antitrust order' means a judgment, decree, or other order of a court or of a commission or board in a suit or proceeding under the Sherman Act (26 Stat. 209; 15 U.S.C. 1-7) or the Clayton Act (38 Stat. 730; 15 U.S.C. 12-27), or both, to which the United States or such a commission or board is a party.

"(e) DEFINITION OF COURT.—For purposes of this section, the term 'court' means a court or a commission or board issuing an antitrust order.

"(f) DEFINITION OF DIVESTED STOCK.—For purposes of this section, the term 'divested stock' means stock meeting the following requirements:

"(1) the stock is the subject of an antitrust order entered after January 1, 1961, which—

"(A) directs the distributing corporation to divest itself of such stock by distributing it to its shareholders (or requires such distribution as an alternative to other action by any person); and

"(B) specifies and itemizes the stock to be divested; and

"(2) the court finds—

"(A) that the divestiture of such stock, in the manner described in paragraph (1)(A), is necessary or appropriate to effectuate the policies of the Sherman Act, or the Clayton Act, or both;

"(B) that the application of subsection (a) is required to reach an equitable antitrust order in such suit or proceeding; and

"(C) that the period of time for the complete divestiture fixed in the order (or orders) is the shortest period within which such divestiture can be executed with due regard to the circumstances of the particular case;

but no stock shall be divested stock if the court finds that its divestiture is required because of an intentional violation of the Sherman Act, or the Clayton Act, or both."

(b) The table of parts for subchapter O of chapter 1 of the Internal Revenue Code of 1954 is amended by adding at the end thereof the following:

"Part IX. Distributions pursuant to orders enforcing the antitrust laws."

(c) The amendments made by this section shall apply only with respect to distributions made after the date of the enactment of this Act.

SEC. 2. (a) Section 301 of the Internal Revenue Code of 1954 (relating to distributions of property) is amended by redesignating subsection (f) as subsection (g) and inserting after subsection (e) the following new subsection:

"(f) SPECIAL RULES FOR DISTRIBUTIONS OF ANTITRUST STOCK TO CORPORATIONS.—

"(1) DEFINITION OF ANTITRUST STOCK.—For purposes of this subsection, the term 'antitrust stock' means stock received in a distribution made after September 6, 1961, either pursuant to the terms of, or in anticipation of, an antitrust order (as defined in subsection (d) of section 1111).

"(2) AMOUNT DISTRIBUTED.—Notwithstanding subsection (b)(1) (but subject to subsection (b)(2)), for purposes of this section the amount of a distribution of antitrust stock received by a corporation shall be the fair market value of such stock.

"(3) BASIS.—Notwithstanding subsection (d), the basis of antitrust stock received by a corporation in a distribution to which subsection (a) applies shall be the fair market value of such stock decreased by so much of the deduction for dividends received under the provisions of section 243, 244, or 245 as is, under regulations prescribed by the Secretary or his delegate, attributable to the excess, if any, of—

"(A) the fair market value of the stock, over

"(B) the adjusted basis (in the hands of the distributing corporation immediately before the distribution) of the stock, increased by the amount of gain which is recognized to the distributing corporation by reason of the distribution."

(b) The amendments made by this section shall apply only with respect to distributions made after the date of the enactment of this Act.

SEC. 3. (a) Section 312 of the Internal Revenue Code of 1954 (relating to the effect on earnings and profits) is amended by adding at the end thereof the following new subsection:

"(k) SPECIAL ADJUSTMENT ON DISPOSITION OF ANTITRUST STOCK RECEIVED AS A DIVIDEND.—If a corporation received antitrust stock (as defined in section 301(f)) in a distribution to which section 301 applied, and the amount of the distribution determined under section 301(f)(2) exceeded the basis of the stock determined under section 301(f)(3), then proper adjustment shall be made, under regulations prescribed by the Secretary or his delegate, to the earnings and profits of such corporation at the time such stock (or other property the basis of which is determined by reference to the basis of such stock) is disposed of by such corporation."

(b) Subsection (b) of section 535 of the Internal Revenue Code of 1954 (relating to accumulated taxable income) is amended by adding at the end thereof the following new paragraphs:

"(9) DISTRIBUTIONS OF DIVESTED STOCK.—There shall be allowed as a deduction the amount of any dividend distribution received of divested stock (as defined in subsection (f) of section 1111), minus the taxes imposed by this subtitle attributable to such receipt, but only if the stock with respect to which the distribution is made was owned by the distributee on September 6, 1961, or was owned by the distributee for at least 2 years prior to the date on which the antitrust order (as defined in subsection (d) of section 1111) was entered.

"(10) SPECIAL ADJUSTMENT ON DISPOSITION OF ANTITRUST STOCK RECEIVED AS A DIVIDEND.—If—

"(A) a corporation received antitrust stock (as defined in section 301(f)) in a distribution to which section 301 applied,

"(B) the amount of the distribution determined under section 301(f)(2) exceeded the basis of the stock determined under section 301(f)(3), and

"(C) paragraph (9) did not apply in respect of such distribution,

then proper adjustment shall be made, under regulations prescribed by the Secretary or his delegate, if such stock (or other property the basis of which is determined by reference to the basis of such stock) is sold or exchanged."

(c) Section 543 of the Internal Revenue Code of 1954 (relating to personal holding company income) is amended (1) by adding at the end of paragraph (1) of subsection (a) the following new sentence. "This paragraph shall not apply to a dividend distribution of divested stock (as defined in subsection (f) of section 1111) but only if the stock with respect to which the distribution is made was owned by the distributee on September 6, 1961, or was owned by the distributee for at least 2 years prior to the date on which the antitrust order (as defined in subsection (d) of section 1111) was entered."; and (2) by adding at the end thereof the following new subsection.

"(d) SPECIAL ADJUSTMENT ON DISPOSITION OF ANTITRUST STOCK RECEIVED AS A DIVIDEND.—If—

"(1) a corporation received antitrust stock (as defined in section 301(f)) in a distribution to which section 301 applied,

"(2) the amount of the distribution determined under section 301(f)(2) exceeded the basis of the stock determined under section 301(f)(3), and

"(3) such distribution was includible in personal holding company income under subsection (a)(1),

then proper adjustment shall be made, under regulations prescribed by the Secretary or his delegate, to amounts includible in personal holding company income under subsection (a)(2) with respect to such stock (or other property the basis of which is determined by reference to the basis of such stock)."

(d) Subsection (b) of section 545 of the Internal Revenue Code of 1954 (relating to undistributed personal holding company income) is amended by adding at the end thereof the following new paragraphs:

"(10) DISTRIBUTIONS OF DIVESTED STOCK.—There shall be allowed as a deduction the amount of any income attributable to the receipt of a distribution of divested stock (as defined in subsection (f) of section 1111), minus the taxes imposed by this subtitle attributable to such receipt, but only if the stock with respect to which the distribution is made was owned by the distributee on September 6, 1961, or was owned by the distributee for at least 3 years prior to the date on which the antitrust order (as defined in subsection (d) of section 1111) was entered.

"(11) SPECIAL ADJUSTMENT ON DISPOSITION OF ANTITRUST STOCK RECEIVED AS A DIVIDEND.—If—

"(A) a corporation received antitrust stock (as defined in section 301(f)) in a distribution to which section 301 applied,

"(B) the amount of the distribution determined under section 301(f)(3) exceeded the basis of the stock determined under section 301(f)(3), and

"(C) paragraph (10) did not apply in respect of such distribution,

then proper adjustment shall be made, under regulations prescribed by the Secretary or his delegate, if such stock (or other property the basis of which is determined by reference to the basis of such stock) is sold or exchanged."

(e) Subsection (b) of section 556 of the Internal Revenue Code of 1954 (relating to undistributed foreign personal holding company income) is amended by adding at the end thereof the following new paragraphs:

"(7) DISTRIBUTIONS OF DIVESTED STOCK.—There shall be allowed as a deduction the amount of any income attributable to the receipt of a distribution of divested stock (as defined in subsection (f) of section 1111), minus the taxes imposed this subtitle attributable to such receipt, but only if the stock with respect to which the distribution is made was owned by the distributee on September 6, 1961, or was owned by the distributee for at least 3 years prior to the date on which the antitrust order (as defined in subsection (d) of section 1111) was entered.

"(8) SPECIAL ADJUSTMENT ON DISPOSITION OF ANTITRUST STOCK RECEIVED AS A DIVIDEND.—If—

"(A) a corporation received antitrust stock (as defined in section 301(f)) in a distribution to which section 301 applied,

"(B) the amount of the distribution determined under section 301(f)(3) exceeded the basis of the stock determined under section 301(f)(3), and

"(C) paragraph (7) did not apply in respect of such distribution,

then proper adjustment shall be made, under regulations prescribed by the Secretary or his delegate, if such stock (or other property the basis of which is determined by reference to the basis of such stock) is sold or exchanged."

(f) Subsection (b) of section 561 of the Internal Revenue Code of 1954 (relating to deduction for dividends paid) is amended to read as follows:

"(b) SPECIAL RULES APPLICABLE.—

"(1) In determining the deduction for dividends paid, the rules provided in section 562 (relating to rules applicable in determining dividends eligible for dividends paid deduction) and section 563 (relating to dividends paid after the close of the taxable year) shall be applicable.

"(2) If a corporation received antitrust stock (as defined in section 301(f)) in a distribution to which section 301 applied and such corporation distributes such stock (or other property the basis of which is determined by reference to the basis of such stock) to its shareholders, proper adjustment shall be made, under regulations prescribed by the Secretary or his delegate, to the amount of the deduction provided for in subsection (a)."

(g) The amendments made by this section shall apply only with respect to distributions made after the date of the enactment of this Act.

Amend the title so as to read: "A bill to amend the Internal Revenue Code of 1954 so as to provide that a distribution of stock made to an individual (or certain corporations) pursuant to an order enforcing the antitrust laws shall not be treated as a dividend distribution but shall be treated as a return of capital; and to provide that the amount of such a distribution made to a corporation shall be the fair market value of the distribution."

The CHAIRMAN. Mr. Robert H. Knight, General Counsel of the Treasury Department, is our first witness.

Will you take a seat.

Senator DOUGLAS. Before we begin, Mr. Chairman, may I ask the status of this bill in the House?

The CHAIRMAN. The status in the House, so I am informed, is that it is still in the Ways and Means Committee, and was reported on the calendar.

Senator DOUGLAS. Reported by the Ways and Means Committee?

The CHAIRMAN. It is on the calendar.

Senator DOUGLAS. Has it been cleared by the Rules Committee?

The CHAIRMAN. I understand it will be cleared by Thursday.

Senator DOUGLAS. I want to compliment the chairman on taking this matter up before it has passed the House. This is a principle for which I have been contending for some time. I deeply appreciate the procedure which the chairman has now established.

The CHAIRMAN. The chairman accepts the compliment. [Laughter.]

Now, before the witness is heard, Senator Kefauver is unable to be here today at this meeting, and asked me to insert this letter in the record:

HON. HARRY F. BYRD,
Chairman, Senate Finance Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: It is my understanding that your committee will hold hearings tomorrow on legislation to reduce the economic hardship on shareholders of Du Pont stock arising out of the divestiture of General Motors stock. Although the divestiture resulted from antitrust action, I believe that it would work undue hardship on shareholders. Therefore, I wish to be on public record in favor of the legislation in principle and hope you will make this letter a part of the record of the hearings.

With kind regards.

Sincerely yours,

ESTES KEFAUVER,
U.S. Senator.

The CHAIRMAN. Mr. Knight, will you proceed and explain the bill before us; explain the House bill.

STATEMENT OF ROBERT H. KNIGHT, GENERAL COUNSEL, TREASURY DEPARTMENT

Mr. KNIGHT. Thank you, Mr. Chairman.

Mr. Chairman, I am delighted to accept your invitation today to discuss H.R. 8847, introduced by Congressman Boggs, and reported favorably by the House Ways and Means Committee on September 7, 1961. The bill would provide tax relief to individual stockholders receiving distributions of stock as a result of antitrust divestiture orders.

Section 1 of H.R. 8847 would add a new section 1111 to the Internal Revenue Code which would provide special tax treatment for individual shareholders who receive divested stock pursuant to an antitrust order. Proposed section 1111 would treat a distribution of divested stock to such shareholders as a return of capital which would be received tax free except to the extent that the fair market value of the divested stock exceeds the shareholders' cost basis for the underlying stock with respect to which the distribution is made. The fair market value of the divested stock would be applied against and reduce the adjusted cost basis of the underlying stock, and any excess of fair market value over such cost basis would be treated as a taxable capital gain from the sale or exchange of property.

The tax treatment which would be accorded by the bill is similar to the tax treatment now provided by section 301 of the code to a corporate distribution which is in excess of the corporation's earnings and profits. The proposed section 1111 provides that the earnings and profits of the distributing corporation shall not be diminished by reason of any distribution of divested stock which is treated as a return of capital.

Section 2 of H.R. 8847 would amend section 301 of the code, relating to the taxation of intercorporate dividends, to provide a new tax treatment to corporate shareholders receiving antitrust stock which has appreciated in value in the hands of the distributor.

Antitrust stock, I might add, is a defined stock within the bill, meaning stock divested pursuant to a court order.

Under existing law, a corporate recipient of a dividend of appreciated property includes in gross income only an amount equal to the cost basis of such property in the hands of the distributor, and then generally is entitled to an 85 percent dividends-received deduction to reduce the amount subject to tax. Thus, under existing law, the entire appreciation in value of the property escapes the intercorporate dividend tax. The new rule, contained in section 2 of the bill, provides that the amount of dividend income resulting from the receipt of antitrust stock, and the amount of the dividends-received deduction, will be measured by the fair market value of the stock distributed. However, the basis of the stock in the hands of the recipient corporation will be partially stepped up in recognition of the fact that a portion of the appreciation in value has been taxed to the recipient corporation at the ordinary corporate rate after application of the intercorporate dividends-received deduction.

Section 3 of H.R. 8847 would add to the code various technical amendments required by the new rule relating to intercorporate dividends in antitrust divestiture cases.

One of the amendments provides for a special adjustment to earnings and profits when a corporation disposes of antitrust stock. The other amendments all involve various sections in subchapter G of the 1954 code, relating to corporations used to avoid income tax on shareholders. These amendments are in general designed to avoid an undue adverse impact upon the shareholders of personal holding companies receiving divested stock.

The Treasury Department has advised you of its views on this subject in a report on an earlier version of H.R. 8847 introduced by Senator Williams of Delaware, that is, S. 2266. In brief, the report points out that we believe that the principal factors involved in determining whether relief should be granted are matters beyond the purview of our own responsibilities, and as a consequence we expressed neither support nor objection to the bill.

The factors we mentioned are: any impact on the market resulting from taxing divestiture distributions under the present tax laws, equity to shareholders in such cases, and the effect on enforcement of the antitrust laws.

We also reported that if this committee should decide to approve the bill, we hoped that certain amendments would be incorporated. The amendments which we suggested have been substantially incorporated in H.R. 8847, except that we urged that our proposed amend-

ment to the intercorporate tax provisions be applied generally as a needed reform rather than confined to antitrust divestiture cases. However, we did indicate to the House Ways and Means Committee that we would not object to the limited amendment incorporated in H.R. 8847 as reported. If the bill in its present form should be passed by Congress, we strongly recommend that the Congress consider appying the intercorporate-dividend amendment generally in the near future.

As the pending Du Pont antitrust divestiture case would be immediately affected by the Boggs bill, we included in our report rough estimates as to the differences in tax consequences that flow from the application of the present law and from application of the Boggs bill.

However, the figures contained in the report were based on the assumption that Du Pont would distribute its General Motors shares while continuing to pay its normal cash dividends. In other words, we assumed that Du Pont did not intend to substitute General Motors shares for any portion of its normal cash dividends to shareholders.

Senator GORE. Why did you assume that?

Mr. KNIGHT. This was based on an earlier estimate made by the Du Pont representatives based on a plan that was before the Chicago court at the time.

Senator GORE. That is not a binding statement, is it?

Mr. KNIGHT. Sir?

Senator GORE. The statement is not binding.

Mr. KNIGHT. No, the statement is not binding.

Senator GORE. Yet you submit estimates based upon that?

Mr. KNIGHT. We submitted estimates because we were attempting to show, Senator, the maximum amount of tax that would be and could be escaped by the application of what was then Senator Williams' bill, 2266, and this was lent support by the fact that Du Pont indicated they would distribute all of their shares in addition to normal cash dividends which would, in effect, provide a substantial maximum possible additional tax.

Senator GORE. You are hypothecating your estimate on that basis?

Mr. KNIGHT. We hypothecated our estimates on that basis.

Senator GORE. Thank you.

Mr. KNIGHT. This assumption was based upon an earlier statement of Du Pont Co. representatives on the basis of a plan then before the Chicago court. After preparing our report, Du Pont representatives informally presented to the Treasury Department tentative plans which could considerably change the estimates contained in our report. Briefly, they presented a four-part plan which they indicate Du Pont would follow to comply with a divestiture order under prevailing tax law. The plan provides for (*a*) an offer to exchange General Motors shares for Du Pont common at a ratio which would provide a premium to the exchanging stockholders; (*b*) a separate offer to exchange General Motors shares for Du Pont preferred at a ratio in which the market value of General Motors stock would equal the call price of the preferred; (*c*) a distribution of a portion of the General Motors shares in lieu of cash dividends; and, lastly, (*d*) a sale of the General Motors shares remaining after the foregoing transactions had taken place. The Du Pont Co. has estimated that the Federal income taxes payable under the plan would

amount roughly to slightly less than $330 million[1] of additional revenue resulting from the divestiture, and such revenue would flow primarily from the sale by the company of the 37 million shares of General Motors stock. Indeed, under an alternative plan submitted by Du Pont representatives at a later date, the resulting revenue would, if the plan were successfully executed, amount to only $133 million.

Taking as fact the assumptions which the company has presented to us, we have no particular quarrel with their estimates.[2] Under these plans, the additional revenue payable under the present tax law would be paid to the United States over a period of 10 years on the assumption that the court in the Du Pont antitrust case would permit divestiture to take place over that period.

The Du Pont officials have indicated that if the Boggs bill is passed, Du Pont would in all probability abandon the four-part plan and would distribute the bulk of its 63 million shares of General Motors stock which would remain after the other provisions of the plan were executed. Indeed, under an alternative plan submitted by Du Pont representatives at a later date, very recently, the resulting revenue would, if this plan were successful, result in the payment of Federal taxes in the amount of roughly $133 million.

Senator DOUGLAS. Mr. Knight, what was this alternative plan?

Mr. KNIGHT. The alternative plan was, in effect to increase the amount of General Motors stock that would be exchanged for Du Pont common from 8 to 30 million shares. In other words, they first submitted a four-part plan, one of the parts of which would provide for the exchange of some 8 million of the shares of General Motors for Du Pont stock.

Senator DOUGLAS. That is item (b)?

Mr. KNIGHT. Item (b)

They came in with another suggestion which they said they were considering under which they would exchange instead of 8 million shares, 30 million shares. These would be, presumably, tax-free or nearly tax-free exchanges, because only high basis Du Pont shareholders presumably would be interested in such an exchange.

Senator DOUGLAS. I wish you would develop that point as to why this alternative plan would result in a lower tax yield.

Mr. KNIGHT. Well, instead of exchanging 8 million shares which would result in no revenue, they would be exchanging 30 million shares which would result in very little revenue, and this would reduce the amount——

Senator DOUGLAS. Do I understand this would not be taxed as a capital gain?

Mr. KNIGHT. Depending on the basis of the Du Pont stock in the hands of the shareholders who were making the exchange. Presumably low basis Du Pont stockholders would not be interested in making

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[1] We are advised that this figure assumes reinvestment by Du Pont of the cash proceeds of the sale of General Motors stock in a diversified portfolio of securities in lieu of distribution of such proceeds to shareholders.

[2] No Internal Revenue ruling was either requested by or given to the Du Pont representatives, nor has Du Pont furnished or been asked for any undertaking that the plan or the assumptions supporting it will become fact under any given circumstances. The revenue figure presumably ignores any revenue losses which Du Pont contends would flow from the adverse impact on the market caused by such a plan of divestiture.

the exchange because they would suffer a tax loss, and the premium would not make it worth it.

Now, the reduction in revenue comes from the fact that 22 million less shares would be sold after these exchange transactions had taken place. Do I make myself clear, Senator?

In other words, if they exchange with their shareholders 30 million rather than 8 million shares they will reduce the number of shares which they will sell at capital gains rates, which the company would sell at capital gains rates. This is under present tax law.

Senator GORE. So you submitted to the Congress certain estimates based upon certain statements to the court by Du Pont officials, and since then there have been two additional proposals which completely invalidate the estimates which you submitted.

Mr. KNIGHT. No, Senator, I do not believe they completely invalidate the estimate we submitted.

Senator GORE. Maybe I used the wrong term. It merely leaves the whole proposition up in the air.

Mr. KNIGHT. What Du Pont has attempted to show by their submissions to the Treasury is that while theoretically present law would provide additional revenue in the amount of about $1 billion, as a practical matter, this would not be so because they would not follow the same kind of plan under present law as they would propose to follow if the Boggs bill were passed.

Senator DOUGLAS. How official was this alternative plan, and when was it submitted, by whom and to whom?

Mr. KNIGHT. The plan has no official standing whatsoever so far as we are concerned. Du Pont Co. representatives asked if they could come in to show us what they proposed to do and what the revenue estimates might be. They did not ask for an Internal Revenue ruling and we did not ask them for a commitment that this is the plan that they would follow. We did not feel it would be proper for us to ask for such a commitment, and I assume they would not be in a position to make one.

They did, however, indicate in testimony before the House Ways and Means Committee that this is the plan that they would propose to follow under present law, and they also testified as to the plan they would propose to follow if what was then the Mason bill, which was then under discussion, was passed.

Senator DOUGLAS. Suppose we were to pass this bill in substantially its present form. Did the Du Pont representatives give any indication as to whether they would propose the alternative plan which you mention?

Mr. KNIGHT. Have they given any indication?

Senator DOUGLAS. Yes.

Mr. KNIGHT. They have not given—well, let me say this, I believe some Du Pont people are here and would speak more authoritatively on it. So far as we were concerned, they said this is a plan, an alternative plan, which they were considering. They had some doubts as to whether the execution of that alternative plan would be successful.

In other words, they could not say with any certainty that they would be successful in an offer to exchange 30 million shares, General Motors shares, for Du Pont common.

Senator DOUGLAS. Both of these plans were made under the assumption that the existing tax law would continue and that the bill in question would not be passed?

Mr. KNIGHT. The plans I have discussed so far are based on what they would do or not do under existing law, and I am about to state what would happen if the Boggs bill were passed.

Senator DOUGLAS. I see. I want to make that clear.

Senator GORE. And the estimates of taxation under existing law vary widely and greatly.

Mr. KNIGHT. That is correct.

Senator GORE. Depending upon the plan.

Mr. KNIGHT. There are a great many different things they could do which would either minimize or tend to maximize their taxes.

Senator GORE. In other words, it is possible under present law for the Du Pont Co. to manage its affairs so as to minimize the adverse effect upon the corporation and the stockholders.

Mr. KNIGHT. Within certain limits; yes, sir.

In other words, they have presented two plans under present law which vary in amount from $330 million down to $133 million under their own submissions.

Senator GORE. So this bill might not be a life-and-death matter in the last week of the Congress, would you think?

Mr. KNIGHT. Well, this is a relief bill which the company favors, and I would suppose they would be better qualified than I to say to what extent they feel this is necessary for them.

Senator GORE. All right.

Senator WILLIAMS. In implementing these plans, these alternative plans, there would be, however, serious market consequences as a result of some of the sales.

Mr. KNIGHT. This is certainly what is claimed by Du Pont, and they presented testimony to that effect from representatives of Morgan, Stanley, investment bankers of New York, Merrill Lynch, and as I am about to indicate, the SEC has commented on it.

Senator WILLIAMS. I think that that assumption was accepted in principle by the Treasury Department, also that there would be market consequences if 20 or 30 million shares were dumped on the market.

Mr. KNIGHT. The Treasury on this has taken the position that they do not have the competence within their own house of predicting the market consequences of this. We have received no particular evidence that would tend to dispute the consequences that Du Pont has claimed.

Senator WILLIAMS. Well, I won't go into the extent. But the natural assumption is that to the extent you increase the offerings of stock, it is the same as the extent to which you increase the size of your offerings on a bond issue, it does have some market consequences.

Mr. KNIGHT. Certainly that is a logical conclusion.

Senator GORE. Well, since the Treasury did not do it, is there not an agency of Government which does have such competency? The Securities and Exchange Commission?

Mr. KNIGHT. We asked the Securities and Exchange Commission, but you are anticipating me a little bit, Senator.

Senator GORE. All right.

Mr. KNIGHT. Would you like me to respond now or wait?

Senator GORE. I will wait. I just wanted to point out that one agency of the Government had made a report on it, and that report is not altogether in conformity with the estimates of those people who testified at the behest of the Du Pont Co. in one instance, and General Motors in another.

Mr. KNIGHT. We did query the SEC and got a response from them.

Taking as fact the assumptions which the Du Pont Co. has presented to us, we have no particular quarrel with their estimates. Under these plans the additional revenue payable under the present tax law would be paid to the United States over a period of 10 years on the assumption that the court in the *Du Pont Antitrust* case would permit divestiture to take place over that period.

The Du Pont officials have indicated that if the Boggs bill is passed, Du Pont would in all probability abandon the four-part plan and would distribute the bulk of the 63 million shares of General Motors stock to its stockholders, in addition to rather than in lieu of normal cash dividends. They have estimated that such a distribution under the Boggs bill would result in the payment of Federal taxes in the amount of roughly $350 million [3] of additional revenue resulting from the divestiture.

Senator DOUGLAS. Mr. Knight, have the Du Pont officials given an official stipulation that the distribution of General Motors stock would be in addition to normal cash dividends rather than in lieu of cash dividends? Has this been made an official stipulation?

Mr. KNIGHT. So far as I am aware, Senator, this has not. It certainly was not made as such to us.

In other words, the Du Pont Co. has made no commitment to the Treasury Department as to how they would distribute the stock. They are in the process in Chicago, in their antitrust case, of settling this with justice before the court, and presumably, the court itself could vary the outcome, so I would assume the company would not be in a position to make any official stipulation until they know the results of their proceedings in Chicago.

Senator WILLIAMS. The Boggs bill leaves it to the courts to determine the time and the terms, and so forth, does it not?

Mr. KNIGHT. Yes. The Treasury Department has urged that if the Boggs bill or one of the similar bills were passed, that the period of divestiture be shortened from the 10 years which the Supreme Court recently indicated would be suitable as a divestiture period. In other words, we felt if the effects of divestiture were mitigated by a relief bill, then it was appropriate to shorten the period of divestiture and allow the Treasury to recover its revenue somewhat sooner.

We have said that either of two alternatives would be suitable. I think if the bill limited this, I think we said, 3 years, I know Justice had said they preferred 2—we also said we would be agreeable to a provision which would direct the court to specify the shortest feasible period of divestiture, and the bill follows the latter alternative.

The CHAIRMAN. Does the Treasury agree with the estimates of the Du Pont Co. that there will be $350 million additional revenue under the Boggs bill?

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[3] This figure presumably ignores possible actions which shareholders can take to minimise their tax burdens. It also seems to ignore potential losses of revenue that could arise from the ability of low basis Du Pont shareholders to sell General Motors stock, currently represented by low basis Du Pont stock, at market prices without gain. The figure assumes that Christiana will in turn distribute the stock it receives to its shareholders.

Mr. KNIGHT. The Treasury agrees that if the stock is distributed as Du Pont has assumed in this plan they presented to us, under the Boggs bill, that their estimates of revenue would be correct, based on their assumptions.

Senator WILLIAMS. Does the Treasury Department agree with the estimate of $330 million that would be paid under existing law as the result of the first plan which they presented to the Ways and Means Committee?

Mr. KNIGHT. Again, on the basis of their assumptions, their mathematics and interpretation of the law, it was correct.

Senator TALMADGE. May I ask a question at that point?

Does the Treasury also agree that it is possible to handle this divestiture with the tax revenue under existing laws which would amount to only $133 million?

Mr. KNIGHT. Yes; if they were successful in their offering to exchange 30 million shares of General Motors for Du Pont stock, their estimate as to the tax payable under such a plan is correct.

Senator TALMADGE. Why, if it would be to the advantage of the company if they could handle this divestiture under existing law at a cost of $133 million, to ask the Congress to pass this bill that would cost $330 million?

Mr. KNIGHT. As I understand, Senator, the company says that while they could minimize their taxes, they could not minimize the market impact, and they could lose a considerable amount of money in the value—or their shareholders would lose a considerable amount of money in the value—of their shares as the result of this impact.

They also say there is no precedent, as I understand it, for this type of exchange in this magnitude, and they are not at all confident that this would be a successful offer.

Senator TALMADGE. Then what you are saying is they are willing to forfeit an additional $200 million in taxes to protect the market price of the stock; is that it?

Mr. KNIGHT. In broad outline, that is correct; the burden shifts somewhat.

Senator GORE. You are appearing, though, for the Treasury, and not on behalf of Du Pont?

Mr. KNIGHT. Absolutely. I am just repeating what the Du Pont Co. representatives have told me.

Senator GORE. Since you are repeating their words, I want the record straight.

Mr. KNIGHT. Well, all the figures, Senator, that we have given here are based on their assumptions, and we are merely pointing out the different possible revenue consequences.

Senator GORE. Well, I see a paragraph here in which every estimate you refer to is Du Pont's estimate. Why doesn't the Treasury Department have some estimates?

Mr. KNIGHT. We have submitted estimates in our report on S. 2266. We show that if Du Pont carried out the plan under present law which they would propose to carry out under the Boggs bill, the revenue payable to the Treasury would be somewhat over $1 billion.

Senator KERR. Say that again.

Mr. KNIGHT. I say if the Du Pont Co. carried out the plan which they propose to carry out if the Boggs bill becomes law, then the

revenue attributable to their following such a procedure under present law would amount to something in the neighborhood of something over $1 billion in revenue.

Senator DOUGLAS. Revenue to whom?

Mr. KNIGHT. Additional revenue to the United States.

Senator KERR. I do not understand that, then. That is not in accordance with what you said awhile ago. You said if they carried it out in accordance with the provision of the bill reported out by the House Ways and Means Committee, that the revenue would be $350 million.

Mr. KNIGHT. Yes, sir. What I am saying is if under present law they carried out the plan that they would propose to carry out if the Boggs bill were passed, the revenue would be in the neighborhood of $1 billion.

Senator WILLIAMS. If they distribute it under the most highly taxed possibilities it would be about $1 billion.

Mr. KNIGHT. That is correct, sir.

Senator WILLIAMS. Is it reasonable to expect any taxpayer to distribute its stocks under a formula which would result in the highest tax possible, or would it not be more reasonable to assume that they would elect a formula wherein they could reduce their tax obligation to the $330 million?

Mr. KNIGHT. It would be reasonable. But I suppose also, Senator, that they have other problems that they have to meet, corporate problems and various other things they have to take into consideration, so what they do I would not care to predict.

The CHAIRMAN. The $1 billion would not be paid by Du Pont but it would be paid by the recipients, stockholders of Du Pont upon receiving shares of General Motors.

Mr. KNIGHT. That is correct; yes, sir.

The CHAIRMAN. Not a dollar would be paid by Du Pont; is that correct?

Mr. KNIGHT. The $1 billion revenue would be payable by stockholders of Du Pont and not by the company.

Senator DOUGLAS. Mr. Knight, may I get the arithmetic of this situation a little bit clearer? Do I understand that the accretion in value of General Motors stock over original costs has been approximately $2 billion?

Mr. KNIGHT. The original shares—they acquired their stock at a cost basis, and now hold it at a cost basis of about $2.09 per share. The market value today is somewhat over $45. I think yesterday it was $47.

Senator DOUGLAS. What is the total accretion in value?

Mr. KNIGHT. I am advised it is close to $3 billion.

Senator DOUGLAS. Close to $3 billion.

Mr. KNIGHT. I can verify that.

Senator DOUGLAS. You say if this is taxed as ordinary income the yield would be at least $1 billion?

Mr. KNIGHT. If Du Pont distributed General Motors shares through its individual shareholders, the tax would be on the market value of the stock, not on the appreciated value.

In other words, a share of General Motors stock distributed under present law to an individual stockholder of Du Pont would be sub-

ject to an ordinary income tax on the market value of the General Motors shares distributed under present law.

Senator DOUGLAS. Do you estimate that would be at an average rate of something over 30 percent?

Mr. KNIGHT. I think we used an average rate of 50 percent.

Senator DOUGLAS. Fifty percent?

Mr. KNIGHT. In the assumptions we made in our report on S. 2266 to you.

Senator DOUGLAS. Why wouldn't it be $1.5 billion?

Senator WILLIAMS. A lot of the stock is owned by corporations under which they would pay 16 cents under existing law, and a lot owned by charitable organizations which would pay no tax, and I think those are the results——

Senator DOUGLAS. Is that correct?

Mr. KNIGHT. That is correct, sir.

The CHAIRMAN. How many stockholders are there of the Du Pont Co. at this time?

Mr. KNIGHT. There are around, as I recall, something like 230,000, I believe.

The CHAIRMAN. These stockholders would be the ones who would pay the $1 billion?

Mr. KNIGHT. Well, most of these 230,000—there are 230,000 total stockholders, some of whom are corporations, some of whom are charitable organizations.

Senator GORE. Well, speaking of charitable organizations, have you taken into consideration the possibility, under present law, of a taxpayer in a high tax bracket transferring his General Motors stock, or Du Pont stock, to a foundation and receiving a tax deduction equal to the current market value?

Mr. KNIGHT. We certainly have, Senator. This is one of the reasons why we emphasize, and I have so far emphasized, all figures are based on Du Pont assumptions because there are a great many things which could vary these figures considerably.

Senator GORE. That is what worries me. You have come here talking to us about Du Pont estimates and assumptions, and yet I read your own words here that Du Pont officials have indicated—now, that is as far as you can go; they have just indicated that if the Boggs bill is passed, Du Pont would, in all probability do thus and so; yet you base your estimates on such uncertain and transitory suppositions.

Mr. KNIGHT. We tried to give you, Senator, estimates on all suppositions. In other words, we think that our estimates of the taxes payable under present law, if they carry out what they would propose to do under the Boggs bill, would be in the neighborhood of over $1 billion. Now, this, in our mind, is about the maximum tax that could be estimated on any reasonable assumption.

Senator GORE. Yet you take another assumption that under present law it could be as small as $133 million.

Mr. KNIGHT. We point out that if Du Pont carries out what it has told us it would do, it could be as low as $133 million.

Senator GORE. Wouldn't it be better, Mr. Knight, to wait until the court renders its decree, and then you would have some better idea upon what we were legislating?

Senator KERR. The court has already rendered its decree.

Senator GORE. But the final plan has not been approved.

One reason for hurrying up this hearing, one excuse, was, as I understand it, that the Du Pont officials have to go to Chicago.

Senator KERR. The court would have to do further violation to justice if it set aside legal methods now legal to this company and its stockholders, to now handle this program, and I am sure the Treasury assumes they would handle this distribution on the most favorable basis permitted under existing law. The Treasury would not only assume that but would expect it, wouldn't it, Mr. Knight?

Mr. KNIGHT. We expect that, absent, as I say, whatever corporate problems in obtaining the maximum tax advantage might be presented to them which, I suppose, might be substantial. I mean, there are a great many variables is all I am saying.

Senator KERR. You would expect them, after having taken those corporate problems into due consideration, to comply with this court order in the manner that would create the lowest liability to themselves and their stockholders, and provide for them the greatest benefit available under existing law?

Mr. KNIGHT. I would certainly assume so; yes, sir.

Senator KERR. And that is what you would do if you were there?

Mr. KNIGHT. I surely would.

Senator KERR. And if they sat down and talked to you about it, as a public official with the responsibility to all taxpayers, and explored with you the possibilities of doing it, you would advise and counsel with them as to how they would handle their problems under existing law, wouldn't you, Mr. Knight?

Mr. KNIGHT. I would certainly answer their questions.

Senator KERR. Yes.

Mr. KNIGHT. I would not attempt to persuade them not to pay any taxes they might otherwise have to pay.

Senator KERR. They would not come for persuasion but to the extent they came for information you would gladly provide it?

Mr. KNIGHT. We would attempt to give it to them.

Senator KERR. Why, certainly.

Senator GORE. Let me clear up this point for a moment. Mr. Knight, didn't you yourself state a few moments ago that the court must give its approval to certain proposals and plans before Du Pont would be certain of its procedure?

Mr. KNIGHT. That is correct, Senator. The problem, and I am certainly not here to argue Du Pont's case, the problem is that the court has to fashion a decree.

The court has, as in the past, indicated some concern with the tax impact on shareholders of Du Pont. It then becomes a question of whether in the interest of an orderly decree the court should know what tax laws it is operating under when it fashions the decree and hears the parties or whether the Congress should know what the decree is before they fashion their tax relief.

This is a difficult question, I agree. So far we have been asked to come up and testify, I assume, on the assumption that the Congress or Members of Congress, are at least interested in determining whether or not to grant tax relief prior to the time the court fashions its decree.

Senator GORE. And such assumptions on your part, and estimates, are based, in turn, upon assumptions and probabilities and variables.

which would result in revenues from $1 billion to $133 million, when the order of the court has not yet been finalized.

Mr. KNIGHT. That is correct. These are the possibilities as we see them. These are the reasonable possibilities as we see them.

Senator GORE. Mr. Chairman, I submit that the point I made is pertinent, but I shall not press it at this moment.

Senator KERR. Let me ask you this question.

Senator DOUGLAS. May I ask a question, Mr. Chairman. All right, Senator Kerr, go ahead.

Senator KERR. You go ahead.

Senator DOUGLAS. I yield.

Senator KERR. I do not want to ask it with your yielding. You go ahead and ask it, and I will ask it on my own yielding.

The CHAIRMAN. Senator Douglas.

Senator BUTLER. Then let me ask a question. Laughter.

Senator DOUGLAS. I will be very glad to yield.

The CHAIRMAN. The Chair recognizes Senator Douglas.

Senator DOUGLAS. Thank you.

Mr. Knight, you mentioned that the Du Pont estimate is that the Federal taxes would amount to $350 million of additional revenue if the bulk of the 63 million shares of General Motors are distributed in addition to the normal cash dividends.

Mr. KNIGHT. That is correct.

Senator DOUGLAS. You have a footnote, however, that says that this figure assumes that Christiana will, in turn, distribute the stock it receives to its shareholders.

As I understand it, Christiana Corp., which is primarily a family holding company, although not exclusively a family holding company, owns approximately 29 percent of the shares of du Pont; isn't that correct?

Mr. KNIGHT. That is correct.

Senator DOUGLAS. Now, suppose Christiana does not distribute the stock to its shareholders but holds it for Christiana itself?

Mr. KNIGHT. This would considerably reduce the tax. I might add that Justice, as I understand it, has taken the position or proposes to take the position that the stock should not be held by Christiana nor distributed by Christiana to its shareholders, but sold, which would increase the tax by $180 million, I believe it is.

Senator DOUGLAS. Do I understand then that if Christiana does not distribute the stock that the total tax would be $350 million minus $180 million or $170 million?

Mr. KNIGHT. No, I am sorry, I have confused you.

Senator KERR. Not necessarily you did it. [Laughter.]

Senator GORE. Probably.

Senator KERR. It is highly doubtful.

Mr. KNIGHT. Roughly the tax would be reduced by $136 million.

Senator DOUGLAS. $137 million.

Mr. KNIGHT. $136 million.

Senator DOUGLAS. $136 million.

Mr. KNIGHT. If Christiana holds onto the stock and neither sells it nor distributes it.

Senator DOUGLAS. Have the representatives of Christiana taken part in any of these negotiations?

Mr. KNIGHT. The representatives of Christiana, as such, certainly have never appeared before me in the Treasury.

Senator WILLIAMS. Would you yield, Senator?

Senator DOUGLAS. Have they made any stipulation as to what their plans would be?

Mr. KNIGHT. Not that I understand.

Senator WILLIAMS. Is not their plan——

Mr. KNIGHT. I understand they have not.

Senator WILLIAMS. Would not their plan be dependent upon what the court says? If the court tells them to distribute it or sell it they will have to abide by that decision?

Mr. KNIGHT. That is correct.

Senator WILLIAMS. Does not the Boggs bill, upon your recommendation, carry a provision where they will leave it to the court as to the method and time, and so forth, of distribution?

Mr. KNIGHT. Yes, the method of distribution is left to the court. We have not made any particular recommendation on that score. We have assumed that the court would direct the distribution of the stock.

Senator WILLIAMS. Under existing law, assuming that the Du Pont Co. distributed its General Motors stock to its stockholders now, under existing law would not the tax to Christiana be substantially less than it would under the Boggs bill if it is enacted?

Mr. KNIGHT. That is correct, because the Boggs bill contains a proposal which we suggested to the House Ways and Means which would apply the intercorporate dividend tax against the fair market value of distributions received by corporations rather than the cost basis of distributions made by corporations.

Senator KERR. Which is existing law.

Mr. KNIGHT. Existing law; correct. It is a difference between $3.50 per share and 16 cents per share.

Senator WILLIAMS. So, in effect, when they endorse this bill they are endorsing something which will raise their tax higher than under existing law.

Mr. KNIGHT. Not only so far as Christiana is concerned, but higher for all corporate shareholders.

Senator WILLIAMS. Yes.

The CHAIRMAN. You may proceed.

Senator KERR. Is the Senator through?

Senator DOUGLAS. Yes, indeed.

Senator KERR. This court order compels this divestiture of this stock, does it not, Mr. Knight? The purpose of this litigation in the Supreme Court, that got to the Supreme Court, is allegedly to enforce the antitrust laws?

Mr. KNIGHT. That is correct.

Senator KERR. And to accomplish divestiture of this stock by Du Pont?

Mr. KNIGHT. That is correct.

Senator KERR. And there is no attitude on the part of the Treasury nor, so far as you know, on the part of the Supreme Court to deny the stockholders of Du Pont from having the benefit of existing law in its many provisions as to the manner in which this divestiture may be accomplished?

Mr. KNIGHT. Yes. I understand, assuming that the antitrust considerations are taken care of, there are no other considerations which would direct the company to do anything different.

Senator KERR. There is no purpose on the part of Treasury to collect more taxes than are due it?

Mr. KNIGHT. That is correct.

Senator KERR. No purpose allegedly on the part of the Supreme Court that they have disclosed or made apparent, to penalize these stockholders beyond the most favorable laws which are in effect prescribing the manner in which the Court's order can be carried out?

Mr. KNIGHT. So far as I am aware no indication whatsover.

Senator GORE. Well, Mr. Knight, stockholders have not been before this Court, have they?

Mr. KNIGHT. No, sir; I do not believe they are before the Court.

Senator KERR. Which is one of the tragedies of the situation.

Senator GORE. Well, there is an attempt here to confuse the stockholders with the corporation.

Senator KERR. Not at all. There is an attempt to clarify the fact that the stockholders are the ones who will bear the penalty of court action which was not directed toward them, and in connection with which they were not parties.

Now, there is no confusion so far as the Senator from Oklahoma is concerned in that regard. There may be insofar as others are.

Senator GORE. Mr. Chairman, I ask the stenographer to read the previous statement by the distinguished senior Senator from Oklahoma. I believe he made reference to possible punishment of stockholders.

Senator KERR. I asked if there was any apparent provision of the decision which had for its purpose the penalization of the stockholders.

Senator GORE. Very well. Then I will not——

Senator KERR. Or if there was any desire on the part of the Treasury to penalize them in any way by imposing upon them the necessity to carry out the provisions of this order in the least favorable method available to them provided by law rather than permitting them to do it in the most favorable method available to them under existing law, and the witness answered it as I knew he would, that there was no such purpose on the part of the Treasury and, so far as he knew, there was none on the part of the Supreme Court.

I thought the statement with reference to the Supreme Court was charitable.

Senator GORE. Then, Mr. Chairman, I withdraw my request that the stenographer reread the statement because the distinguished senior Senator has accurately restated it. Now, at that point, I inquired if the stockholders were in court. This suit was against the Du Pont Co., was it not?

Mr. KNIGHT. Just the Du Pont Co.; yes.

Senator GORE. Mr. Greenewalt has been handing out statements to the effect that the stockholders are innocent. Did the Government ever charge the stockholders were guilty of anything?

Mr. KNIGHT. I believe the stockholders were originally named as parties, but I believe that the charges or the complaint against the stockholders was dismissed.

Senator GORE. Well, even though that had not been the case, this has not been a criminal action; has it?

Mr. KNIGHT. No; it is a civil action.

Senator GORE. So all of these statements that the stockholders are not guilty and the stockholders are innocent, are really irrelevant to the question at issue.

Mr. KNIGHT. Well, so far as I am aware, the only statements which have been made to me in that context are that the stockholders are undertaking tax burdens at a time not fixed by them and when they were not before the court nor were they charged or found guilty of any crime or civil wrongdoing or what have you. In other words, as I understand what the bill is, it is an attempt to relieve individual stockholders for the most part of the burdens which they would otherwise suffer if the divestiture order is carried out and they are required to receive General Motors stock as a dividend at a time which is fixed not by the company or shareholders but by the court. This, as I understand it, is the purpose of the bill. Incidentally, no corporation gets tax relief under the bill as proposed. Their taxes are raised under the bill as proposed.

Senator GORE. Well, there is some question about that in certain instances about which I will ask you a little later. That is subject to question.

Now, again with respect to the guilt or innocence of stockholders, what about the many purchasers who purchased stock since this suit has been pending? Did you ever hear of caveat emptor?

Mr. KNIGHT. There certainly have been a number of stockholders who purchased stock since this suit has been pending. It has been pending for some time. I have no idea about how many.

Senator WILLIAMS. Have those stockholders who purchased those stocks at market value, we will say, of $220 a share, with respect to them, did not the man from whom they purchased it already pay a capital gains for the tax?

Senator KERR. If they had a profit.

Senator WILLIAMS. They would have had a profit as it moved in the low base up.

Mr. KNIGHT. I assume so.

Senator GORE. So the bill would attempt to treat the distribution of corporation assets to its stockholders as a return to capital, that is, to the individual stockholder.

Mr. KNIGHT. Yes, sir.

Senator GORE. But when we come to corporate stockholders, Christiana, for instance, the bill puts on a different suit.

Mr. KNIGHT. The bill would increase their taxes from $3 million to $63, $64 million, possibly.

Senator GORE. Well, would the bill treat the distribution to Christiana Corp. as a return of capital?

Mr. KNIGHT. No; it would not. The law applicable to intercorporate dividends is different at present from the law applicable to distributions of stock to individuals.

Senator GORE. I understand that perfectly well; I understand that perfectly well. You are changing the law in both instances.

Mr. KNIGHT. Yes; the bill would be changing the law in both instances.

Senator GORE. Excuse me, the bill would propose to change the law.

Mr. KNIGHT. It proposes to change the law. It would increase the intercorporate rate, the intercorporate tax, payable by a corporate recipient, and it would reduce the tax payable by individual recipients.

Senator GORE. But this clever theory of return of capital is applied to an individual stockholder, but Christiana is not measured by the same yardstick in the bill.

Mr. KNIGHT. No; nor under present law.

Senator GORE. I am not asking you about present law.

Mr. KNIGHT. That is correct. In the bill they are treated entirely different.

Senator DOUGLAS. May I ask a question there, Mr. Chairman?

The CHAIRMAN. Yes.

Senator DOUGLAS. You spoke of the change in the taxation of intercorporate dividends provided in this particular case as compared to present law, which, as I understand it, carries over to all other similar antitrust cases. The present law is that the tax is 52 percent of 15 percent of original cost.

Mr. KNIGHT. That is correct.

Senator DOUGLAS. And this was the provision in the bill of last year, which would have resulted in a tax of roughly 7.5 percent of original cost which, in the case of a large volume of Du Pont purchases, amounted to $2.15 a share or roughly only 16 cents a share.

Mr. KNIGHT. That is correct, sir.

Senator DOUGLAS. Under the new provision it is 15 percent of what?

Mr. KNIGHT. 52 percent of 15 percent of the fair market value.

Senator DOUGLAS. And the fair market value was taken as what, $45?

Mr. KNIGHT. In our estimates it is taken as $45.

Senator DOUGLAS. $45; and this amounts to what, $3.50?

Mr. KNIGHT. About $3.50.

Senator DOUGLAS. In this aspect it is a much better bill than the bill of last year.

Mr. KNIGHT. Certainly from the Treasury's point of view.

Senator DOUGLAS. I think from the standpoint of equity, too.

The CHAIRMAN. You may proceed.

Mr. KNIGHT. I was pointing out that the Du Pont officials have indicated that if the Boggs bill is passed, Du Pont would in all probability abandon the four-part plan and would distribute the bulk of its 63 million shares of General Motors stock to its stockholders, in addition to, rather than in lieu of, normal cash dividends. They have estimated that such a distribution under the Boggs bill would result in the payment of Federal taxes in the amount of roughly $350 million of additional revenue resulting from the divestiture. This would result in additional revenue to the Treasury of $350 million.

Senator DOUGLAS. Only $214 million if it did not distribute the stock which it holds.

Mr. KNIGHT. That is correct.

Senator GORE. Why do you assume that they are going to distribute?

Mr. KNIGHT. This is what they have told us they would do.

Senator GORE. Well, you said in all probability.

Mr. KNIGHT. Because they have made no commitment to us that they would do it, and because, presumably, the court could frustrate their intentions.

Senator GORE. Let us not get into that point now.

Senator DOUGLAS. I do not want to dwell on that very much. Christiana did not appear as a defendant, even though there is a close connection between Du Pont and Christiana, nevertheless Christiana is a separate legal entity, and it would certainly not be legally bound as yet and would certainly not be bound in honor to do what is assumed.

Mr. KNIGHT. I think the Du Pont Co. would have to answer that.

Senator DOUGLAS. What?

Mr. KNIGHT. I believe Christiana or the Du Pont Co. would have to answer that.

I should point out this figure of $350 million, on the one hand, ignores possible actions which shareholders could take to minimize their tax burdens. As Senator Gore pointed out they could give their stock away tomorrow.

Senator GORE. I asked you if the Treasury took this into consideration, and you said they had.

Mr. KNIGHT. I understood you to ask if the Treasury had taken that into consideration, and we have, and that is why we are pointing out Du Pon't estimate of $350 million does not, nor do I believe it can, estimate things which shareholders might do to minimize their taxes, You are talking about several hundred thousand individuals all of whom are free to act as they see fit.

Senator GORE. Mr. Chairman, the late President Roosevelt steadfastly refused to answer what he called the "iffy" questions. I suggest we ought to be careful in passing an "iffy" bill.

The CHAIRMAN. Proceed.

Senator KERR. I want to ask a question right there, Mr. Knight.

Assuming that with the tax burden of $350 million, an important part of which would be paid by the stockholders, would result in their giving consideration to making a contribution of that stock to charitable organizations, wouldn't there be just three times as much incentive for them to do it to avoid paying $1 billion in taxes?

Mr. KNIGHT. Presumably.

Senator KERR. That is not unreasonable, is it?

Mr. KNIGHT. No.

Senator KERR. That hardly would come within the purview of being subject to criticism of being "iffy." That would be a distinct probability there.

Mr. KNIGHT. It would be a very distinct probability.

Senator LONG. Let me get it straight in my mind. On the part of the individuals receiving this stock, would that, under existing law, be a capital gains transaction or would that be taxed as ordinary income?

Mr. KNIGHT. Under present law, individuals receiving General Motors stock would include the market value of that stock as ordinary income in their income tax returns.

Senator KERR. And taxed accordingly.

Mr. KNIGHT. And taxed accordingly.

Senator KERR. And if they were in the 75-percent bracket it would mean they would lose that part of what is now a nontaxable investment or without the court order would be a nontaxable investment.

Senator LONG. If that would put someone in a $1 million bracket, it stands to reason he would be working overtime to find some way

that he could minimize that tax consequence of paying it under a 90-percent bracket, would he not?

Mr. KNIGHT. I would assume so; yes, sir.

Senator LONG. There are a number of things he could do. He could give the money to a foundation.

Senator KERR. Give the stock to a foundation.

Senator LONG. Give the stock to a foundation. That would get him a deduction, would it not? He could give it to a foundation.

Mr. KNIGHT. Yes.

Senator LONG. Or he could do any one of a number of things that would cause him to have a loss in the same year that this matter came to him to postpone the tax consequences.

Mr. KNIGHT. A great many things he could do.

Senator BUTLER. But, Mr. Knight, another aspect of this situation is you have 230,000 stockholders. They are not all of a class who would want to give their investments away to avoid this tax, and the smaller ones among them would be forced in the market to sell, would they not, to pay the tax, probably?

Mr. KNIGHT. Certainly, Du Pont has claimed that they would, and we have no reason to doubt it.

Senator BUTLER. I do not see how you could keep them out of the market if it is taxed as ordinary dividends, the ordinary schoolteacher or the fellow who has 10 or 20 or 30 shares, and he is paying a full income tax on the distribution, he is going to go to the bank and borrow or he is going to sell some of that stock, and I would say that stock would deluge the market and probably burst it wide open, but I think that is to be considered, is it not?

Mr. KNIGHT. This is, as I understand it, the basis for those who contend relief is required.

Senator BUTLER. Has the Securities and Exchange Commission or anybody given any estimate of how many of the stockholders are in position where they would be forced in the market to sell?

Mr. KNIGHT. Estimates have been supplied by Morgan, Stanley, and by Merrill Lynch on behalf of the Du Pont Co.

SEC has been asked to consider this but, as appears later in my prepared statement, they say they think there would be some impact but are not prepared to say to what extent.

Senator BUTLER. As a matter of fact, a sensible person would say the only way you could distribute this stock to the stockholders who, by right, should have it if it is a forced distribution, is to adopt the Boggs bill. You cannot do it under the four-point plan enumerated in your testimony because none of the stock goes to the stockholders unless they exchange Du Pont stock to get it, common or preferred.

There is no way to get their stock to the stockholders under any reasonable distribution, under any fair distribution, except through the Boggs bill, is there?

Mr. KNIGHT. That certainly is the contention of the company, and we cannot——

Senator BUTLER. It certainly seems to be a fair contention to me. I do not see how you can expect a small stockholder who, in good faith, invested in the company, and have half of his investment wiped out simply because some court says that the company itself did something wrong 30 or 40 years ago.

Senator GORE. Would the Senator yield?

Senator BUTLER. I would be very happy to yield, yes.

Senator GORE. The Senator is aware, I know, being the able lawyer that he is, that this is by no means the only form of involuntary divestiture. There are several ways in which a man may be required to dispossess himself of property.

Nor, I take it, does the Senator think this would be the only case in which a taxpayer might be required to liquidate some of his assets in order to pay his taxes. I have had to do that during the last few years, and now and then I have, in addition, had to go to the bank to borrow some money to pay taxes.

So the Du Pont stockholders are not the only taxpayers who are required to pay taxes and who may have to sell something in order to raise the money.

Senator BUTLER. I do not know of any court, unless I do not know you as well as I think I do, which has forced you to sell any of your assets.

Senator GORE. Quite to the contrary. Eminent domain is practiced quite regularly.

Senator WILLIAMS. When it is practiced, I think you will find it is practiced under the formula provided in the Boggs bill, capital gains.

Senator KERR. That is because of the nature of the property when it is done.

Senator BUTLER. What other property do you possess that they condemned? That is an interesting inquiry. What else is the Government interested in that you have got.

Senator WILLIAMS. And, as it is taxed to you under this process it is taxed to you on the basis of return of capital, and you are taxed at capital gains rates only to the extent that you receive an amount in excess of your original cost, which was the basis of——

Senator GORE. If the Senator wants to put it on that basis, what this bill essentially does it to permit a distribution of corporate assets, not as dividends to the stockholders, but instead sets up a special provision which I do not think is justified by the facts involved.

I recognize there may be need for some legislation when the court orders are final. Then we will know what we are doing. But I certainly am not prepared to support the kind of "iffy" bill that is before us now.

Senator WILLIAMS. The Senator from Tennessee is the one who made the comparison. I merely point out there is a similarity that follows through in the tax consequences.

Senator GORE. The Senator is trying to confuse, it seems to me, real estate with corporate dividends.

Senator WILLIAMS. I will apologize for anything that I say which would tend to further confuse you. [Laughter.]

The CHAIRMAN. Proceed, Mr. Knight.

Senator FULBRIGHT. Mr. Chairman, may I ask a question at that point?

The CHAIRMAN. Yes.

Senator FULBRIGHT. Does the Treasury know how many of these stockholders own 100 or less shares in Du Pont?

Mr. KNIGHT. We do not know that.

Senator KERR. Du Pont people are here who can answer the question on this point.

Senator FULBRIGHT. What?

Senator KERR. I would presume there are witnesses in this room who could answer the question on that point.

The CHAIRMAN. Is there anyone here who can answer that question?

Senator KERR. Mr. Greenewalt, president of Du Pont, is speaking, for the record.

Mr. GREENEWALT. Mr. Chairman, there are 173,000 shareholders with less than 100 shares.

Senator FULBRIGHT. I could not hear you. Speak up.

Mr. GREENEWALT. There are 173,000 shareholders owning less than 100 shares.

Senator BUTLER. Is that the figure?

Mr. GREENEWALT. Is that the figure you would like, sir?

Senator BUTLER. A very significant figure.

Senator FULBRIGHT. Does this bill have general application, or does it apply only to Du Pont?

Mr. KNIGHT. It has general application to antitrust divestiture cases.

Senator FULBRIGHT. It would not apply to a voluntary distribution? Must it be in accord with a court decision?

Mr. KNIGHT. It has to be in accord with a court decision for the stock to qualify for the relief proposed by the bill.

Senator FULBRIGHT. Would there be any objection to making it applicable to either voluntary or involuntary divestiture on the part of the Treasury?

Mr. KNIGHT. Yes. I believe the Treasury would object if what you are suggesting is that we should change from the present law which treats voluntary distributions of property as ordinary income at market value. This is the present law, and we certainly do not recommend and, presumably do not intend to recommend, that such a change be made, if I understood you correctly.

Senator DOUGLAS. Mr. Knight, the Senator from Arkansas has touched off a very interesting line of inquiry. I had always thought that Du Pont, the *Du Pont* case, had a lesser twin in the form of the *Hilton Hotel* case.

Now, what is the situation of the *Hilton Hotel* case in relationship to this bill? Is the *Hilton* case outside the purview of this bill?

Mr. KNIGHT. There are a number of differences from the point of view of the Treasury in the *Hilton Hotel* case for relief and the *Du Pont* case for relief.

One of the factors we think is important and a consideration for the Congress is the effect on antitrust enforcement.

I understand the Department of Justice believes that relief proposed in the *Hilton* case would be contrary to the interests of antitrust enforcement rather than consistent with it.

In the second place, the Hilton Corp. itself is asking for the relief, not shareholders, individual or otherwise, in Hilton.

In the third place, there has been no showing that I am aware of that the divestiture order in the *Hilton* case had any impact on the market. No showing to that effect has been made.

It was the sale of hotels to other corporations, so I presume they had no such effect.

Senator DOUGLAS. Then, this bill purports to be, although it purports to be general in character, in reality it merely applies as of this moment to the *Du Pont* case; is that correct?

Mr. KNIGHT. Well, the *Du Pont* case is the only one that is immediately before us. I understand there is another pending to which it could apply. The Department of Justice can speak to that more authoritatively than I can.

But the bill as I understand it, is designed to apply to antitrust divestitures, and it is designed to give tax relief only to individual shareholders in antitrust divestiture cases where those shareholders have been found by the court not to have participated or to have been guilty of violation of the antitrust law.

Senator HARTKE. Mr. Chairman, may I follow up the question of my distinguished colleague from Arkansas with a question regarding the 173,000? The figure that was given, the 173,000 who own 100 shares or less, what percentage of the stock does this represent?

Mr. GREENEWALT. Of the stock? I do not have that figure, Senator.

Senator HARTKE. Could we have it supplied?

Senator KERR. What percentage of the stock owned by Du Pont stockholders does that represent, I believe is the question.

Senator HARTKE. That is right.

Senator KERR. In view of the fact that this relief applies only to individual stockholders, I wonder if the Senator's question really was what percentage of the total amount of Du Pont, individual Du Pont, stockholders would this 173,000 represent in terms of stock volume.

Senator HARTKE. Yes, that is right. Can we get that?

The CHAIRMAN. Mr. Greenewalt, can you answer the question?

Senator KERR. Do you understand, Mr. Greenewalt? Now, the 173,000, I would presume, are individual stockholders?

Mr. GREENEWALT. That is correct.

Senator KERR. I think that the question he asked was the stock owned by them is what percent of Du Pont stock that is owned by individual stockholders.

Mr. GREENEWALT. One-third, I am told, Mr. Kerr. In other words, 173,000 individual shareholders owning less than 100 shares each one, one-third of the stock that is owned by all individual shareholders.

Senator HARTKE. Of Du Pont?

Mr. GREENEWALT. Of Du Pont.

Senator DOUGLAS. Mr. Greenewalt, if you were to take Christiana into consideration, what percentage of the total holdings would this be?

Mr. GREENEWALT. Christiana owns 29 percent of the outstanding common stock of Du Pont.

Senator DOUGLAS. Then would this be one-third of 71 percent?

Mr. GREENEWALT. Yes.

Senator DOUGLAS. Or about 24 percent.

Senator KERR. Wait, I doubt that. There are other corporate stockholders.

Mr. GREENEWALT. Oh, yes.

Senator DOUGLAS. Then it would be less than 24 percent?

Mr. GREENEWALT. There are other corporate shareholders besides Christiana.

Senator DOUGLAS. Have you any estimate what percentage of the total stock, both individual and corporate, these 173,000 individuals would hold?

Mr. GREENEWALT. 10 or 12 percent.

Senator DOUGLAS. 10 or 12 percent?

Mr. GREENEWALT. Yes.

Senator DOUGLAS. Thank you very much.

Senator GORE. If I may continue, Mr. Greenewalt, what percentage of the stock is held by corporations? You said Christiana had 29.

Mr. GREENEWALT. Yes.

Senator GORE. What percentage do all other corporations hold?

Mr. GREENEWALT. In total, I am told, 35 percent of the Du Pont stock is held by corporations.

Senator GORE. Thank you.

Senator KERR. Including that which Christiana owns?

Mr. GREENEWALT. Including that which Christiana owns.

Senator KERR. Then your answer to the question of the Senator from Illinois, I believe, should be corrected. If 35 percent of the stock is owned by corporations, 65 percent would be owned by individuals.

Mr. GREENEWALT. Trust funds——

Senator KERR. Oh.

Mr. GREENEWALT. Pension plans, noncorporate shareholders, non-individual shareholders.

Senator KERR. I see. In other words, the noncorporate—there are a number of noncorporate shareholders who are not individual shareholders.

Mr. GREENEWALT. That is correct, sir. For example, there is about 5 percent of the outstanding common stock of the Du Pont Co. that is held by charities. There is an additional amount that is held by pension funds, by trusts; many kinds of shareholders who are not individuals.

Senator KERR. And about 30 to 35 percent of it is owned by individuals?

Mr. GREENEWALT. Yes.

Senator HARTKE. Mr. Knight, do you have a statement here along the lines of the questioning which we were indulging, a chart which you can include in the record or something of that sort?

Mr. KNIGHT. No, sir.

Senator HARTKE. I just noticed you were referring to this when we started to get these answers from Mr. Greenewalt, and I thought possibly you might have something to enlighten us on it.

Mr. KNIGHT. We have no figures showing stock distribution which are up to date or as informative as what Mr. Greenewalt has been giving you.

Senator HARTKE. That is not that chart here?

Mr. KNIGHT. No. This one is dated 1957.

Senator GORE. Mr. Knight, the so-called charity organizations, holders of Du Pont Stock, are not subject to taxation, are they?

Mr. KNIGHT. Presumably not.

Senator GORE. So this is not a bill for relief of charities.

Mr. KNIGHT. No, it is not. It is a bill for relief only of individual stockholders.

The CHAIRMAN. Proceed.

Mr. KNIGHT. In indicating the figure of $350 million which Du Pont has estimated would be payable——

The CHAIRMAN. Mr. Knight, will you give the page and exactly where you are.

Mr. KNIGHT. I am on page 4, Senator, in the second paragraph around six lines down, and what I am really discussing is the footnote to the sum of $350 million.

The CHAIRMAN. The Chair would suggest that your assistant, if he desires to sit near you, may have the privilege of sitting there. Let us proceed.

Mr. KNIGHT. I was pointing out that this figure of $350 million ignores possible actions which shareholders can take to minimize their tax burdens. It also seems to ignore potential losses of revenue that could arise from the ability of low basis Du Pont shareholders to sell General Motors stock, currently represented by low basis Du Pont stock, at market prices without gain. The figure assumes that Christiana will in turn distribute the stock it receives through its shareholders.

This sum would be payable over a shorter period of time if the court adheres to the admonition contained in section 1 of the bill with regard to limiting the period of divestiture. Indeed, Assistant Attorney General Oberdorfer has testified that the Department of Justice feels that if the bill is passed the divestiture could be appropriately completed in 2 years. It should be pointed out, however, that Du Pont's plan for distribution under the Boggs bill would, if made under present law, result in the payment of Federal income taxes in an amount roughly in the neighborhood of $1 billion as described in the Treasury Department's report to this committee.

Senator DOUGLAS. Now, Mr. Knight, you mention the report of the Treasury to this committee on S. 2266. When was that report submitted?

Mr. KNIGHT. Actually that report on S. 2266 has come down, I believe, today, early this morning. The report was prepared, the committee should know, several weeks before, and it was cleared by Budget for release only yesterday.

Senator DOUGLAS. Mr. Chairman, I wonder if copies of this report could not be made available to members of this committee because I had not previously heard of this report by the Treasury on S. 2266.

The CHAIRMAN. What was the question?

Senator DOUGLAS. I asked if copies of the report on S. 2266 by the Treasury, could not be made available to members of the committee? I see the clerk has given me a copy of what seems to be this report on S. 2266. I think this is very vital, and I ask that it be made a part of the record at this point.

The CHAIRMAN. Of course, it should be a part of the record.

Senator DOUGLAS. I had not previously known of it, Mr. Chairman.

The CHAIRMAN. We will make it a part of the record.

(The document referred to follows:)

THE GENERAL COUNSEL OF THE TREASURY,
Washington, September 12, 1961.

Hon. HARRY F. BYRD,
Chairman, Committee on Finance,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for this Department's views on S. 2266, to amend the Internal Revenue Code of 1954 so as to provide that certain distributions of stock made pursuant to orders enforcing the antitrust laws shall not be treated as dividend distributions but shall be treated as a return of basis and result in gain only to the extent basis of the underlying stock is exceeded; and to further provide that the amount of a dividend in kind received by a corporation shall be its fair market value.

S. 2266 would add a new section 1111 to the Internal Revenue Code which would provide special tax treatment for individual shareholders who receive divested stock pursuant to an antitrust order. Proposed section 1111 would treat a distribution of divested stock to such shareholders as a return of capital which would be received tax free except to the extent that the fair market value of the divested stock exceeds the shareholder's cost basis for the "old" stock with respect to which the distribution is made. The fair market value of the divested stock would be applied against and reduce the adjusted cost basis of the old stock and any excess of fair market value over such cost basis would be treated as a taxable capital gain from the sale or exchange of property.

The tax treatment which would be accorded by the bill is similar to the tax treatment now provided by section 301 of the code to a corporate distribution which is in excess of the corporation's earnings and profits. The proposed section 1111 provides that the earnings and profits of the distributing corporation shall not be diminished by reason of any distribution of divested stock which is treated as a return of capital.

During the past 2 years several forms of tax relief have been proposed in order to facilitate antitrust divestiture proceedings. Interest in this matter has been highlighted by the pending case of *United States* v. *E. I. du Pont de Nemours and Co.* in which the Supreme Court has recently held that, within a period of 10 years, Du Pont must divest itself of its 63 million shares of General Motors stock.

Whether relief to shareholders who have not themselves participated in antitrust violations is warranted in antitrust divestiture cases would appear to this Department to depend upon finding the presence of three factors, viz: (*a*) that the present tax law does not provide equitable treatment for innocent shareholders, (*b*) that failure to provide tax relief for antitrust divestitures would produce a substantial adverse impact upon the market for divested shares as a result of their sale by the shareholders to meet the taxes to be assessed, and (*c*) that antitrust enforcement would be improved by the enactment of tax relief. This Department is not in a position to express an opinion as to the existence of any of these factors or the weight to be given to them. We believe, however, that the proposed relief should not have the effect of placing the shareholders in a better position after divestiture than they would have been if the divestiture had not been ordered, and we understand that the bill is intended to give effect to this principle in paragraph g(1)(B) thereof, requiring the court to find that the relief is both necessary or appropriate and required to reach an equitable order.

If the Congress should determine that the relief proposed should be given, we would urge, as a condition to the granting of the relief, that the duration of the time for divestiture of the shares be limited to a relatively short period. Since the relief proposed would be designed to eliminate any inequity to shareholders and the possibility of an adverse market effect, there would appear to be little need for deferring the imposition of taxes payable under the bill. Moreover, the antitrust objective to be accomplished by divestiture would be more readily obtained by a relatively short period of divestiture. If in the *Du Pont* case, for example, S. 2266 is enacted and the divestiture takes place over the 10 years permitted by the Supreme Court, Du Pont could distribute its General Motors stock in place of its regular taxable dividend and thus distribute its current earnings tax free (or in some cases taxable at capital gains rates). Thus, for 10 years Du Pont stock would become a tax-free or capital-gains-

dividend stock. The granting of such a benefit would appear to be wholly unwarranted.

S. 2266 also would amend section 301 of the 1954 code to provide that the intercorporate dividend tax would be imposed against the fair market value of property received by a corporation, but that the recipient corporation would obtain only a carryover basis for the property except where such basis is less than the amount included in the corporation's income after application of the intercorporate dividend-received deduction. This would generally provide a minimum carryover basis of 15 percent of the fair market value of the property. This intercorporate dividend tax formula follows the approach suggested by this Department in our report of July 18, 1961, on H.R. 7849 to the Committee on Ways and Means. However, as a result of further study, we would revise the intercorporate dividend tax formula to provide that the basis in the hands of the recipient generally would be equal to the basis in the hands of the distributor increased by 15 percent of the difference between such carryover basis and the fair market value of the property at the time of distribution. Although technical revision of the formula would produce slightly less revenue than our first suggestion, it would be more in keeping with the principle that the total taxes derived from an intercorporate distribution and subsequent sale of property should not exceed the total taxes to be derived if the distributing corporation first sold the property and distributed the net cash proceeds.

S. 2266 also would amend section 312 of the 1954 code, relating to the computation of earnings and profits, in order to avoid a doubling up of earnings and profits by reason of the new intercorporate dividend tax formula. Technical refinements appear to be required in the proposed amendment to section 312. For example, the proposed rule for diminishing the earnings and profits upon a subsequent sale or exchange by the recipient corporation should be extended to a subsequent distribution by the recipient corporation.

For obvious reasons it is impossible to determine the amount of revenue that would be realized in future divestiture cases under present law or under S. 2266 if it were to be enacted. In the case of Du Pont, the estimates which have been made are of necessity based on assumptions that any distribution of GM stock will be made to existing Du Pont shareholders, and do not take account of possible steps that such shareholders might take to minimize their taxes by new arrangements or other dispositions of their present holdings.

With such qualifications and arbitrarily assuming a 50 percent tax bracket for individual shareholders, we estimate[1] that under present law the total taxes payable by individual Du Pont shareholders upon distribution of GM shares, valued at $44 a share, would amount to approximately $900 million and about $3.5 million would be payable by corporate shareholders of Du Pont. This sum would be increased by as much as another $200 million if Christiana is forced to sell the GM stock it receives and by a substantial amount more if Christiana in turn distributes such shares to its own shareholders.

On the same assumptions under S. 2266, the taxes immediately payable are estimated to be about $170 million from individual shareholders of Du Pont and about $65 million from corporate shareholders of Du Pont by reason of the proposed intercorporate dividend tax formula. This sum would be increased by about $170 million if Christiana is forced to sell the GM stock it receives and by a substantial amount more in Christiana in turn distributes such shares to its own shareholders. Because of the very speculative character of any such attempt, we have not tried to estimate the revenue which would be realized under existing law or under S. 2266 upon the sale or other disposition of the Du Pont stock by present Du Pont shareholders.

If Congress should pass S. 2266, modified to include our suggestions, this Department would not object to its becoming law, although we take no position with respect to the need or desirability of tax relief in antitrust divestiture cases.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

ROBERT H. KNIGHT, *General Counsel.*

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[1] Much of the information used in making these estimates was supplied by representatives of the Du Pont Co.

The CHAIRMAN. Proceed.

Mr. KNIGHT. Thus, according to the representations made by the Du Pont representatives to the Treasury Department, the effect of the Boggs bill would be to change the pattern of distribution, to increase the control or choice of section of the shareholders with respect to the assets in question,[4] and to shift the tax burden from the Du Pont Co. to the shareholders who acquired their shares prior to 1949 when Du Pont stock last sold at a price below current market price of the General Motors shares to be distributed. In this connection, I should point out that Du Pont very recently filed in the antitrust suit in the Chicago court, a proposed final judgment which would permit Du Pont to divest itself of General Motors stock—

by distribution to its stockholders or by such other means as it may select * * *.

If Du Pont prevails, Christiana would not be legally bound to redistribute any General Motors' stock it receives and its failure to do so would reduce the taxes payable by roughly $136 million. Despite these considerations, however, it must be conceded that if the Du Pont assumptions may be taken as factual, the revenue payable to the United States as a practical matter will be approximately the same whichever tax law is made applicable to the divestiture. If the committee is satisfied that this practical result will in fact obtain, this would remove a principal concern which the Secretary of the Treasury had at the time our report was prepared.

Senator DOUGLAS. Let me clarify this. Do I understand that Du Pont, as distinguished from Christiana, has asked Judge La Buy to free Christiana from any obligation to redistribute General Motors stock?

Mr. KNIGHT. No. As I understand it, Du Pont, as required by the Supreme Court mandate, a week or so ago filed with the Chicago court a proposed decree which would carry out the direction of the Supreme Court and the district court to the divestiture of General Motors stock.

Senator DOUGLAS. That does not carry with it any requirement upon Christiana that Christiana should redistribute.

Mr. KNIGHT. It carries no requirement whatsoever with regard to Christiana.

Senator GORE. Yet your report assumes that Christiana will make a distribution?

Mr. KNIGHT. Senator, I have assumed nothing. I want to be very clear on that. Du Pont has suggested to us that this is what it would do, and I am merely pointing out to the committee the assumptions which Du Pont has made and has advised the Treasury Department it would propose to follow under certain alternatives.

Senator GORE. In your footnote on page 4 you say:

It also seems to ignore potential losses of revenue that could arise from the ability of low basis Du Pont shareholders to sell General Motors stock, currently represented by low basis Du Pont stock, at market prices without gain. The figure assumes that Christiana will in turn distribute the stock it receives to its shareholders.

[4] E.g., Du Pont shareholders will be able to obtain at reduced capital gains rates full control of the General Motors shares and may thereafter obtain tax free the proceeds of any sales of such stock. Following the Du Pont plan under present law would leave the proceeds after taxes from such a sale in the Du Pont Co., and if distributed, such proceeds would be subject to ordinary income taxes on the shareholders.

Mr. KNIGHT. And I indicated that the figures are the estimate made by Du Pont on the basis of what it would propose to do if the Boggs bill were passed, and the estimate submitted by Du Pont, and which we looked at informally, contained an express assumption that Christiana would redistribute its stock to its shareholders.

Senator WILLIAMS. But that assumption is based on the assumption that, perhaps, the court is going to force them to distribute.

Mr. KNIGHT. Du Pont would have to answer as to why they assume that.

Senator WILLIAMS. Well, the assumption would be that if they are not forced to distribute it, they would not distribute under existing law any more than they would under this bill; isn't that correct?

Mr. KNIGHT. I am sorry, Senator; I did not hear that.

Senator WILLIAMS. Under existing law if they are not forced to distribute it this bill would not affect it in any way.

Mr. KNIGHT. It would not.

Senator WILLIAMS. And if they are not forced to distribute it by the court they could not distribute it under the provisions of this bill.

Mr. KNIGHT. That is right, Senator.

Senator WILLIAMS. Yes.

Senator GORE. I would like to get an answer——

Senator KERR. I would suggest, Mr. Chairman, that the Du Pont witnesses are here in the event they get a chance to testify, and members want to cross-examine them, and they will have ample opportunity to do so.

Senator GORE. Well, Mr. Chairman, in reply to that, I would call the committee's attention to the fact that about two-thirds of the testimony of Mr. Knight is based upon various assumptions and probabilities as to what the Du Pont Co. may or may not do.

Senator KERR. He has made it very clear they are based on those assumptions.

Senator GORE. And, I submit, if the presentation of the Treasury Department is to be based upon such assumptions then committee members ought to be entitled to inquire about them.

Senator KERR. They are and, I would presume, they will, and I withdraw the suggestion. I only made it to be helpful, thinking that what my friend wanted was information rather than "iffy" answers to "iffy" questions.

Senator GORE. The Senator is correct in his conclusion as to my desire. I do desire information, not "iffy" probabilities. But I am sorry to say that the latter is what we have had for the most part from the Treasury Department and, as I have read on through the statement, the Treasury Department has not yet made up its mind whether it is for or against this bill; is that right, Mr. Knight?

Mr. KNIGHT. The Treasury Department has indicated to the House Ways and Means Committee that if the bill contains suggestions which we made to the House Ways and Means Committee and which are contained in the reported bill, if they were made, the Treasury Department would not object to the passage of the bill.

Senator KERR. That is stated very clearly in the report of the Treasury which the Senator from Illinois asked to put in the record a while ago, on the last page, next to the last paragraph.

Senator GORE. I had hoped that in a Democratic administration we would have a Treasury Department which could make up its mind one way or the other on important tax matters. I am sorry to say that in this case, in the case of restricted stock options, in the case of H.R. 10, and several other matters, the Treasury Department has been most indecisive, in my opinion, and ineffective.

I would like to ask a question of fact from the Treasury. Are there not provisions of law now for partial liquidation of corporate assets?

Mr. KNIGHT. Yes, sir; there are, Senator. They would not apply to this situation or presumably would not apply to this situation, because there is a general rule of thumb that for those provisions to apply the corporation has to have a contraction of corporate business and, presumably the General Motors stock does not constitute a part of the business, or the General Motors Co. does not constitute a part of the business, of the Du Pont Co.

Senator GORE. Well, if——

Senator KERR. Not an "iffy" question, surely, Senator. [Laughter.]

Senator GORE. I thank my friend. The principles contained in existing provisions of law for partial liquidation could be applied to Du Pont if the Congress so chose.

Mr. KNIGHT. Yes, it could.

Senator GORE. What are those principles?

Mr. KNIGHT. The shareholders would pay a capital gains tax on an allocated basis of the appreciation in value.

Senator GORE. If corporation A owned stock of corporation B, and one-fourth of the value of the stock of corporatin A was represented by stock held by A in B, then under the partial liquidation provision of existing law the allocation would be to the stockholder, one-fourth B, three-fourths A.

Mr. KNIGHT. One-fourth would be taxed at capital gains rates, but I think you are talking about the allocation between the values of A stock and B stock.

Senator GORE. To the stockholders.

Mr. KNIGHT. I am not quite sure I understand you. You are asking how it would be allocated?

Senator GORE. In consequence of a partial liquidation.

Mr. KNIGHT. Your assumption is correct.

Senator GORE. Thank you, Mr. Knight. But that, of course, is not followed in the pending bill.

Mr. KNIGHT. It is not followed in the pending bill at all.

Senator GORE. Thank you.

Senator KERR. Would the Treasury favor an amendment to the bill permitting the alternative in this situation of the distribution of this stock by Du Pont to its shareholders under the terms of existing law applying to partial liquidation?

Mr. KNIGHT. We would have to study that, Senator. I am trying to recall—a bill for such treatment of the situation, for partial liquidation, I know, has been presented to the Treasury in the past or, at least, it has been considered by the Congress in the past.

We have taken no position favoring such treatment, and we would want to study it a little bit further before we give our views.

Senator KERR (presiding). Proceed.

Senator GORE. You have not made up your mind whether you would be for or against that either?

Mr. KNIGHT. It has not been presented to us, Senator, for consideration.

Senator GORE. Yes.

Senator KERR. Does the Senator offer that as an amendment?

Mr. KNIGHT. We are not offering relief in these cases. We are considering proposals for relief.

Senator GORE. I understand. In 1959, of course, there was a different Treasury Department, but at that time, as I recall the Treasury Department did favor the partial liquidation approach.

Mr. KNIGHT. I am advised that is correct. But whether or not the present Secretary would favor such treatment I cannot say. It has not been presented to him for consideration.

Senator GORE. Then you cannot say that the Secretary of the Treasury favors passage of H.R. 8847?

Mr. KNIGHT. I cannot say that he favors passage of H.R. 8847. I can only say that he would not object to passage in its present form if the Congress determined that it wished to do so.

Senator GORE. So he is neutral on this?

Mr. KNIGHT. He takes essentially a neutral position.

Senator DOUGLAS. You know Congress canont take such an action. We have to be either for or against.

Mr. KNIGHT. To do nothing is to do something; yes.

Senator DOUGLAS. This is a privilege which the executive alone can assume. It is not a privilege which we possess, much as we might wish to have it.

Senator BUTLER. Do I understand from that observation that Congress is never on both sides of the same question?

Senator DOUGLAS. No, we simply have to make up our minds.

Mr. KNIGHT. I believe I was pointing out when I stopped in my prepared statement, Mr. Chairman, that Du Pont has filed a proposed decree in the Chicago court, and the proposed decree suggests that the company be permitted to comply with the divestiture order by distribution of its General Motors stock to its stockholders or by such other means as it may select to accomplish the divestiture order.

I have already pointed out that legally Christiana would not be required to pass through the General Motors stock to its shareholders, and if it failed to do so it would reduce the taxes which they have estimated by roughly $136 million.

Despite these considerations, however, it must be conceded that if the Du Pont assumptions may be taken as a factual, the revenue payable to the United States as a practical matter will be approximately the same whichever tax law is made applicable to the divestiture. If the committee is satisfied that this practical result will in fact obtain, this would remove a principal concern which the Secretary of the Treasury had at the time our report was prepared.

Senator DOUGLAS. What report are you referring to?

Mr. KNIGHT. The report that was submitted by the Treasury.

Senator DOUGLAS. Under date of September 12?

Mr. KNIGHT. Yes.

Senator DOUGLAS. So you had this doubt on September 12. Do you have this doubt as of September 13?

Mr. KNIGHT. No, I am sorry, the report was prepared in August.

Senator DOUGLAS. Well, it is signed "Robert H. Knight, General Counsel."

Mr. KNIGHT. That is correct.

Senator DOUGLAS. Under date of September 12.

Mr. KNIGHT. That is correct, Senator.

Senator DOUGLAS. Does this represent your doubts of September 12?

Mr. KNIGHT. This is a report which was prepared by us a month ago but released by the Bureau of the Budget only yesterday. The question we expressed in that report was our concern over loss of revenue, and we are saying here——

Senator DOUGLAS. Loss of revenue if Christiana does not redistribute the General Motors stock to its shareholders, is that correct?

Mr. KNIGHT. The loss of revenue which would come from Du Pont following the plan it proposes to follow if the Boggs bill were passed. In other words, we have said if this would result in substantial loss in revenue we would naturally be concerned. Now we are saying that Du Pont says they would not follow the plan that would provide the $1 billion.

Senator DOUGLAS. That was a statement which was signed yesterday and which was transmitted to us this morning, and you expressed your doubts in that.

Now, do you have these doubts as of 12 o'clock, one minute after 12, on September 13?

Mr. KNIGHT. Senator, we said we would be concerned by a loss of revenue. We are saying that if the Du Pont assumptions are correct, and they follow the plan they propose to follow, for which we have no commitment, but if they follow it, then, as a practical matter, there would not be the loss of revenue, and this would remove a cause of concern.

Senator DOUGLAS. But you have stated that the Du Pont proposal in the Chicago court does not call for any divestiture by Christiana of General Motors stock, and that if the court so orders, that is, if the court does not make this requirement, that revenue will be diminished by $136 million; isn't that true?

Mr. KNIGHT. If Christiana does not distribute the General Motors stock to its stockholders——

Senator DOUGLAS. Don't you think we ought to try to protect this loophole in the bill before us rather than depend upon the court in this matter?

Mr. KNIGHT. Senator, the Treasury Department is not urging passage of this bill. We have attempted to show the committee the various kinds of revenue estimates that could be made on differing assumptions.

We have no commitment from the Du Pont Co. that these assumptions which they have submitted will, in fact, be carried out.

Senator DOUGLAS. Mr. Knight, I am perfectly ready to acquit you of any charge that you are trying to pass this bill or endorse everything that the Du Pont Co. has told you. But shouldn't you also be concerned with getting a bill which will do justice to the recipients for this accretion in value?

Mr. KNIGHT. That is correct.

Senator DOUGLAS. And, nevertheless, protect the Treasury and the people of the United States?

The point I want to suggest is simply this: Would it not be well to close this loophole in the bill itself by making some provision concerning the fact that Christiana should pass on the General Motors stock instead of holding it?

Mr. KNIGHT. I understand that representatives of the Du Pont Co. are expected to testify, and any form of commitment that they may make to the committee or any indication that they would make to the committee I should think would weigh in the committee's consideration.

Senator DOUGLAS. Aren't you ready to make some recommendations?

Mr. KNIGHT. Our recommendation is that if the committee is satisfied that there will not be a substantial loss of revenue on the basis of whatever evidence the Du Pont Co. plans to offer to this committee, if you are satisfied there will be no loss of revenue, then we would not object to the passage of the bill.

Senator DOUGLAS. But haven't you got some language ready which would make it perfectly certain that General Motors stock would have to be passed on by Christiana to its stockholders?

Senator WILLIAMS. Would the Senator yield for a question there?

Senator DOUGLAS. I would like to have Mr. Knight answer the question first, and then I will be glad to yield to the Senator.

Mr. KNIGHT. Senator, we have not thought it appropriate to ask the Du Pont Co. to make any commitment to us as to how they propose to carry out the distribution of their stock, nor have they offered to do so.

Senator DOUGLAS. You are not dealing with Du Pont at the moment; you are dealing with the U.S. Senate.

Mr. KNIGHT. That is correct.

Senator DOUGLAS. Are you ready to make any recommendation to us of how to guard against this loophole because a tremendous amount of money is at stake on this very issue?

Mr. KNIGHT. The inference of our recommendation, I believe, is that the committee should satisfy itself in questioning the Du Pont representatives who plan to appear here that their revenue estimates have a basis in fact. We have no basis for making such a statement at this time.

Du Pont is free to act in a great many different ways, and they have presented to us revenue estimates based on certain assumptions. We are not prepared to say that their assumptions are correct.

Our hope is that the committee, in questioning Du Pont representatives, will satisfy itself that their contention that there will be no loss of revenue is, in fact, correct, and it is only if you reach that conclusion that we would not object to the passage of the bill.

Senator DOUGLAS. Now, Mr. Knight——

Senator KERR. Would the Senator yield?

Senator DOUGLAS. May I follow this up for just a minute?

Now, Mr. Knight, you know this is a highly complicated matter.

Mr. KNIGHT. Yes, sir.

Senator DOUGLAS. And attorneys on both sides, and indeed, on various sides have been working on this issue for years. The com-

plexities are very great, with hundreds of millions of dollars being at stake.

In a sense, I do not think the Treasury can purely wash its hands like Pilate on this matter and dismiss it. I think you have a responsibility to the Congress to help us on this matter, and I assure you we want to be fair.

I have no punitive desire to punish anybody. Can't you help us, please, on some language which will deal with this question as to whether or not the provisions of this bill should be operative unless Christiana passes on General Motors stock to its stockholders, because the language will be complicated at best?

If Du Pont is not required by the court to do this, and does not ask the court to do it, there is going to be a revenue loss of $136 million. Instead of depending on the court isn't there some way that we can deal with this matter now?

Mr. KNIGHT. Senator, this is a question primarily of antitrust enforcement.

The Justice Department, I believe, is making certain recommendations to the court in response to the proposed decree presented by Du Pont.

We do not feel that it is within the scope of the responsibilities of the Treasury Department to suggest how Du Pont should propose to dispose of its stock. This is now before a court, and it is also a matter of principal concern to the Justice Department.

Senator DOUGLAS. This is also a revenue matter, according to our figures, a matter of $136 million.

Mr. KNIGHT. It is a revenue matter, Senator, but the Treasury Department seldom suggests how people should dispose of their property in order to acquire revenue. In other words, what I am trying to say is we feel it would be improper to urge that Du Pont dispose of its General Motors stock in any particular fashion.

Senator DOUGLAS. What would you say to this proposal, that the provisions of the bill should be inapplicable unless Christiana divests itself of its stock?

Mr. KNIGHT. This again I would prefer to defer to the Department of Justice because the Department of Justice has strong views as to how the company should dispose of its stock.

I believe they are urging that it not be passed through to the stockholders but they are urging that it be sold by Christiana.

Senator GORE. Right at this point, Mr. Knight, you told us earlier that this bill would represent a big increase in tax liability for Christiana.

Now suppose, in fact, this bill is passed, and Christiana does sell its stock.

Mr. KNIGHT. That would result in an increase of revenue to the Treasury Department of a substantial amount. The taxes payable on the sale would be $184 million because Christiana would have to pay a capital gains tax on the appreciation in value between its stepped up basis under section 2 of the proposed bill, and the market value of the stock as sold.

Senator DOUGLAS. Approximately $850 million?

Mr. KNIGHT. $180 million.

Senator DOUGLAS. No, no, the accretion in market value, 25 percent.

Mr. KNIGHT. The stepped-up basis under the proposed bill would result in an increase in basis per share from $2.09 to approximately $8.

Senator GORE. Which would reduce the capital gains tax in case of sale.

Mr. KNIGHT. It would reduce the capital gains tax, but it would increase the corporate dividend tax. The stepped-up basis would reduce the capital gains tax payable, but it would increase the intercorporate tax payable, and the net taxes payable would be greater than they would be under present law if Christiana received the stock and sold it.

Senator GORE. But not as great as would be the case if this bill were passed and the stock distributed to stockholders by Christiana.

Mr. KNIGHT. Well, the step-up in basis——

Senator GORE. That is right. The bill steps up the basis and thereby would reduce the capital gains tax in the event Christiana sold according to the recommendations of the Justice Department.

Mr. KNIGHT. That is correct.

Senator GORE. Then, this is another item that has not been taken into consideration on divestiture.

Mr. KNIGHT. Oh, yes, sir; it has been taken into consideration. The taxes payable under the bill, as proposed, would result in a net increase in tax if Christiana received the General Motors stock from Du Pont and, in turn, sold it, there would be a substantial increase.

Senator GORE. But the step-up, the reduced capital gains as a consequence of the step-up in the basis created by the bill, would tend to equate itself against the step-up in tax on Christiana Corp.

Mr. KNIGHT. It would partially——

Senator GORE. Partially equate.

Mr. KNIGHT. Partially mitigate it. But the net effect would be more revenue if the bill were passed from the standpoint of just looking at Christiana.

Senator GORE. Somewhat. But the estimate we have been given on this bill of the additional tax liability imposed by this bill upon Christiana is certainly modified by the possibility, would be modified——

Mr. KNIGHT. It would be greater.

Senator GORE. By sale after this new basis is established, which would reduce the gain upon which the capital gains tax would be calculated.

Mr. KNIGHT. Well, Senator, the revenue estimate which Du Pont submitted of $350 million would be higher if the bill were passed and if Du Pont, instead of passing through its stock, sold the stock in the market and paid capital gains rates under the terms of the bill. There would be substantially more revenue rather than less. In other words, the figures we have—the purpose of the estimates which we have given have been to show Du Pont's contention that under the Boggs bill they would pay more taxes than they would if no bill was passed.

Now, if Christiana receives the distribution of 18.4 million shares of General Motors stock, to which it is entitled, and if it, in turn,

is required to sell that stock, the revenue estimate of $350 million would have to be increased.

Senator KERR (presiding). Proceed.

Mr. KNIGHT. Also, at the time of preparing our report, we had no independently derived source of information which would tend to support the Du Pont contentions with regard to the impact on the market of divestiture under present law. Since that time we have received advice from the Securities and Exchange Commission which would lend some support to the claim that divestiture under existing Internal Revenue laws could have an adverse impact on the market. However, the Securities and Exchange Commission was careful to point out that there were many factors bearing upon this question which cannot be presently evaluated, such as the general trend of the market over the period of divestiture, the opportunities open to Du Pont to minimize the impact of taxes, et cetera. Accordingly, they cautioned that reliance on any such estimate might prove extremely hazardous.

The difficulties in arriving at reliable tax revenue estimates and in forecasting the impact of divestiture under present law led the Treasury Department to take a neutral position with regard to the desirability of the Boggs bill. However, we can state, if the committee feels that the relief proposed is necessary or desirable under all the circumstances and if it can be established to the satisfaction of this committee that the Du Pont contentions are substantially correct as to market impact and as to the similarity of revenue return to the United States under either present law or the Boggs bill, the Secretary of the Treasury has authorized me to say that he would have no objection to its passage. In so stating, we are aware that the Boggs bill is designed not as a private relief bill but to apply to divestitures generally. In this connection, the discretion left to the court under the terms of the bill would seem to us to provide a safeguard against windfalls to future taxpayers affected by antitrust divestitures.

In other words, the bill says the court must make a finding that this is necessary in equity to the stockholders to accomplish the purposes of the decree.

If in the future a situation should arise which would belie this assumption, we assume that the Congress will take appropriate legislative action to protect the interest of the United States in the light of the facts pertaining in such case, and, indeed, we shall so recommend.

Senator DOUGLAS. Now, Mr. Knight, you say—

if it can be established to the satisfaction of this committee that the Du Pont contentions are substantially correct as to market impact and as to the similarity of revenue return to the United States under either present law or the Boggs bill—

there is no objection to the bill.

Why don't you want to have it established to the satisfaction of the Treasury, not merely to the satisfaction of the committee, to help to determine the position which you have taken?

Mr. KNIGHT. Senator, as I think I have attempted to point out, there are a great many variables in all of these estimates. They cover a number of factors which are not under the control of the Treasury

Department and which, in fact, will be affected by a decree of the court.

Senator DOUGLAS. But you pass that over to us, who are in a far poorer position to judge this matter than you have been, because your staff has had years to consider this matter.

Mr. KNIGHT. Well, Senator, I think our assumption has been that the representatives of the company most affected, the Du Pont Co., are to be called by the committee to testify, and that the committee is in a position which the Treasury at the moment is not, to ask for statements as to how they propose to exercise whatever discretion the court may have given them, and our feelings is that the committee is in a better position than we are by virtue of the information available to it, than we are, to determine whether, in fact, Du Pont proposes to carry out these proposals; whether, in fact, therefore, the revenue will be substantially the same or less.

Senator DOUGLAS. Now, suppose the committee is not able to obtain a commitment from Du Pont as to what Christiana will do, and is not able to obtain a commitment as to whether General Motors stock will be distributed in lieu of cash dividends rather than in addition to cash dividends.

Would you have any advice to us as to what this committee should do?

Mr. KNIGHT. If the committee found that there might be, that there would be some very substantial losses of revenue or that the market impact would not be as claimed——

Senator DOUGLAS. I am ruling out that.

Mr. KNIGHT. There are a number of factors which we think are to be weighed here, which we think are not within our own particular competence.

Senator DOUGLAS. I will ask two specific questions, each one in turn:

Suppose we are not able to obtain a commitment from Du Pont that Christiana will distribute its shares of General Motors stock to its stockholders. Would you regard this as a serious argument against the bill?

Mr. KNIGHT. I would think the problem, Senator, was whether the committee was satisfied with the revenue estimates submitted by Du Pont which, I presume, they will submit to this committee. Whether or not a commitment is necessary to the satisfaction of your judgment, I just cannot say.

Senator WILLIAMS. Mr. Chairman, would you yield for a question? In the absence of an agreement by the Department of Justice could Christiana enter into any such agreement with the committee? Would they not have to take into consideration the possibility that Justice might have different ideas?

Mr. KNIGHT. They certainly would.

Senator KERR. Is not Justice asking the Supreme Court to direct Christiana to either sell or pass through?

Mr. KNIGHT. I believe that the Department of Justice is asking not the Supreme Court, the Chicago court.

Senator KERR. The trial court, the one having the jurisdiction, to preclude a passage through of these shares by Christiana.

Mr. KNIGHT. The Department is opposing any desire on the part of Christiana to pass through shares to its stockholders.

Senator KERR. What are they asking?

Mr. KNIGHT. They are asking that Christiana dispose——

Senator KERR. Sell.

Mr. KNIGHT (continuing). Dispose of any General Motors shares it now has without passing them through to its shareholder, sell it, give it away, et cetera.

Senator KERR. If the court so orders, then Christiana would be bound by it.

Mr. KNIGHT. This is a question I think probably before the court. I believe this is a question in dispute.

Senator KERR. If the court issues a decree which became final——

Mr. KNIGHT. I assume that the court could adequately provide for that.

Senator KERR. And Justice is here to speak with reference to that?

Mr. KNIGHT. That is correct.

Senator KERR. And you are not in position to bind them nor are you bound by them?

Mr. KNIGHT. That is correct.

Senator DOUGLAS. Now, Mr. Knight, if I may ask—pardon me, Senator, have you finished?

Senator KERR. I hope I am not finished. I have no further questions.

Senator DOUGLAS. I mean, are you finished at the moment. [Laughter.]

Mr. Knight, may I ask the second part of my question:

Suppose Du Pont were to distribute the General Motors stock in lieu of cash dividends, not in addition to cash dividends. These would be taxable as capital gains, would they not, rather than as income?

Mr. KNIGHT. No. If Du Pont distributed General Motors stock in lieu of cash dividends, then the stock would be taxable as ordinary income.

Senator DOUGLAS. Under this bill?

Mr. KNIGHT. No, not under this bill.

Senator DOUGLAS. That is the point.

Mr. KNIGHT. Not under this bill.

Senator DOUGLAS. Then, under this bill if Du Pont, under this bill, distributed this stock in lieu of ordinary dividends, it would be taxable at capital gains rates, would it not?

Senator KERR. Not at all.

Senator DOUGLAS. Just a minute, Senator.

Senator KERR. If they distribute this stock as a dividend, the income is taxable as ordinary income.

Sentaor DOUGLAS. I have great admiration for the ability of the Senator from Oklahoma.

Senator KERR. I charge nothing for information.

Mr. KNIGHT. The bill attempts to take care of it, Senator. It has a special rule which states that the relief provided by the bill shall not apply to any transaction one of the principal purposes of which is the distribution of earnings and profits of the distributing corporation. Presumably that would—so that if they distributed this as in lieu of ordinary cash dividends, it would fall under the provision of

this section since the principal purpose of the distribution would be the distribution of profits.

Senator DOUGLAS. Does the bill set up any test or criteria as to whether the distribution of the General Motors stock is in lieu of cash dividends or is in addition to cash dividends?

Mr. KNIGHT. No; it does not.

Senator DOUGLAS. What?

Mr. KNIGHT. It does not set up any criteria for determining it.

Senator DOUGLAS. Don't you think that such a test is desirable?

Mr. KNIGHT. I think that the Du Pont company has a dividend history and, presumably, there would be a number of other facts which would indicate readily to anyone looking at the facts whether the distribution was in lieu of dividends or in addition to dividends or partially one and partially the other.

Senator DOUGLAS. You mean this would be subject to suit by Internal Revenue?

Mr. KNIGHT. I think it is a factual question, and the facts would be facts which are readily available for such a determination. I am saying that on the basis of my own personal experience, where a corporation declares dividends, usually there are adequate records which would permit a determination of what it has done.

Senator KERR. Under section (c) of title—I do not know—have you got the report of the committee? The act contains this provision, I believe, Mr. Knight:

(1) DISTRIBUTIONS TO AVOID FEDERAL INCOME TAX.—Subsection (f) shall not apply to any transaction one of the principle purposes of which is the distribution of the earnings and profits of the distributing corporation or of the corporation whose stock is distributed, or both.

Mr. KNIGHT. It was to that section, Senator, that I was referring a minute ago.

Senator KERR. I interpret that as being rather specific criteria; don't you?

Mr. KNIGHT. Yes, sir; I do. Senator Kerr, I was responding to Senator Douglas' question on the assumption that he had some question as to how you determine whether it was in lieu of or in addition to cash dividends, and I said I believe in any publicly held corporation that there is sufficient evidence to make such a factual determination.

Senator DOUGLAS. There may be some reservations on this if there is an investment. The earnings plowed back in the form of investment are subject to corporation tax and not necessarily individual taxes.

Mr. KNIGHT. Well, I am not sure I understand your question.

Senator DOUGLAS. Just let the question stand for the record. You might have the earnings show up on the corporation tax as 52 percent, but by reinvestment, not in an individual income tax.

Mr. KNIGHT. Oh, yes; I see. You were asking whether they might otherwise have a larger dividend than normal if they had not plowed it back. Again, there probably would be corporate records that would help in that. But——

Senator GORE. I seem to recall that earlier in your testimony you expressed the hope that the committee would be able to reach certain

understandings or obtain certain commitments from the Du Pont Co. as to its course of action in the event of passage of this bill; is that correct?

Mr. KNIGHT. I do not believe, Senator, that I suggested that the committee obtain commitments. We have asked that the committee, on the basis of the evidence that I understand they are asking or testimony they are eliciting, that they satisfy themselves that these facts and assumptions, in fact, have a basis.

Senator GORE. What hope was it that you expressed earlier today? You expressed the hope that the committee would, I understood to say, obtain commitments and understandings. Maybe you did not. I seem to recall that.

Mr. KNIGHT. No. I think I said we had obtained no commitments or understandings, and we hoped that the committee—I pointed out that the committee had before it representatives of the company which I hoped would enable them to make a determination, satisfy themselves, that these facts are, in fact, factual.

Senator GORE. Now, in response to questions from Senator Kerr you say, in fact, that Du Pont is incapable of entering into such commitments, and I would suggest further that Congress would be in a peculiar position of trying to enforce a commitment, if it had one. Has that occurred to you?

Mr. KNIGHT. Yes, sir. I am not suggesting that you obtain commitments.

Senator GORE. Then, having said that Du Pont is incapable of giving commitments——

Senator KERR. No, no; Christiana.

Senator GORE. He said it with respect to both.

Senator KERR. Well, it is factual with respect to both.

Senator GORE. You agree it is factual with respect to both?

Mr. KNIGHT. Yes.

Senator KERR. No party can make a commitment to do something which the court is about to prohibit it to do if the court proceeds to prohibit it from doing it.

Senator GORE. We understand that.

Mr. KNIGHT. Yes.

Senator GORE. Now, if the committee, therefore, is unable to establish to its satisfaction that the Du Pont contentions, plans, or assumptions are substantially correct, what would be the position of the Secretary of the Treasury with respect to his recommendation on this bill? Would he still be neutral?

Mr. KNIGHT. If the committee were not satisfied that this was justified under the factors which we suggested as those that should be weighed, then I presume the committee will not report favorably on the bill, and the Secretary would feel they acted perfectly properly in not reporting favorably on the bill.

Senator GORE. Would he recommend that it act properly or improperly?

Mr. KNIGHT. He certainly recommends that it act properly. In other words, the Secretary, Senator, is pointing out——

Senator GORE. We are getting very close to saying the Secretary is going to be against this bill. You had better be careful.

Mr. KNIGHT. The Secretary does not object to the bill if the committee is satisfied in weighing the factors of market impact, equity to shareholders, antitrust enforcement, and revenue that the——

Senator GORE. You do not say that.

Mr. KNIGHT. This is warranted.

Senator GORE. You do not say that.

Mr. KNIGHT. If the committee finds these factors do not justify the bill, I am sure the Secretary would agree the bill ought not to be reported favorably.

Senator GORE. You say if it is established to the satisfaction of the committee that the Du Pont contentions are substantially correct as to market impact. Now, the Securities and Exchange Commission does not agree with the estimates of the Du Pont Co. and you plead your inability to reach an opinion on the case.

Mr. KNIGHT. I am not clear that the SEC disagrees. I think they have only said that they cannot state with any certainty that the Du Pont contentions as to market impact will, in fact, occur.

Senator GORE. Then you think the committee could or the Treasury could satisfy itself with uncertainties?

Mr. KNIGHT. The Treasury has said that if the committee is satisfied as to market impact——

Senator GORE. Well, I wish you would report—there is no requirement for you to do so—but I would be pleased if you would report to the Secretary of the Treasury that one member of the committee wishes he would make up his mind.

Mr. KNIGHT. I shall certainly so report, Senator.

Senator GORE. Thank you.

The CHAIRMAN (presiding). I would like to point out that the letter to the chairman dated September 12 is very much more specific. It says:

> If Congress should pass S. 2266, modified to include our suggestions, this Department would not object to it becoming law, although we take no position with respect to the need or desirability of tax relief in antitrust divestiture cases.

That is much clearer than the testimony which you have given us.

Senator GORE. Clearly it does not take any position at all.

The CHAIRMAN. He says he has no objection, and that is the customary procedure with the various departments of the Government. If they have an objection to the bill they state their objection. If they say they have no objection, that indicates they are not opposed to the bill, and if they are not opposed to it, therefore, they are for it. They cannot be both. [Laughter.]

Senator DOUGLAS. Provided the facts are as stated.

Senator KERR. Mr. Chairman, I suggest that the letter from the Treasury forms a basis that cannot provide comfort to the members of the committee in staying with the convictions they had about the bill when the hearings started.

Senator GORE. And provides no assistance for the committee to reach satisfactory conclusions.

Senator KERR. That is neither the Treasury's letter nor is there any other document capable of being written by human hands which could provide comfort to some members of this committee with reference to the passage of this bill.

Senator DOUGLAS. I agree. [Laughter.]
Senator GORE. Passage of this bill?
Senator KERR. That is right, or any bill calculated to accomplish a purpose similar to the one calculated to be accomplished by this bill.
Senator GORE. I doubt if any member of the committee could be so described.
Senator DOUGLAS. I want to strike my comment, if I may, because I think it is susceptible of an improper interpretation.
The CHAIRMAN. Are there any further questions?
(No response.)
The CHAIRMAN. If not, the committee will recess until 2:30. Does that suit you?
(Whereupon, at 12:30 p.m., the committee was recessed, to reconvene at 2:30 p.m., the same day.)

AFTERNOON SESSION

Senator KERR (presiding). The committee will come to order.
Mr. Louis F. Oberdorfer. All right, Mr. Oberdorfer.
That is Judge Lee Loevinger you have with you?

STATEMENT OF LOUIS F. OBERDORFER, ASSISTANT ATTORNEY GENERAL, TAX DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY LEE LOEVINGER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. OBERDORFER. Judge Loevinger is sitting with me, sir.
Senator KERR. For his benefit or yours?
Mr. OBERDORFER. He is here at the request of the committee.
Senator WILLIAMS. The chairman asked him to be here.
Mr. OBERDORFER. The chairman asked him to be here, sir. Judge Loevinger is the head of the Antitrust Division.
Senator KERR. Very good; you may proceed.
Mr. OBERDORFER. Mr. Chairman, I am here this afternoon in response to the committee's request that the Department present its views on H.R. 8847, as reported to the House of Representatives by the Committee on Ways and Means.
This bill would amend the Internal Revenue Code of 1954 with respect to the taxation of distribution of stock made pursuant to orders enforcing the antitrust laws. Substantially similar legislative proposals (S. 2266) have been the subject of written comment by the Attorney General and the Deputy Attorney General and have been carefully considered in terms of the pending case of *United States* v. *Du Pont*.
As you know, the Du Pont case was initiated by our predecessors in 1949 and thereafter vigorously prosecuted by them. The case was twice carried to the Supreme Court. In 1957, the Supreme Court held that Du Pont's ownership of 23 percent of the stock of General Motors Corp. violated section 7 of the Clayton Act and remanded the case to the district court for determination of the relief necessary and appropriate to terminate the Clayton Act violation. In 1957 the Department submitted to the district court, at its request a proposed judgment which would provide that Du Pont divest itself of its shares

of General Motors stock by annually distributing, as a dividend, one-tenth of this stock for a period of 10 years; that is, one-tenth each year over a period of 10 years.

The Department further proposed that since Christiana Securities Co. and Delaware Realty & Investment Corp. owned 30 percent of Du Pont's stock and have long been intimately linked with Du Pont's management, the stock distributed to these corporations be sold at public or private sale by a trustee within a year after distribution or within any additional time granted by the Court.

In 1959 the district court concluded that Du Pont need not divest itself of its General Motors stock. It determined that adequate and effective relief against future violation of section 7 of the Clayton Act would be provided by Du Pont's "passing through" its voting rights in General Motors stock to Du Pont common stockholders on a pro rata basis. The district court refused to decree divestiture of the kind proposed by the Department because the court concluded that it would impose heavy tax and adverse market consequences on stockholders of Du Pont and General Motors.

In 1959 the Department appealed to the Supreme Court to reverse the district court decision. On May 22, 1961, the Supreme Court held that the remedy ordered by the district court was not adequate effectively to cure the situation. It directed the district court to enter a decree requiring Du Pont to divest itself completely of the General Motors stock within 10 years from the date of the decree. The Supreme Court held that divestitures could not be denied because of possible tax or market consequences.

The Department having stated in its brief in the Supreme Court that it recognized that alternative plans of divestiture were possible, the method of divestiture was left by the Supreme Court to be fashioned by the district court upon hearing all the parties. The Supreme Court ordered that Du Pont's proposal for carrying out the divestiture be submitted to the district court on or before September 5, 1961.

Du Pont has submitted to the district court a proposed final judgment which would direct that divestiture commence within 90 days from the effective date of the judgment and be completed within 10 years but does not prescribe the methods to be used by Du Pont, that is, methods to effect the divestiture.

Senator KERR. To perfect or effect it?

Mr. OBERDORFER. Effect it.

Senator KERR. All right.

Mr. OBERDORFER. Du Pont, however, has indicated outside the court proceedings that it is considering at least two general methods for carrying out the divestiture which has been ordered by the Supreme Court.

One of these methods is the distribution of General Motors stock directly to Du Pont stockholders.

The other general method is the so-called flexible procedure originally suggested by the Government in its brief in the Supreme Court and more recently proposed by Du Pont—proposed informally, not on the record, that is, not in the court, but suggested at least to its stockholders by Du Pont—in the event that tax relief legislation is not enacted. Under the alternate method Du Pont would dispose of its General Motors stock as follows—this is not specific but it is an

example; it might distribute approximately 15 million shares of General Motors stock to Du Pont stockholders in lieu of cash dividends, exchange approximately 10 million shares with Du Pont stockholders in redemption of their Du Pont stock and dispose of approximately 35 million shares on the market.

The bill here under consideration, the one which has been reported out by the House Ways and Means Committee, would apply only to the extent that Du Pont would distribute the General Motors stock directly to its, that is, Du Pont stockholders.

H.R. 8847 would treat a stock distribution to an individual shareholder pursuant to an antitrust divestiture decree as a return of capital for Federal income tax purposes.

The result would be, in the Du Pont case, assuming divestiture was accomplished by stock distribution, that an individual Du Pont stockholder receiving General Motors stock would pay no tax on that stock except to the extent that the value of the General Motors stock received exceeded the basis of the Du Pont stock in his hands. The excess, that is, the excess of the General Motors stock over the basis of the Du Pont stock, would be taxed at capital gain rates.

Further, H.R. 8847, as reported to the House of Representatives, would change the tax consequences to corporations of stock distributions made pursuant to antitrust divestiture decrees. Section 2 of H.R. 8847 would amend section 301 of the Internal Revenue Code to tax what is described in the bill as "antitrust stock"—that is, stock received by a corporation in a distribution after September 6, 1961, made either pursuant to, or in anticipation of, an antitrust divestiture decree—at its fair market value rather than at its basis in the distributing corporation's hands, which is the way it can be taxed under existing law.[1] Section 2 of H.R. 8847 would not, however, change the 7.8 percent effective rate at which certain intercorporate distributions are taxed.

None of these tax consequences would follow, and this bill would not apply, unless the court ordering the divestiture finds that the period of time fixed for the divestiture is the shortest time within which such divestiture can be executed in the circumstances of the case.

The Department feels that general legislation along the lines under consideration is not necessary and not justified as an aid in the enforcement of the antitrust laws.

Senator KERR. I take it your statement in that regard is limited to the proposition of being an aid in the enforcement of the antitrust law?

Mr. OBERDORFER. In this connection, yes, sir; that is correct.

Senator KERR. All right.

Mr. OBERDORFER. For example, H.R. 8847, as reported to the House of Representatives, does not provide a general solution to the combined antitrust and tax problems of divestiture. This bill would apply only to distributions of stock pursuant to antitrust divestiture decrees. However, as Du Pont's alternate proposals themselves illustrate—I say Du Pont's alternate proposals, they were also suggested to the Supreme Court by the Department—there are many variations of

[1] Du Pont's General Motors stock has an average basis of $2.09 per share; its market value is approximately $48.

transactions which would carry out a divestiture decree, including corporate dissolutions, stock redemptions, exchanges, gifts, and sales.

Senator KERR. Let me ask you this.

Mr. OBERDORFER. Yes, sir.

Senator KERR. Representing the Justice Department in the enforcement of the antitrust laws, is your interest primarily enforcement of the antitrust laws, exclusively enforcement of the antitrust laws, or does it go beyond either?

Mr. OBERDORFER. Certainly we are in this context primarily interested in the enforcement of the antitrust laws.

Senator DOUGLAS. Mr. Chairman, may I ask a question?

Senator KERR. I will be glad to cease and desist until the Senator from Illinois asks a question, or I would be glad to finish the question I have in mind.

Senator DOUGLAS. I would be glad to cease and desist if the chairman has other questions.

Senator KERR. Did you understand the question?

Mr. OBERDORFER. Yes, sir. You asked whether we were—as I recall it, Senator, we were asked whether we are primarily interested in enforcement of the antitrust laws or exclusively interested——

Senator KERR. Or otherwise.

Mr. OBERDORFER. Or otherwise.

Senator KERR. Or otherwise.

Mr. OBERDORFER. I would say that I do not think that we can say we are exclusively interested in the antitrust laws or——

Senator KERR. What is your other interest?

Mr. OBERDORFER. We have concern that—if I can say that this way, Senator: We do not want to be in the position of recommending to the Congress that there be a change in the tax laws, as they apply generally for the purpose, in order to help us or under, I do not want to use the word "pretext" invidiously, I do not mean it invidiously, but on the assumption that a change in the tax laws would help us to enforce the antitrust laws.

Senator KERR. You made that statement, you made it quite plainly, in the paragraph ahead of this.

Mr. OBERDORFER. And we do not want to be in the position of, I do not want to use the word "acquiescing," again, we do not want to be in the position of recommending legislation which might have the opposite effect; that is, tax legislation which could be a source of some handicap to us in the enforcement of the antitrust laws.

Senator KERR. I asked you, you have not yet told me what other interests you have other than in the enforcement of the antitrust laws.

Mr. OBERDORFER. I think that—I cannot define another interest except to say that the antitrust problem in this case is, in part, a tax problem. In other words, how the antitrust law works would be affected by what the Congress does with the tax laws.

Senator KERR. I did not know that the antitrust law was enacted to either increase or decrease tax revenue.

Mr. OBERDORFER. I think I, certainly—that is certainly right, Senator.

Senator KERR. What I am asking you is, is your purpose one either to maintain existing tax laws or change existing tax laws for

any purpose other than to enable you to meet your responsibilities in connection with enforcing antitrust legislation?

Mr. OBERDORFER. Well, I think we do have—I think we have tried here to make an analysis and to make statements about the effect of tax law changes on antitrust laws.

Senator KERR. Well, I am asking you, though, and I would like an answer, what is the interest of the Justice Department in our tax laws other than in connection with your responsibility in enforcing the antitrust law?

Mr. OBERDORFER. Well, you see, Senator, what we are trying to say is that when it comes to enforcing the antitrust laws we do not want to recommend a change in tax laws.

Senator KERR. I am not asking you to recommend. You have a responsibility as an agency of Government.

Mr. OBERDORFER. Yes, sir.

Senator KERR. Insofar as the matter before us is concerned, as I understand it, it has to do with the enforcement of antitrust laws.

Mr. OBERDORFER. That is right.

Senator KERR. What I am asking you is, what other interests you have than in the enforcement of the antitrust laws in connection with tax legislation?

Mr. OBERDORFER. The responsibility——

Senator KERR. Do you have any responsibility to collect taxes, to write tax laws?

Mr. OBERDORFER. Not to write tax law; no, sir. But, for instance, the Tax Division, as the Senator knows, has responsibility for enforcing——

Senator KERR. And collecting taxes.

Mr. OBERDORFER. And litigating.

Senator KERR. And enforcing penal provisions of the tax laws.

Mr. OBERDORFER. Criminal and civil.

Senator KERR. And civil.

Mr. OBERDORFER. We do have responsibilities in the tax area, in other words.

Senator KERR. But that is the responsibility, isn't it?

Mr. OBERDORFER. That is it; yes, sir.

Senator KERR. And it has to do with the tax laws as written by the Congress?

Mr. OBERDORFER. That is correct, sir; yes, sir.

Senator KERR. Not as the Justice Department would like to have the tax laws be?

Mr. OBERDORFER. No, sir.

Senator KERR. But as they are.

Mr. OBERDORFER. That is correct, sir.

Senator KERR. What I am asking you now is, what other interests than that you have in the tax laws.

Mr. OBERDORFER. Well, in this context, Senator, it seems to me inevitable that in considering a proposal to amend the tax laws on account of an antitrust problem, that we would look at the tax effect of the proposal. It is not a matter of interest——

Senator KERR. Is that your responsibility or is that Congress responsibility?

Mr. OBERDORFER. It certainly is Congress responsibility and not ours in the sense of writing the law, but in terms of advising and thinking and looking and, I suppose, within the administration, it is primarily the Treasury's responsibility.

Senator KERR. Well, is it not exclusively the Treasury's responsibility?

Mr. OBERDORFER. We have—this may be debatable, Senator, but we think that where we have an observation, we are not doing anything but reporting something that we observe; in this particular case, it seemed to us, for example, that we could not favor—if we did our duty we could not fail to observe and note for ourselves in response to a request for advice from Congress to report our observations, that this proposal would do—would have particular tax effects. Now we conclude from that that having looked at the tax effects——

Senator KERR. I think it is all right if the committee is unable to determine itself what the tax effects of certain laws would be, I think that you have a responsibility to advise the committee what the effects of certain laws would be taxwise. I think that is very appropriate.

But I am asking you what the responsibility of the Justice Department is in the matter of determining tax policies insofar as the performance of your constitutional or statutory duty in connection with antitrust enforcement is.

Mr. OBERDORFER. The problem comes up, Senator, because this legislation, not just this legislation but legislation, a whole lot of legislation, with a variety of suggestions in this area, was introduced, and the Department of Justice was asked by, first by the Ways and Means Committee, and by this committee, to comment.

Senator KERR. All right. I am asking you——

Mr. OBERDORFER. Yes, sir.

Senator KERR (continuing). The basis of your authority.

Mr. OBERDORFER. The answer—I just have to think this out because I had not anticipated precisely this type of question—the basis for our responsibility which is, of course, limited, but nevertheless the basis for it is in this area, is the inquiry that we received from the Ways and Means Committee for a report on particular legislative proposals.

Senator KERR. Were you asked for what the effect of the proposals would be, or were you asked as to whether you felt the proposals, as a matter of tax policy, would be wise or unwise?

Mr. OBERDORFER. The report was very general—the request was a very general request, Senator.

Senator KERR. All right.

Now, let us assume that is true, and that you are making it.

Mr. OBERDORFER. Yes, sir.

Senator KERR. I am asking you specifically, as a member of the Justice Department, what is your responsibility in connection with determining tax policy?

Mr. OBERDORFER. I do not think we have any responsibility except to comment, in response to inquiries from the committees of Congress or from the Treasury Department, for our views on legislative proposals. But I do think we have that responsibility.

Senator KERR. You have no responsibility under any of the laws that you know of to determine tax policy?

Mr. OBERDORFER. Not to determine it; no, sir.

Senator KERR. Your responsibility is to carry out tax laws.

Mr. OBERDORFER. In the courts.

Senator KERR. Enforce them in the courts.

Mr. OBERDORFER. Yes, sir.

Senator KERR. Written by the Congress, tax laws written by the Congress.

Mr. OBERDORFER. Yes, sir.

Senator KERR. And you regard it, do you, or not, as the primary responsibility of the Treasury Department to recommend policies that should be written into law?

Mr. OBERDORFER. It is clearly the primary responsibility of the Treasury, Senator, no question about that.

Senator KERR. Clearly the responsibility of the Treasury.

Mr. OBERDORFER. Yes, sir.

Senator KERR. Clearly not the responsibility of Justice.

Mr. OBERDORFER. Except to the extent, if the Senator will permit me, except to the extent that we are called on by Treasury for our views on particular matters, for example in an area where we have been litigating, in the tax areas, as to what we think about a proposal or——

Senator KERR. Do they ask you about what a proposal ought to be or how to effect a certain proposal?

Mr. OBERDORFER. I am not sure I remember a particular inquiry, a specific inquiry, at this point. But I think whatever they ask us we would answer, and if we are asked by a committee of Congress to report we ordinarily probably would not report to either a committee of Congress on tax policy, that is, whether the rate should be lowered or raised or whether something should be taxed as capital gains.

Senator KERR. Or whether a certain principle be implemented or not.

Mr. OBERDORFER. That is correct. Ordinarily that is so.

Senator KERR. Now, if asked for that, I can understand, as a matter of courtesy or even as a matter of information, you would comply. But the question I am asking you is, what is the responsibility of the Department of Justice in the matter of determining tax policy of this Government.

Mr. OBERDORFER. It is very limited. I would hesitate to say it is nonexistent, but it is very limited.

Senator KERR. Well, if it is existent, I want you to show me the law or the provision of the Constitution that fixes it.

Mr. OBERDORFER. The provision of the Constitution?

Senator KERR. Or of law.

Mr. OBERDORFER. I would have to study that, Senator.

Senator KERR. You are not familiar with it at the moment?

Mr. OBERDORFER. I do not have it at my fingertips; no, sir.

Senator KERR. And you do not recall having ever seen any that provided it?

Mr. OBERDORFER. No, sir; I do not; not at this time.

Senator KERR. All right, you may proceed.

Does the Senator want to ask a question at this time?

Senator DOUGLAS. You are, however, the Assistant Attorney General in Charge of the Tax Division of the Department of Justice, are you not?

Mr. OBERDORFER. Yes, I am, sir.

Senator DOUGLAS. Mr. Loevinger is the Assistant Attorney General in Charge of Antitrust?

Mr. OBERDORFER. Yes, sir.

Senator DOUGLAS. Would you regard it as infringing upon your duty if, in response to a question from a member of this committee, to say to what, in your judgment, would be the effects of a given line of action?

Mr. OBERDORFER. I have not thought so, but I am responsive to Senator Kerr's suggestion that we look it up.

Senator DOUGLAS. As one humble member of this committee——

Senator KERR. As what?

Senator DOUGLAS. Very humble.

Senator KERR. To whom does the Senator refer?

Senator DOUGLAS. The first person. One humble and relatively unimportant member of this committee.

Senator GORE. I thought you were referring to me. [Laughter.]

Senator DOUGLAS. I would like to ask Mr. Oberdorfer a question on two sets of effects:

Suppose that the court orders distribution of the stock of General Motors but Christiana does not choose to distribute to its stockholders, but retains the stock in its own hands. Would that distribution be subject to tax?

Mr. OBERDORFER. The distribution by Du Pont to Christiana?

Senator DOUGLAS. That is correct, but not by Christiana to its shareholders.

Mr. OBERDORFER. And the Senator's question assumes existing law?

Senator DOUGLAS. No, under the bill.

Mr. OBERDORFER. Under the proposed bill?

Senator DOUGLAS. Yes.

Mr. OBERDORFER. Yes, sir.

Under the proposed bill there would be a tax imposed on the payment, as I understand it, on the payment, distribution by Du Pont to Christiana.

Senator DOUGLAS. How much of a tax?

Mr. OBERDORFER. The estimate I have here if Christiana neither passes through the stock it gets from Du Pont nor sells, the total tax, I believe, is in the range of $60 million on Christiana.

Senator DOUGLAS. And if distributed to the stockholders of Christiana, how much will the tax be?

Senator KERR. On Christiana?

Senator DOUGLAS. No.

Mr. OBERDORFER. On the individuals?

Senator DOUGLAS. On the individuals.

Mr. OBERDORFER. I do not believe I have that.

Senator DOUGLAS. There was testimony this morning.

Mr. OBERDORFER. Those figures——

Senator DOUGLAS. I thought it would be a loss of revenue of $136 million.

Senator KERR. I think the testimony was that it would be that much less if it were not passed on to the stockholders than if it were.

Senator DOUGLAS. I agree if it were not passed on there would be a tax of $136 million less than if it were passed on.

Senator KERR. No, no.

Senator DOUGLAS. Let's wait a minute. May I raise the question?

Senator KERR. I answered the Senator once. Go ahead and make all the mistakes you want to. I beg your pardon.

Mr. OBERDORFER. Senator Douglas, the estimates are that, sir, if the stock is not passed on by Christiana, I think it is in this context that the Senator is speaking?

Senator DOUGLAS. That is right.

Mr. OBERDORFER. The total revenue to the Government would be $214 million.

If Christiana, in turn, passes on the General Motors stock it receives to the stockholders of Christiana, and this is done pursuant to court decree, and the proposed legislation is applicable, the revenue has been estimated at $350 million.

Senator DOUGLAS. So that you agree with the testimony of the Treasury this morning that the loss of revenue in this case would be approximately $136 million?

Mr. OBERDORFER. That is the difference—if there were a pass-through as distinguished—there would be a difference in revenue if there were a pass-through, it would be more revenue if it were a pass-through than if there were not a pass-through.

Senator DOUGLAS. That is correct.

Now, I would like to inquire into a second set of effects:

Suppose Du Pont distributed the General Motors stock in lieu of cash dividends and was successful in defending that position. Do you have any estimate as to the amount of revenue that would be lost in this contingency?

Mr. OBERDORFER. This assumes that this distribution of stock occurs with this bill having been enacted?

Senator DOUGLAS. That is correct.

Mr. OBERDORFER. This depends, Senator, on what revenue is now produced by the cash dividends paid by Du Pont. I suppose that is a figure that the Senator seeks, and if I may inquire we may have that here.

Senator DOUGLAS. Wouldn't it be half the ordinary revenue because there would be a situation where the tax would be at the capital gains rate instead of at the ordinary income rate.

Mr. OBERDORFER. We assume, I think we have assumed, that the tax is 50 percent, that is, the average income tax paid by Du Pont stockholders—individual stockholders has been in the range of 50 percent.

Senator, if we can check our calculations when we have the figures in front of us, our rough calculation is, that Du Pont has been paying an average of $6 a share dividends, and that again an assumption has been throughout the consideration for this that the tax rate is 50 percent, so that means that the ordinary income tax has been $3 per share, and there are, our estimates are there are 46 million shares of Du Pont stock owned by individuals, which means that the ordinary income tax paid today by individuals on Du Pont dividends is $138 million, and this will take place—if this took place over a 10-year

period that you could have a figure of $1.38 billion in tax that would escape taxation, if that is the Senator's point, if the Boggs bill were adopted and the distribution were made pursuant to that bill in lieu of the ordinary regular dividend.

Senator DOUGLAS. Would it be that sum or half that sum?

Mr. OBERDORFER. I assumed that the dividend was $6 a share, and the tax was $3 a share, and if I am correct on my assumptions——

Senator DOUGLAS. It would be taxed under the capital gains rate.

Mr. OBERDORFER. No, sir. We are assuming, under existing law, this tax is being paid at ordinary income tax rates, and that is the tax that would be missing from the Treasury if the Mason bill were used.

Of course, against that is the tax that would, in fact, be produced—I said the Mason bill—the tax that would, in fact, be produced by the application of the Boggs bill.

Senator WILLIAMS. Would the Senator yield for a question at that point?

Senator DOUGLAS. Senator, I would appreciate it if I could continue.

Senator WILLIAMS. Go ahead.

Senator DOUGLAS. Assume that the Boggs bill is passed. Then what would be the difference in revenue if General Motors stock is distributed in addition to cash dividends rather than in lieu of cash dividends?

Mr. OBERDORFER. If General Motors has distributed in addition to cash dividends, then it is probably not fair to say that the revenue being paid on the cash dividends now being paid by Du Pont is lost; that revenue continues to be collected.

Senator DOUGLAS. I wondered if your staff would be willing to read the record tonight and then prepare a considered response to questions which I have asked.

Mr. OBERDORFER. We would be very happy to.

(The following was subsequently received for the record:)

DEPARTMENT OF JUSTICE,
Washington, September 14, 1961.

HON. HARRY F. BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: In the course of my testimony yesterday before the Senate Finance Committee, Senator Douglas requested that I explain what the relative revenue effects would be if H.R. 8847 were enacted and Du Pont substituted divestiture distributions in lieu of its regular dividends (assuming that the bill would allow the return-of-capital treatment to apply to such substituted distributions) as opposed to the revenue effect if H.R. 8847 were enacted and there were no such substitutions. This letter is in response to that request.

Assuming that the Du Pont yearly dividend continues to be $6.50 per share, and assuming that the noncorporate Du Pont shareholders pay an average tax on such dividends at an effective rate of 50 percent, it is estimated that the yearly tax paid by all Du Pont shareholders with respect to Du Pont's cash dividends will be approximately $100 million a year. It has been estimated that the revenue resulting from divestiture under H.R. 8847 will be a total of approximately $350 million. Hence, if the divestiture is not substituted for regular cash dividends, the revenues will be $350 million with respect to divestiture distributions in addition to approximately $100 million a year with respect to regular cash distributions.

If, on the other hand, the divestiture distributions were substituted for regular cash dividends, the revenue would remain $350 million with respect to divestiture distributions under H.R. 8847, but the $100 million collected yearly with respect to Du Pont cash dividends would not be collected in each year in which a

complete substitution were made. Thus, for each year that divestiture distributions are completely substituted for regular cash dividends, the revenues will be reduced by $100 million. Assuming that the distributions occur over a 5-year period, complete substitutions of divestiture distributions for cash dividends over such 5-year period would produce approximately $500 million less revenue than if there were no such substitutions. Assuming that the divestiture distributions occurred over a 2-year period, such complete substitutions during the 2-year period would produce $200 million less revenue than if no such substitutions were made.

I wish to point out that the revenue reductions attributable to these substitutions would not occur if H.R. 8847 (more specifically, subsection (c)(1) of new section 1111 proposed by H.R. 8847) can be interpreted as not being applicable to divestiture distributions which are in lieu of cash dividends. Furthermore, Mr. Greenewalt stated in his testimony that complete substitution of divestiture distributions for cash dividends is not practical since it would have the effect of accelerating the amount of sales of General Motors stock by Du Pont distributees. If partial substitutions were made instead of complete substitutions, the resulting amount of revenue reductions attributable to such substitutions would be proportionately less. Thus, if only one-half of the cash dividends were replaced by divestiture distributions, then the resulting reduction in revenue would be only one-half of the revenue collected with respect to Du Pont cash distributions; that is, one-half of $100 million, or $50 million, for each year such partial substitutions were made.

I hope that the above satisfactorily answers Senator Douglas' question.

Sincerely yours,

LOUIS F. OBERDORFER,
Assistant Attorney General, Tax Division.

Senator DOUGLAS. Now, Senator, I will yield to you.

Mr. OBERDORFER. Yes, sir.

Senator WILLIAMS. Mr. Oberdorfer, one of your assumptions, as I understand it, was if the Boggs bill were enacted, and if the distribution took place over a period of 10 years, has there been any suggestion that the distribution would be stretched out to 10 years under the Boggs bill?

Mr. OBERDORFER. As a matter of fact, Senator, that is a very good point. We are very hopeful if the Boggs bill is issued that the distribution will take place in a much shorter time.

Senator WILLIAMS. Was not one of the suggestions made that the Boggs bill could be limited to 5 years, and then upon your suggestion and the Treasury Department's it was left at the discretion of the court?

Mr. OBERDORFER. At the suggestion of the Treausry Department. I do not think we have joined in that.

Senator WILLIAMS. Well, perhaps not, because I think the Treasury Department's responsibility is to make these suggestions, and we respect them. But nevertheless that was included.

Now, you are suggesting here and assuming the 10 years, which is an unrealistic suggestion, as you well know.

Mr. OBERDORFER. I think we should revise our premise in giving an answer to Senator Douglas' question.

Senator WILLIAMS. That is right. You are proceeding on the premise that Du Pont is paying $6 per share dividends.

Mr. OBERDORFER. Yes, sir.

Senator WILLIAMS. Is it not a fact that approximately $2.30 of that dividend, of that $6, represents dividends which they are, in turn, receiving from General Motors and passing on?

Mr. OBERDORFER. I believe that is a correct figure, Senator.

Senator WILLIAMS. Is it not a reasonable assumption that this $2.30 will not be available to pass on if they also sell or get rid of their General Motors?

Mr. OBERDORFER. When that takes place that is certainly true.

Senator WILLIAMS. So again this projected $6 a share on that basis is unrealistic.

Mr. OBERDORFER. We have got to consider the hypotheses carefully for a reasoned and careful answer to Senator Douglas' question and, Senator Williams, your caveats are certainly things that we should take into consideration in making that reply.

Senator WILLIAMS. Not only should but you have to take into consideration.

Mr. OBERDORFER. That is right.

Senator WILLIAMS. And were not taken into consideration in the $1,380 million figure you used.

Mr. OBERDORFER. Yes, sir.

Senator WILLIAMS. Therefore, you will have to furnish entirely new figures.

Mr. OBERDORFER. We will have to start from a beginning point.

Senator WILLIAMS. Yes.

Mr. OBERDORFER. And I think that this is susceptible to demonstration for whatever—wherever the ball bounces, that is where it bounces.

Senator WILLIAMS. Now, if I recall correctly, in reading your testimony over in the House, you were present at the time, and you heard the Treasury Department's estimate as to the possible revenue under the Boggs bill, it being around $350 million.

Mr. OBERDORFER. Yes, sir.

Senator WILLIAMS. And also when Treasury said they had no quarrel with the estimate submitted by the Du Pont Co. how, under existing law, under the plan as outlined that date, and again this morning, the tax would be about $330 million. You were present, were you not?

Mr. OBERDORFER. Yes, sir.

Senator WILLIAMS. If I remember correctly, you told the committee you had no quarrel with the figures as presented by the Treasury Department.

Mr. OBERDORFER. We certainly yield to Treasury on the—I think, if I remember my testimony correctly, Senator, in those responses, I tried hard to say that we were also adopting for purposes of responding to those questions the assumptions that Treasury also adopted, that is, we were relying on Du Pont as a source, from Du Pont to Treasury to us, if I may say it. We were reserving any question that might develop as to whether those assumptions were valid.

Senator WILLIAMS. Well, in reading your statement it was answered pretty much as you answered it now, but it all gets back to the point you did not quarrel with the estimates that were, as they were, presented, and you accept them today, is that correct?

Mr. OBERDORFER. With those caveats; yes, sir.

Senator WILLIAMS. Well, you have no better estimates of your own to submit to the committee?

Mr. OBERDORFER. No, sir.

Senator WILLIAMS. You have nothing better to submit?

Mr. OBERDORFER. In the way of estimates, no, sir. There are a couple of other assumptions that have come up. For example, we are not sure at this point where we end up if this proposal that I think Du Pont brought to Treasury after the hearing before the House——

Senator WILLIAMS. I am not discussing that one. I am discussing the one that was before the House and the one which presented the figures.

Mr. OBERDORFER. The point is, Senator, that the assumptions that we used, that Treasury used, could vary. I am just saying that again.

Senator WILLIAMS. Yes. And the assumptions which you used just a moment ago in reply to the Senator from Illinois, you will admit now, were assumptions which were unrealistic and which would actually not happen and could not happen under the Boggs bill.

Mr. OBERDORFER. I certainly accept the Senator's correction of those premises that we were just using in that colloquy; yes, sir.

Senator WILLIAMS. In other words, you were dealing with a hypothetical situation which could not possibly develop under the law as it——

Mr. OBERDORFER. I had not thought the law through.

Senator KERR. In further thinking it through, you are familiar with section (c) paragraph (1) in the Boggs bill?

Mr. OBERDORFER. That is correct.

Senator KERR. Which reads as follows:

DISTRIBUTIONS TO AVOID FEDERAL INCOME TAX

Subsection (a) shall not apply to any transaction one of the principal purposes of which is the distribution of the earnings and profits of the distributing corporation or of the corporation whose stock is distributed, or both.

Mr. OBERDORFER. Yes, sir; I am familiar with that provision, Senator; yes, sir. I have not found it yet.

Senator KERR. And if that should become the law and be enforced, as I assume and feel certain it would be, then the hypothesis discussed would not develop.

Mr. OBERDORFER. I assume that that provision is aimed at this problem.

Senator KERR. Well, now, if it is aimed at this problem, and if it is inadequate to meet this problem, would you advise me in what regard, and provide language that would correct it?

Mr. OBERDORFER. I would be happy to, Senator.

Senator KERR. In which event either if this language is calculated to do that and would succeed or if in your judgment it does not and you provide language which would, then the hypothetical case referred to would be one that could not occur on the basis of the law being enforced.

Mr. OBERDORFER. If the law is drawn to prevent——

Senator KERR. Isn't that the purpose of this section?

Mr. OBERDORFER. That is right; and I am——

Senator KERR. Isn't that the purpose of this section?

Mr. OBERDORFER. I understand it to be.

Senator KERR. And if it is not you will provide us with the language that will?

Mr. OBERDORFER. Yes, sir. And when that——

Senator KERR. If you do, and it is adopted, then that situation could not develop.

Mr. OBERDORFER. To the best of our ability; yes, sir.

Senator KERR. Well, is there somebody that you have access to in whose ability you have enough confidence that they could provide us language?

Mr. OBERDORFER. I would like to consult with the Treasury about this just to make sure that what we do is——

Senator WILLIAMS. It might interest you to know that language was submitted by the Treasury Department.

Mr. OBERDORFER. But we have not knocked heads about it, and we will if the Senator permits.

Senator KERR. I would be glad for you to because I must say I am sure that those who favor this bill are just as anxious and determined to avoid the development of that hypothetical situation as I know my good friend from Illinois is.

Mr. OBERDORFER. Yes, sir.

Senator KERR. And if the Treasury submitted language which would accomplish the purpose I understood they had in mind, which was to prevent that, we would like to have your opinion on it, and if it would not, we would like to have your suggestion as to how it should be amended to do just that.

Mr. OBERDORFER. I will certainly do that.

Senator KERR. All right.

(The following was later received for the record:)

DEPARTMENT OF JUSTICE,
Washington, September 14, 1961.

HON. HARRY F. BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: During the course of my testimony of September 13, 1961, before the Senate Finance Committee, Senator Kerr asked my opinion on whether the language contained in subsection (c)(1) of new section 1111 as proposed by H.R. 8847 would have the effect of making the provisions of H.R. 8847 inapplicable in the event that Du Pont substituted divestiture distributions for its regular cash dividends. Senator Kerr also asked me whether a provision could be drawn which would be more effective in withholding the benefits of H.R. 8847 in the event of such substitutions, should there be a doubt as to the effectiveness of the present provision. This letter is in response to Senator Kerr's inquiry.

Subsection (c)(1) referred to above states that section 1111(a) "* * * shall not apply to any transaction one of the principal purposes of which is the distribution of earnings and profits * * *." Ordinarily, if a corporation had a long history of regular cash dividends, and the pattern was changed simultaneously with the beginning of distributions pursuant to an antitrust divestiture, it should not be very difficult to persuade a court that such a change reflected a principal purpose of using the antitrust divestiture to distribute earnings and profits. It is probable that if the committee report recited such an example the courts would follow it, particularly when it is considered in the context of the colloquies on this subject in hearings before your committee on September 13, 1961.

The committee may feel, however, that it might be advisable to express the provision more specifically, so that taxpayers could learn from the statute itself and without the necessity of finding and depending upon the committee reports or the hearings.

Accordingly, we respectfully suggest that subsection (c)(1) be amended to read as follows:

"(1) Distributions to avoid Federal income taxing.—Subsection (a) shall not apply—

"(A) to any transaction one of the principal purposes of which is the distribution of the earnings and profits of the distributing corporation or of the corporation whose stock is distributed, or both, nor;

"(B) to any distribution to the extent that it is in lieu of the regular dividend to the shareholders of the distributing corporation."

Sincerely yours,

LOUIS F. OBERDORFER,
Assistant Attorney General, Tax Division.

Senator DOUGLAS. Has the Senator from Oklahoma temporarily completed his questioning on this point?

Senator KERR. Neither temporarily nor permanently.

Senator DOUGLAS. Would the Senator from Oklahoma regard it as proper if I addressed a question to the witness on this point?

Senator KERR. I have not heard the question. I concede the possibility that you might ask a proper question.

Senator DOUGLAS. Is the Senator from Oklahoma setting himself up as a judge on what questions are proper and what questions are improper?

Senator KERR. No more than he would do so in response to a stimulant of a similar situation that he had conceived by the Senator from Illinois.

Senator DOUGLAS. The distinguished Senator from Virginia has now entered the room and is now the chairman.

Senator KERR. He was the chairman before he entered the room. [Laughter.]

Senator DOUGLAS. I would like to ask the Senator from Virginia if I may ask the witness a question.

The CHAIRMAN (presiding). There is no prohibition that I know of.

Senator KERR. Does the Senator say can he or may he?

Senator DOUGLAS. May I ask the witness a question?

The CHAIRMAN. You may. [Laughter.]

Senator DOUGLAS. The Senator from Oklahoma is a master of both the subtle and the brutal insult. [Laughter.]

Senator KERR. I want to thank my friend from Illinois, assuming the correctness of that statement. It is the accomplishment of a lifelong ambition. [Laughter.]

Senator DOUGLAS. Abundantly realized. [Laughter.]

Never has ambition been so fully and completely realized.

Senator KERR. I thank the Senator.

Senator DOUGLAS. Now, Mr. Chairman, may I ask the witness a question?

The CHAIRMAN. You may. [Laughter.]

Senator DOUGLAS. I would like to ask the Assistant Attorney General in charge of the Tax Division to look at section (c) on page 7 of the bill to which the Senator from Oklahoma has referred and ask whether you would be willing as of this moment to give us an opinion as to whether the present language furnishes adequate protection against the posisble distribution of General Motors stock in lieu of cash dividends or whether it is desirable to set up additional tests other than those contained in the language?

Mr. OBERDORFER. Senator, I am always hesitant to give, as a lawyer to give, an off-the-cuff opinion on anything, particularly in the tax area.

But I will say this, that with the benefit of this colloquy available on the record and the colloquy this morning in the hearing when Mr. Knight was asked the same questions on the record, and with the further possibility that there might be some observations in the committee report, perhaps, as to the purpose of this particular provision, subject to further reflection, and with all the hedges that a lawyer can reserve when he is asked a verbal opinion without real study, my answer would be that I think this would be adequate for that. My answer is, I think, this would be adequate for that purpose.

Senator DOUGLAS. All right. You will give us a more considered opinion?

Mr. OBERDORFER. Yes; I would aprpeciate the opportunity to do so.

The CHAIRMAN. Proceed, sir.

Mr. OBERDORFER. As we were saying, the Department does not believe that H.R. 8847 provides a general solution to the combined antitrust and tax problems of divestiture.

Many divestiture decrees result in sales of notes, securities, patents, trademarks, and a variety of assets other than stock. A divestiture decree may compel cancellation of contracts or a release of valuable contract rights and obligations.

Applying H.R. 8847, as reported to the House of Representatives, to the *Du Pont* case—the facts of that case in its present posture—there is some suggestion of equity in the application of the return of capital tax theory to Du Pont stockholders in particular because some of those who recently acquired their stock, including Du Pont employees, have a high basis and would not be taxed on the receipt of General Motors stock, whereas the low basis stockholders who are presumably the ones who profited the most from the relationship between Du Pont and General Motors would be required to pay some tax. Another divestiture, however, may involve people in entirely different circumstances and may involve entirely different considerations of equity and public interest.

There is a problem which the *Du Pont* case might have in common with many other forms of divestiture: A person affected by a divestiture decree may be involuntarily exposed to a tax liability which would otherwise be postponed. But the Department does not feel that the involuntary aspect of the tax incidence resulting from an antitrust divestiture decree necessarily justifies a change in the basic principles of tax law so as to treat as tax free or as capital gains amounts now treated as ordinary income. It may be that deferral of the tax consequences would be sufficient.

The Department is sensitive to the possibility that divestiture might affect the market value of the stock of General Motors Corp. which is held by many stockholders. However, the Department feels that it is not now established whether a detrimental market effect will, in fact, be more likely to occur if a divestiture is carried out under the proposed legislation or is carried out under existing law along the lines outlined by Du Pont.

Although evidence about market consequence is inevitably conflicting and speculative, Du Pont estimates that the entire distribution could be effected in a much shorter period without as serious market consequences if a distribution were carried out under the proposed legislation instead of being effected pursuant to the alternate

proposals of the Du Pont Co. under existing law. There is no clearly proved comparison however of the market effects of (1) distribution of General Motors stock to Du Pont stockholders tax free or at capital gains rates with the basis of the General Motors stock in each stockholder's hands equal to its market value, and (2) divestiture under existing law by the three-pronged approach described by Du Pont.

Further, it is not now clear what the relative revenue effect would be if Du Pont disposed of its General Motors stock by distribution under the proposed legislation or in the manner suggested by Du Pont without new law.[2]

If the committee decides to report favorably a return of capital bill, the Department believes that any bill should be clearly limited to the *Du Pont* case alone.

Finally, even if the legislation is so limited, a principal antitrust enforcement advantage would be produced by special legislation only if this—and we are using here the words of the Supreme Court—"already protracted litigation" could be completed within not more than 2 years from the date of the entry of the final judgment in that case instead of the maximum period of 10 years permitted by the Supreme Court decision.

Accordingly, as indicated in the letters of the Attorney General and the Deputy Attorney General, the Department does not recommend this legislation.

(The letters referred to follow:)

JULY 19, 1961.

Hon. HARRY FLOOD BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR SENATOR BYRD: This is in response to your request for the views of the Department of Justice concerning S. 2013, a bill to amend the Internal Revenue Code of 1954 with respect to the taxation of distributions of stock made pursuant to court orders enforcing the antitrust laws.

Under existing law a stockholder of a parent corporation receiving a pro rata distribution of stock of a subsidy pursuant to an antitrust divestiture decree would ordinarily incur no tax liability if the parent corporation owned 80 percent or more of the stock of the subsidiary. If the parent corporation owned less than 80 percent of such stock, the distribution would be taxed as a dividend to the stockholder at ordinary income tax rates (assuming that the distribution was out of earnings and profits). This would also be the result when a corporation which is not a parent corporation distributes to its stockholders stock of another corporation. An individual stockholder would pay tax on the market value of the distributed stock at ordinary income tax rates. A corporate stockholder would pay tax on the distributing corporation's basis or the fair market value, whichever is lower, at the ordinary income tax rates applicable to intercorporate dividends (an effective rate of only 7.8 percent because of the 85 percent dividends-received deduction. If a corporate taxpayer subsequently sold or exchanged the stock received on the distribution, it would be subject to a capital gains tax on the difference between the basis of the stock in the hands of the distributing corporation and the proceeds of the sale.

S. 2013 would add sections 1111 and 1112 to the Internal Revenue Code on modifications of section 301. Section 1111 would provide, with respect to "divested stock" as defined in subsection (f) which is distributed pursuant to the decree of a court enforcing the antitrust laws, that the amount of the dis-

[2] The Du Pont Co. estimates that the revenue to the Federal Government under existing law would be $330 million. Du Pont estimates that the revenue realized under a return of capital bill similar to H.R. 8847, as reported to the House of Representatives, would be approximately $350 million. While these two estimates are substantially equal, they do not take into account other long-range revenue considerations such as the basis advantage to shareholders under the return of capital bills and possible redemptions of stock prior to distributions which would substantially reduce the amount of revenue collectible under these bills.

tribution taxable to both individual and corporate stockholders would be the lesser of the fair market value of the divested stock or its "average adjusted basis in the hands of the distributing corporation." The distributee's basis for his stock in the distributing corporation, as increased by the amount (if any) which is taxed at the time of the distribution, would be allocated between such stock and the divested stock. Under section 1112 of the code a redistribution of divested stock by a distributee corporation to its stockholders within 1 year of its receipt of the divested stock would be treated the same as if the divested stock had been received directly from the distributing corporation, with no gain or loss to be recognized to the redistributing corporation on the receipt of the divested stock. Accordingly, S. 2013 would put individual stockholders on a par with corporate stockholders so far as the amount includible in income is concerned but it would also permit a tax-free distribution and redistribution of divested stock to individual stockholders in the amount of the difference between the fair market value of the divested stock and the average basis in the hands of the distributing corporation.

The Department of Justice has carefully considered this bill in terms of the pending case of *United States* v. *E. I. du Pont de Nemours & Co.*, October term, 1960, No. 55, in which the U.S. Supreme Court has directed that within 10 years Du Pont divest itself of its 23 percent interest in the common stock of General Motors Corp. The Department has also considered the bill in terms of antitrust enforcement policy as it may be carried out by divestiture decrees in future cases.

In the *Du Pont* case the Supreme Court held that, since divestiture was the only effective remedy for the violation of the antitrust laws there involved, possible adverse tax and market consequences should not bar a divestiture decree. In discussing the tax consequences the Court noted, without comment, that bills had been introduced in Congress "to ameliorate the income tax consequences of gain on disposition of stock pursuant to orders enforcing the antitrust laws."

It may be that no involuntary tax liability should be incurred at the time of a distribution pursuant to a decree of divestiture and that such a distribution should not itself be a taxable event. The Department does not feel, however, that there are any antitrust enforcement considerations which would require or justify a change in the tax law designed specially to permit the reduced rate or base of taxation of distributions of divested stock as proposed in S. 2013.

In connection with the *Du Pont* case, we understand from information furnished to the Government by representatives of the Du Pont Co. that the United States would realize tax revenues of at least $900 million under existing law but only about $423 million under S. 2013. It is the Department's view that no antitrust enforcement considerations justify any loss of revenue of this proportion in the *Du Pont* case or any other antitrust divestiture proceeding now in process or now contemplated.

In sum, this Department does not recommend enactment of S. 2013. We would, however, welcome an opportunity to study any proposal which might defer taxation of a distribution effected pursuant to an antitrust divestiture decree so long as the deferred tax consequences were substantially those which would have resulted had existing law applied to the distribution at the time it occurred.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

ROBERT F. KENNEDY,
Attorney General.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., August 1, 1961.

Hon. HARRY FLOOD BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR SENATOR BYRD: This is response to your request for the views of the Department of Justice concerning S. 2266, a bill to amend the Internal Revenue Code of 1954 so as to provide that certain distributions of stock made pursuant to orders enforcing the antitrust laws shall not be treated as dividend distributions but shall be treated as a return of basis and result in gain only to the extent basis of the underlying stock is exceeded; and to further provide that

the amount of a dividend in kind received by a corporation shall be its fair market value.

As to individual stockholders, under S. 2266 no gain would be recognized on a distribution of divested stock pursuant to an antitrust divestiture decree if the stockholder's basis for such stock was equal to or greater than the fair market value of the distributed stock. To the extent that the fair market value of the divested stock exceeds the stockholder's basis in the distributing corporation's stock, the stockholder would be subject to capital gains tax. The stockholder's basis in the distributing corporation's stock would be reduced (but not below zero) by the fair market value of the stock received in the divestiture distribution. The basis of the divested stock would be its fair market value. In addition, as to corporate stockholders, S. 2266 would amend section 301 of the code with respect to the treatment of all distributions of dividends in kind, whether or not pursuant to antitrust decrees. The amount taxable as a dividend to a corporate stockholder (ordinarily at an effective rate of only 7.8 percent because of the dividends received deduction) would be the fair market value of the distributed property rather than, as under existing law, the fair market value or the basis of the property in the hands of the distributing corporation, whichever is lower. Under existing law, the basis of the appreciated property received by corporate stockholders would be the basis of the stock in the distributing corporation's hands. Under S. 2266 this rule is retained except that the basis would not be less than the fair market value of the property minus the corporate dividends received deduction.

One effect of S. 2266, therefore, would be to increase the amount on which corporate distributees pay tax on dividends in kind, without regard to the nature of the property received and whether or not the distribution is pursuant to an antitrust order requiring divestiture. Antitrust enforcement is only peripherally related to this portion of the bill. It is essentially a matter of revenue policy, the formulation of which is not within the functions of this Department. We therefore make no comment on this portion of the bill.

The part of S. 2266 relating to the taxation of individual stockholder-distributees on stock received pursuant to a divestiture decree in an antitrust case is the same as H.R. 7349 and was previously given careful consideration by the Department of Justice when we were asked for comment on that bill. The comments we made in relation to the bill, which we forwarded at that time to Hon. Wilbur D. Mills, chairman of the House Ways and Means Committee, were substantially the same as our comments to you in our letter of July 19, 1961, with reference to S. 2013. The latter are also applicable to S. 2266 and the Department does not recommend enactment of this bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

BYRON R. WHITE,
Deputy Attorney General.

The CHAIRMAN. Are there any questions?

Senator DOUGLAS. Mr. Chairman, unless there are other questions I would like to ask a question or two, if I may.

May I inquire if under the Boggs bill a divestiture of General Motors stock to the Du Pont stockholders is treated as a return on capital, and hence, has a capital gains tax applied to it?

Mr. OBERDORFER. Under the Boggs bill, a Du Pont stockholder receiving General Motors stock would be taxed at capital gains rates only to the extent that the value of the General Motors stock he received exceeded his basis. But to that extent it would be——

Senator DOUGLAS. I understand.

Mr. OBERDORFER. Yes, sir.

Senator DOUGLAS. In other words, it is treated as return on capital and has a capital gains tax applied to it.

Mr. OBERDORFER. That is correct.

Senator GORE. That is for individuals.

Senator Douglas. For individuals; and that lays the basis for my second question. In the case of divestiture of General Motors stock to corporations, is this treated as a capital gains or an intercorporate dividend?

Mr. Oberdorfer. Under the Boggs bill?

Senator Douglas. Under the Boggs bill.

Mr. Oberdorfer. It is treated as an intercorporate dividend, somewhat differently from the way intercorporate dividends are treated outside the divestiture area.

Senator Douglas. I understand. But whatever the base taken it is 52 percent of 15 percent, isn't that true?

Mr. Oberdorfer. Yes, sir; 7.8 percent.

Senator Douglas. Of whatever the base taken.

Well, now, as Attorney General in Charge of the Tax Division of the Department of Justice, are you willing to express an opinion as to the logic of treating these two types of distributions differently? If it is a capital gain to the individual why is it not a capital gain to the corporations?

Mr. Oberdorfer. Senator, we have raised this question amongst ourselves and, just as a matter of logic, there is a question of logic to be asked, that is, if the principle——

Senator Douglas. In other words, in order to protect myself from the Senator from Oklahoma, this is not an illogical question?

Mr. Oberdorfer. It is a question—it is not an unprecedented question.

Senator Douglas. Not an illogical one.

Senator Kerr. Thank you for failing to give him an affirmative answer.

Mr. Oberdorfer. I did not. [Laughter.]

I am not a master of logic.

Senator Douglas. You did not mean to say it was an illogical question. Does the stenographer have that on the record? You did not say it was an illogical one.

Mr. Oberdorfer. No, sir.

Senator Kerr. Nor that it was not illogical. [Laughter.]

Mr. Oberdorfer. In other words, if one of the—seriously responding to the Senator's question—if a law treating this as a partial liquidation, which it is not under existing law, if the Congress just passed a law and said that Du Pont distribution is going to be treated as a partial liquidation, then corporate stockholders and individual stockholders would each be taxed at capital gains rates, and there would not—so that what was a capital gains for one would be a capital gains for another instead of one being a return of capital in one case and a dividend in the other.

There is also—we talked about this in the Ways and Means Committee—it is possible that if the same principle were applied to individuals and corporations that there would not be much of a debate when the case gets back to court about whether Christiana disposes of its General Motors stock or passes it through to its stockholders.

Senator Douglas. I happen to be one who believes the general application of the ordinary income tax to an accrual is too severe, and I am one who believes that it is a capital gains tax and, of course, this would mean a smaller total tax than if it were treated otherwise. But

if it is a capital gains tax I fail to see the logic of treating it as capital gains to the individual but merely as an intercorporate dividend to the corporation; and it would seem to me that the inherent contradictions in the present bill would be solved if you treat them all as capital gains.

Then the question as to whether or not Christiana distributes its stock to individual shareholders, or not, does not matter, and I suggest that this would eliminate a great deal of difficulty, as logic generally does.

The CHAIRMAN. Any further questions?

Senator KERR. Yes, if the Senator is through.

Senator DOUGLAS. Yes.

The CHAIRMAN. Senator Kerr.

Senator KERR. What is the capital gains tax to an individual on a capital gain income?

Mr. OBERDORFER. On individuals?

Senator KERR. Percentagewise.

Mr. OBERDORFER. Sir?

Senator KERR. Percentagewise.

Mr. OBERDORFER. If the individual is in the 50 percent bracket, it is 25 percent. Below that it is a tax at his ordinary income tax bracket on one-half of the gain.

Senator KERR. But not to exceed 25 percent of the total profit.

Mr. OBERDORFER. That is correct.

Senator KERR. Now, what is the percentage paid by a corporation on an intercorporate dividend?

Mr. OBERDORFER. The corporation pays ultimately 7.8 percent of whatever the tax base; in the case of cash it is 7.8 percent of the cash intercorporate dividend.

Senator KERR. Or of the value of any other thing received in lieu of cash.

Mr. OBERDORFER. It is, I believe under existing law, Senator, it is the basis, but I am not sure—I am at a loss as to——

Senator KERR. Well, you are applying the principle, and I am asking you what the principle is. The principle is 15 percent of the dividend received.

Mr. OBERDORFER. If it is a dividend; yes, sir.

Senator KERR. What other tax is there?

What other tax is there on intercorporate dividends?

Mr. OBERDORFER. None other than intercorporate dividends.

Senator KERR. Well, what is the rate?

Mr. OBERDORFER. It is 7.8 percent, effective rate.

Senator KERR. I thought it was the effective rate on 15 percent of the dividend received.

Mr. OBERDORFER. Well, that is correct; yes, sir.

Senator KERR. Is that correct?

Mr. OBERDORFER. Yes, sir.

Senator KERR. It might be 7.8; it might be something else.

Mr. OBERDORFER. In principle—I have just used as a rule of thumb 7.8 percent. But the Senator states the principle effectively. It is 52 percent of 15 percent.

Senator KERR. Not necessarily 52 percent.

Mr. OBERDORFER. Whatever the corporate rate is.

Senator KERR. Whatever the corporate rate is.

Mr. OBERDORFER. Yes, sir.

Senator KERR. And for it to be 7.8 it has to be the 52-percent rate.

Mr. OBERDORFER. That is correct, sir.

Senator KERR. So we get back to the basic premise that the principle is the applicable tax to 15 percent of the dividend received.

Mr. OBERDORFER. The principle in the case of intercorporate dividends is as the Senator states.

Senator KERR. Is the applicable tax rate to 15 percent of the dividend?

Mr. OBERDORFER. Because of the intercorporate dividend received deduction; yes, sir.

Senator KERR. I tell you you are very smart and very able, and you are as smart as I am, you know as much about this as I do. I am just trying to get into this record what the facts are. Is that correct?

Mr. OBERDORFER. Yes, sir.

Senator KERR. Well, there is quite a difference insofar as the taxpayer is concerned between paying up to but not exceeding 25 percent of the profit realized, which is the case in the capital-gains tax by an individual, and in paying up to but not exceeding 52 percent of 15 percent of an amount received, isn't there?

Mr. OBERDORFER. There certainly is; yes, sir.

Senator KERR. Now, then, what I want you to tell me is how you can take those two entirely different applications and rates of taxes and then make a logical relationship as between them, and the logical relationship of the application of different tax rates to them when one has only 15 percent of the income taxable and the other has 100 percent of the income taxable.

Mr. OBERDORFER. Senator, there is, in fact, a logical basis for it.

Senator KERR. All right, now, give it to me.

Mr. OBERDORFER. And that is that—I say there is, in fact. I think there is a logical basis.

Senator KERR. All right, let us have it.

Mr. OBERDORFER. In that a corporation like an individual pays a tax. In the corporation's case it is, as I recall it, 25 percent of a gain where there is a capital gain.

Senator KERR. But that is a capital gains tax.

Mr. OBERDORFER. Yes, sir.

Senator KERR. But there is no capital gains tax on an intercorporate dividend.

Mr. OBERDORFER. But I believe that the answer, if there is an answer——

Senator KERR. There is no capital-gains tax on an intercorporate dividend.

Mr. OBERDORFER. But——

Senator KERR. Is there?

Mr. OBERDORFER. I think where we come to a dividing point, Senator, is where the Senator says that inevitably this is an intercorporate dividend.

Senator KERR. I am not saying inevitably. I am only talking about where it is.

Mr. OBERDORFER. Well, if it is an intercorporate dividend then there is no logic to this other position. But this assumes it is an intercorporate dividend.

Senator KERR. Well, I am not asking you to assume that something which is not an intercorporate dividend under the law is one. I am only asking you about that which under the law is an intercorporate dividend.

Mr. OBERDORFER. We are changing—I am sorry, there is a proposal to change the law to treat what is a dividend for purposes of individuals as a return of capital.

Senator KERR. I understand; I understand.

Mr. OBERDORFER. Now, the logical problem posed by Senator Douglas——

Senator KERR. Now, wait a minute.

Mr. OBERDORFER (continuing). Is whether——

Senator KERR. You are then saying that his proposal was logical?

Mr. OBERDORFER. I said the problem was logical.

Senator KERR. Sir?

Mr. OBERDORFER. I called it a problem of logic.

Senator KERR. Well, I will agree with that. [Laughter.]

Senator DOUGLAS. He does not believe any good can come out of Nazareth.

Senator KERR. I did not even know it was Nazareth. [Laughter.]

Let me say for the record that I think there is no finer gentleman in the U.S. Senate than Paul Douglas. I think he is one of the ablest, finest legislators that I know, and I am very fond of him.

Senator DOUGLAS. What are you leading up to, Bob? [Laughter.]

Senator KERR. I am not leading up to anything. I am trying to get away from——

Senator DOUGLAS. Not only the needle but the knife is coming now. [Laughter.]

Go ahead, Bob.

Senator KERR. I am perfectly capable of disassociating the fine character and the able legislator from the political philosopher, and any disagreement that I may have with my good friend from Illinois is on political philosophy.

Senator GORE. Mr. Chairman, if we would advertise when this bout was going to go on, we could pay off some of the public debt from receipts at the door. [Laughter.]

Senator KERR. I cannot tell now—you and I, was this a compliment?

Senator DOUGLAS. I am not certain, Bob, whether it was a compliment or not.

Senator KERR. All right.

Now, then, let us get back to the question.

Senator GORE. Before you do, I should say I intended it as a pleasantry.

Senator KERR. I know. You are one of the most delightful men I know.

But let us get back to this thing. We are talking about something being logical, and I gather that you were, in part, persuaded or at least contemplated the possibility of announcing your present attitude as being such or becoming persuaded to have the attitude, that in order for the different provisions of this bill to be logical we would have to apply the capital gains tax on an intercorporate dividend if we were going to apply capital gains tax to a return of capital to an individual stockholder?

The question that I was asking you, and the one that is in my mind is this: In view of the fact that the individual income is taxed, that all of the individual income is taxed at the rates fixed by law, and only 15 percent of the intercorporate dividend is taxed, how can you establish the premise that in order to be logical you have got to have the same rate applied to both?

Mr. OBERDORFER. I think the answer is, Senator, the answer simply is a suggestion of a possibility of explanation, is by analogy on the partial liquidation. In other words, in the case of a partial liquidation a corporation and an individual are both taxed to the full value, and the corporation does not in that case enjoy the dividends-received deductions.

Now, that does not conclude the matter but that is just a peg to hang the hat of authority on.

Senator KERR. And in the light of that now, you think it would be illogical to have the return of capital principle with the capital gains resulting tax applicable to the individual stockholder and to have the intercorporate dividend principle not in accordance with existing law, which would apply only to the cost of the asset in the hands of the present owner, but at the present market value insofar as the tax owed by the receiving corporation is concerned?

Mr. OBERDORFER. I do not say it would be illogical, Senator, to do it.

Senator KERR. Now, just stop right there. We are in perfect accord. That is all right. I think you made a good answer, and now if you want to make a speech you go ahead.

Senator LONG. Has he completed his statement? May I ask a question, Mr. Chairman?

The CHAIRMAN. Senator Long.

Senator LONG. Do I understand from your statement that you and the Justice Department are not interested in adjusting the tax structure to lighten the impact on these divestitures? I believe that was said somewhere in your statement here. I read it before you testified. For example, the Hilton Hotel people had a statement by Mr. Herbert Bergson, who once served in Mr. Loevenger's responsibility, that while the department he had recommended that the Government should permit a corporation to use its money to buy something else without recognizing the gain at that point. He contended that it would be much easier to obtain a divestiture in the public interest if you did not tax that transaction but instead kept it subject to being taxed at the disposal of the property.

You are familiar with the so-called Hilton Hotel bill?

Mr. OBERDORFER. Yes, sir.

Senator LONG. Do I understand from your statement that you are not concerned about that problem or that you do not care to encourage any tax adjustment for that purpose?

Mr. OBERDORFER. Of course, the statement the Senator read was directed to this particular legislation.

Senator LONG. I am asking my own question, I am not asking about——

Mr. OBERDORFER. We have commented on the Hilton amendment, the Department has, the Deputy Attorney General has written a letter to the Ways and Means Committee. I do not recall whether

he has written any to this committee, but he said that we do not recommend that legislation for purposes of helping us enforce the antitrust law.

Senator LONG. I think somewhere in here you make a statement along that line with regard to this bill. You say that so far as you are concerned you are not interested in adjusting the tax structure so as to make it more attractive for people to accept divestiture.

Mr. OBERDORFER. That is, certainly, what we intend to say. I think that is our position in that respect.

Senator LONG. I have discussed the Hilton proposition many times. It has been urged that the Hilton amendment should be put into law. I do not know whether I will vote for that or not. But you state that the Department feels that general legislation along the line under consideration is not necessary and not justified as an aid in the enforcing of the antitrust laws. It would seem to me that there might be a lot of cases where people might be willing to go along with divestiture, to agree to a consent decree rather than to keep you in court for 4 or 5 years, if it were not for the tax problem, that being one of the main problems involved. Does not this tax difficulty impede divestiture when you think it should be achieved?

Mr. OBERDORFER. Mr. Loevinger is here, and perhaps can better answer that than I. The Department's position is that the Supreme Court's decision in the Du Pont case is on the books. We think that the courts will decree divestitures under existing law. We cannot say that we will need this in order to——

Senator LONG. I have a high admiration for Judge Loevinger, because of the opinions he has rendered on various and sundry matters which coincide with my views on the antitrust laws and what they ought to be, but he is a little confused about taxing farm cooperatives. With that exception we could agree on the antitrust laws.

I would like to get your view on that phase of it, if you would, Judge Loevinger, and as to the tax's consequence upon divestiture, that is, whether it is an impediment to achieving divestiture.

Mr. LOEVINGER. I think that there is one thing that the committee must keep in mind and that is, that at best this is a bill of very limited application. When you have one corporation owning 80 percent or more of another corporation, then you have no problem, you have the usual spinoff provision. This bill happens to apply or will be of significance only in those situations where you have less than 80 percent ownership. It is not a fact that there are many of these cases we have in which there is such a minority ownership, but, nevertheless, still constitutes a degree of control that we have this kind of problem; in other words, it is not a problem that arises with great frequency. Consequently, it is not a matter of general concern within the field of antitrust enforcement.

Senator LONG. In other words, it is only once in awhile that you think this problem would come up anyway?

Mr. LOEVINGER. So far as we can ascertain from a survey of pending and prospective cases there is only one other case that we are aware of in which this legislation, if enacted as general legislation, could apply, and that is considerably different than the *DuPont-General Motors* case because the scale of magnitude is so completely different.

The CHAIRMAN. Are there any further questions?

Senator WILLIAMS. As I understand, one of your recommendations was complete deferral of all tax liability, is that correct, reading from your statement?

Mr. OBERDORFER. We have under consideration, and this is in the very beginning stage, an idea of applying it to some kind of transactions in divestiture where the person who is involved receives property in kind, instead of cash, permitting him to defer tax in the manner that is now applied by the Treasury Department administratively with respect to blocked income. Under administrative practice an individual who gets paid in blocked currency in a country and has access to that currency, if he could spend it over there, but is not over there, is not taxed when he earns that blocked income and he only pays the tax when he takes the blocked income out of that country or goes to that country and spends it and gives it away or anything else.

Senator WILLIAMS. We are not dealing with blocked currency. I go back to my question again, did you say or did you not recommend the deferral of all tax obligation?

Mr. OBERDORFER. The answer is that we do not recommend complete deferral.

Senator WILLIAMS. It may be that the deferral tax consequences would be sufficient," it says here. That is a complete statement. Do you recommend that or are you against it?

Mr. OBERDORFER. This focuses on what we are thinking about—it is not an adequate statement.

Senator WILLIAMS. In other words, it is not a logical statement?

Mr. OBERDORFER. It is. Any criticism is valid. It is not an adequate statement.

Senator WILLIAMS. I think that you should answer the questions.

Mr. OBERDORFER. Yes, sir.

Senator WILLIAMS. Because this is not a question which has just come up this afternoon. You testified before the Ways and Means Committee and over there you told the Ways and Means Committee that you thought the solution would be a complete deferral of all tax obligations.

Mr. OBERDORFER. If I said that, I mispoke.

Senator WILLIAMS. Would you say a partial——

Mr. OBERDORFER. Because what was in my mind——

Senator WILLIAMS. You said deferral—did you say partial deferral—would you say that?

Mr. OBERDORFER. I hope that I am more guarded than this statement is, and I am glad to have this opportunity to amplify this statement because it is not an accurate reflection of what we have in mind.

Senator WILLIAMS. I will go back beyond this statement. When you commented on some previously introduced bills that had been pending in the Ways and Means Committee, you held a press conference, and both at the press conference and in the latter release you recommended deferral.

Mr. OBERDORFER. We said we would like—we would be interested in considering deferral. We are really—I must emphasize, Senator, that this is not a mature idea that has been approved in the Department.

Senator WILLIAMS. Is it any more mature or less mature than the statement you have at the end of it when you said that you are not making any recommendation on this legislation. Is that a mature statement?

Mr. OBERDORFER. Yes, sir.

Senator WILLIAMS. That is mature?

Mr. OBERDORFER. Yes, sir, that is the authoritative position of the Department.

Senator WILLIAMS. That is a mature statement?

Mr. OBERDORFER. That is right.

Senator WILLIAMS. Will the same mature individual who makes that statement also comment on the other part of your statement regarding the deferral—would you go along, and are you recommending deferral of all tax liability?

Mr. OBERDORFER. The direct answer to the Senator's question is "No."

Senator WILLIAMS. That is a direct answer to the question this way. Did you not make that recommendation on three different occasions, once before the Ways and Means Committee, once before this committee today, and once in a previous letter to the chairman of the committee on other legislation—did you not recommend deferral as being the answer, and I wish you would answer that short, because you did or did not.

Mr. OBERDORFER. I would have to look at the record to see exactly what we did, but I, certainly, was not intending to make a blanket recommendation that deferral of all divestitute income was the solution, and if we did that I, certainly, want to give the correct answer, to correct the errouneous impression.

Senator WILLIAMS. Well, admit that is in your statement, will you not?

Mr. OBERDORFER. Yes, sir. It says that it may be that deferral of tax consequences would be sufficient.

Senator WILLIAMS. Yes.

Mr. OBERDORFER. That is what it says.

Senator WILLIAMS. Behind that—the thinking behind that is that it could be the solution through this legislation?

Mr. OBERDORFER. Yes.

Senator WILLIAMS. It was put in with that thought?

Mr. OBERDORFER. And without the amplification that the Senator has allowed me to offer.

Senator WILLIAMS. That is your opportunity to elaborate at this time. I saw a similar statement before the Ways and Means Committee and a statement in your previous suggestion, and it is the only suggestion that we have. I will ask you this question: Do you have any other suggestion which would be better than the pending legislation?

Mr. OBERDORFER. I, personally do not. I do not know whether Judge Loevinger would like to answer that in another way or not, but the answer for my part——

Senator WILLIAMS. That you have no suggestion?

Mr. OBERDORFER. Yes.

Senator WILLIAMS. Do you have any suggestion, Judge Loevinger?

Mr. LOEVINGER. I take it that you are asking for an expression, an opinion on a matter of philosophy and policy——

Senator WILLIAMS. No.

Mr. LOEVINGER. To which Senator Kerr objected.

Senator WILLIAMS. No. I am just referring to——

Senator KERR. I do not object to another man's philosophy. But I reserve the right to disagree.

Mr. LOEVINGER. Yes.

Senator GORE. He is always allergic.

Senator WILLIAMS. Was not the suggestion made by the Justice Department to the Treasury Department that the deferral of tax consequences on the date of distribution may be the answer?

Mr. LOEVINGER. I think that suggestion was made at the wrong time.

Senator WILLIAMS. That was my understanding. Do you have any other suggestion other than that?

Mr. LOEVINGER. I think the difficulty can be highlighted only by putting to you this problem of policy. There is an antitrust problem presented by the tax laws, by virtue of the fact that in many situations the tax laws seem to create an incentive for merger. The antitrust laws by and large tend to try to prevent mergers, at least, among relatively large corporations who are large in relation to their market.

If you make a divestiture or unassembling merger that is found to be inconsistent with the antitrust laws easier and more profitable, then what you are doing, in effect, is to remove any potential official consequence, unfavorable consequence and increase the incentive to merger. It may very well be that if you are going to use the tax laws as a means of effectuating antitrust policy it would be more effective to make mergers more difficult, rather than the unmerger easier. And this is the kind of problem that we are wrestling with. We do not have a definitive answer. I think it is a question of policy that has to be decided in terms of how you are going to approach the problem.

Mr. OBERDORFER. Would the Senator be interested in the statement before the Ways and Means Committee having to do with it?

Senator WILLIAMS. Yes, I would.

Mr. OBERDORFER. On page 19 of the hearing before the Ways and Means Committee there is a letter from the Attorney General to Chairman Mills which says at its conclusion:

> We would, however, welcome an opportunity to study any proposal which might be for taxation of a distribution effected pursuant to an antitrust divestiture decree so long as the deferred tax consequences were substantially those which would have resulted had existing law applied to the distribution at the time it occurred.

And on page 88 he said something further, and I will quote:

> Would welcome an opportunity to study proposals such as recognition of the involuntary character of a divestitture by deferring tax with respect to payments received in kind as result of a divestiture decree.

Senator WILLIAMS. Would not the complete deferral result in substantially lower revenue to the Government and——

Mr. OBERDORFER. Complete deferral—if we ultimately collect the tax, for instance, if there was no stepped-up basis on account of death, or if death was the occasion for the tax, I do not know—probably—I do not know—it might or might not.

Senator WILLIAMS. I understand that your suggestion that deferral would create a change in the rate in inheritance and the general tax structure, would it not?

Mr. OBERDORFER. No change.

Senator WILLIAMS. And would not complete deferral of the tax obligation automatically vanish upon payment of the inheritance and thereby result in the loss of revenue to the Government?

Mr. OBERDORFER. It may be that the Senator is referring to what happens to the owner of property at death under existing law. And one of the ideas being to get around in possibly this kind of a situation—and only this kind of a situation— by changing the income tax law with respect to the effect of death so that there would not be a loss of income tax on account of death. That may be what the Senator is referring to.

Senator WILLIAMS. I thing that Senator Kerr said or referred to the fact that the Treasury Department had the responsibility of making any recommendations to this committee in connection with any change in the tax laws.

Mr. OBERDORFER. We, certainly, agree with that.

The CHAIRMAN. Thank you very much.

Senator GORE. I would like, if I may, to ask some questions.

Reference has been made here to the logical or otherwise difference between tax treatment under this bill on corporate shareholders and individual shareholders. The bill proposes changes in the law with respect to both, does it not?

Mr. OBERDORFER. Yes.

Senator GORE. So the bill proposes to treat it differently and to some extent artificially this distribution of corporate assets—if not artificially, at least, arbitrarily?

Mr. OBERDORFER. That difference.

Senator GORE. And different from the provisions of the existing law in both cases?

Mr. OBERDORFER. Yes.

Senator GORE. So it would appear to me that it is illogical to change the law for one and not to change the law for the other.

Mr. OBERDORFER. I really feel somewhat at a loss to answer that.

Senator GORE. I will not pursue it any further. I think you have done well. I congratulate the Justice Department in taking a position. At least, we know that the Justice Department is opposed to the bill. We do not know where the Treasury Department stands, whether it is for or against the bill. Indeed, they say neither.

If the Christiana Corp. receives General Motors stock under the bill—by terms of the bill—it will pay a tax of about $3.50 per share on the General Motors stock, is that correct?

Mr. OBERDORFER. Yes.

Senator GORE. Therefore, the basis of the General Motors stock in the hands of Christiana would be raised to about $9?

Mr. OBERDORFER. Yes.

Senator GORE. On the subsequent sale by Christiana of General Motors stock for $45, for example, the capital gains tax paid by Christiana would be $9, or a total tax of $12.50 per share of General Motors stock.

Mr. OBERDORFER. Yes.

Senator GORE. Do you agree to that?

Mr. OBERDORFER. Yes; that is in the range of figures we have been submitting.

Senator GORE. I do not want to make an exact calculation. That is not exact as to the decimal point.

Under existing law Christiana would pay approximately 17 cents per share on the receipt of General Motors stock which would have a basis of about $2.50, is that correct?

Mr. OBERDORFER. That sounds right.

Senator GORE. Now then, would it follow—would it be true that that a subsequent sale of Christiana would result in a capital gains tax on Christiana of about $10.75 or $11 on the stock?

Mr. OBERDORFER. That sounds right.

Senator GORE. Now if Christiana passes through General Motors stock to its stockholders, under this bill, the individual stockholders in Christiana would pay about $11 tax on each share of General Motors stock, is that correct?

Mr. OBERDORFER. That sounds right.

Senator GORE. If Christiana holds onto the stock or exchanges it for other stock, the loss to the Government could amount to about $185 million?

Mr. OBERDORFER. That sounds like the figure that again we are familiar with.

Senator GORE. So the indicated sale by Christiana—indeed, with the Justice Department recommending the requirement of sale by Christiana—this great tax burden which we are told in the pending bill would place upon Christiana seems more apparent than real?

Mr. OBERDORFER. Christiana would pay, if the Department of Justice recommendation about the sale of the stock—there would be a capital gains tax on Christiana and that would produce, it seems to me—it produces more revenue than if Christiana passes it through.

Senator GORE. The equating is not complete.

Mr. OBERDORFER. That is right.

Senator GORE. And I do not suggest that it is. I think you have testified excellently. Thank you.

The CHAIRMAN. Are there any further questions?

Senator GORE. I would like to ask to be excused. I have no more questions. I am advised that Mr. Greenewalt will follow, and I would like to stay a few moments.

The CHAIRMAN. Our next witness is Mr. Greenewalt.

STATEMENT OF CRAWFORD H. GREENEWALT, PRESIDENT, E. I. DU PONT DE NEMOURS & CO., WILMINGTON, DEL.

Mr. GREENEWALT. Mr. Chairman and members of the committee, I am not sure that it is appropriate for me to say this, but I understand that Mr. Gore must leave.

Senator KERR. He has said that he wanted to stay, in view of the fact that you were to appear.

Mr. GREENEWALT. I have a statement that will take some time to present, and if Mr. Gore would like to anticipate that by asking some questions I will be quite content with that.

Senator GORE. Mr. Greenewalt is very generous, and I appreciate it. It is true that I must depart. I am sorry, you may be disappointed, but I will return to meet this bill on the floor.

Mr. GREENEWALT. I will not be disappointed, I assure you.

Senator GORE. I would rather that you would follow through your statement. I will try to stay until it is finished. You are very kind, and I thank you.

Mr. GREENEWALT. Thank you.

The CHAIRMAN. Proceed.

Mr. GREENEWALT. I am grateful for this opportunity to discuss with you a grave problem which confronts more than a million American citizens who, in the absence of corrective legislation, will be severely punished though they have done no wrong.

I appear before you today not on behalf of the Du Pont Co. because our business as a chemical manufacturer in no way will be affected by the legislation under consideration. I am here on behalf of more than 200,000 stockholders of the Du Pont Co. and, indirectly, nearly 850,000 stockholders of General Motors Corp. These 1 million citizens are residents of every State in the Union; many of them are your constituents. Their innocence is unquestioned; yet, they find themselves, through no fault of their own, in a situation where only positive action by Congress can spare them from gross inequity. I should like to offer two exhibits, Mr. Chairman, listing by States the number of stockholders of these two companies.

The CHAIRMAN. Are they attached to your statement?

Mr. GREENEWALT. They are, sir.

The CHAIRMAN. Without objection they will be made a part of the record.

Mr. GREENEWALT. Let me review briefly the background of the problem.

As you know, the Du Pont Co. owns 63 million shares of common stock of General Motors Corp. Sixty million of these shares were acquired more than 40 years ago, from 1917 to 1919. Over the years, Du Pont has held this investment for the benefit of its stockholders, passing the General Motors dividends to them intact, save for the intercorporate dividend tax. For 30 years, the Government did not question the propriety of this investment.

Then, in 1949, the Department of Justice filed a complaint alleging a conspiracy among Du Pont, General Motors, and others to divide fields of activity and to force the companies to purchase goods from one another. After a lengthy trial, the district court in Chicago dismissed the complaint in its entirety.

In 1955, on appeal to the Supreme Court, the Department of Justice dropped all parts of its original case except that involving relationships between Du Pont and General Motors. The Government also abandoned the charge of conspiracy.

In 1957, the Supreme Court, by a vote of 4–2 and in a new interpretation of section 7 of the Clayton Act, held that Du Pont's ownership of 23 percent of the common stock of General Motors was sufficient to create a "reasonable probability" that, at some future time, Du Pont might monopolize General Motors' purchases of automotive paints and fabrics. There was no finding of monopoly or restraint of trade; simply a fear of what might happen in the future.

Senator LONG. Did the language of the Sherman Act go that far to imply divestiture where it was shown one corporation might be in position to influence the activity of others?

Mr. GREENEWALT. Senator Long, my legal friends tell me that this action of the Supreme Court is a completely new interpretation of the Clayton Act.

Senator LONG. I know that in the field of price discrimination—in that field under the Robinson-Patman amendment the word "may" is used, which has the effective meaning that something might have a certain effect, but I did not know that with regard to the theory of monopoly that the thought was to make divestiture mean that it was felt that it might in the future result in that.

Mr. GREENEWALT. There is a long argument on that point. The Supreme Court held that section 7 could properly be interpreted this way. I am not a lawyer, Senator Long, but what I have just read to you is virtually a quotation from the Supreme Court's opinion.

The Supreme Court then returned the case to the district court for framing a judgment for "equitable relief." At that time, the Department of Justice proposed to the district court that Du Pont distribute its General Motors shares to Du Pont stockholders over a 10-year period, with the added provision that shares allocable to certain stockholders, amounting to about one-third of the stock, be sold for their account by a trustee. The Commissioner of Internal Revenue then ruled that shares so distributed would be taxable to individual stockholders as a dividend, at effective ordinary income tax rates ranging from 16 to 87 percent of market value at time of distribution.

The district court hearings in 1959 centered on the specific plan proposed by the Department of Justice. A survey accepted by the court at that time demonstrated that in the distribution called for by the Department of Justice plan the more than 230,000 individual beneficial owners of Du Pont common stock would become liable for taxes ranging from $700 million to more than $1 billion, depending upon the market price of General Motors. It was pointed out to the court that many Du Pont stockholders would have to sell all or part of their General Motors shares to pay these taxes. Others would sell their Du Pont stock to avoid receiving the General Motors shares with the associated tax liability.

Expert witnesses testified that these sales, added to those of the trustee, would result in erosion of market values in the range of 20 to 25 percent for General Motors stock and 25 to 30 percent for Du Pont stock. On this basis, the aggregate reduction in capital value would be in the range of $4 billion to $6 billion for the million stockholders of both companies.

In 1959, the district court declined to adopt such a "harsh and punitive" stockholder penalty. The court held that any possibility of Du Pont influence over General Motors could be prevented by passing voting rights to Du Pont's General Motors stock through to Du Pont stockholders, and by certain injunctive provisions.

The Department of Justice again appealed and, on May 22, 1961, the Supreme Court, by a vote of 4–3, ruled that no less a remedy than complete divestiture was required.

Our judicial remedies are now exhausted. On September 1, 1961, Du Pont filed a proposed judgment of divestiture with the district court in Chicago. The Department of Justice has until October 2 to propose amendments, after which the district court will enter its final judgment. The Supreme Court's mandate requires that divestiture commence within 90 days of final judgment and be completed within 10 years.

The need for corrective legislation, therefore, is urgent.

Recognizing the possibility of an adverse court decision, I appeared before your committee during the 86th Congress to urge corrective legislation to prevent unintended and unfair consequences to stockholders in antitrust divestitures. I testified first in behalf of a bill which would have permitted a distribution of General Motors stock with no tax at the time of distribution.

This treatment seemed eminently fair because it would leave the stockholder in precisely the same position he was in before, save that he would hold his General Motors stock directly instead of indirectly, and his investment would be evidenced by two stock certificates instead of one. Because of objections raised to this approach by the Department of Justice, I later testified before your committee to urge support of a bill which would impose income tax on distributed shares only to the extent of the cost of the stock to the distributing corporation—in our case, the average cost of the General Motors stock is $2.09 a share. This treatment also seemed equitable, since the tax on stockholders would not have been confiscatory. This bill was reported favorably by the House Ways and Means Committee and a substantially similar proposal was later approved by the Senate Finance Committee, but failed to reach a vote on the floor of either House.

A new approach to the problem has been offered in the present Congress in bills sponsored in the Senate by Senator Williams of Delaware and Senator Bennett and in the House by Representatives Mason and Boggs. The House Ways and Means Committee has reported favorably the Boggs bill, H.R. 8847 as amended. This bill would treat stock distributed to individuals in an antitrust divestiture as a return of capital. The stockholder would pay an immediate tax at capital gains rates on the amount by which the value of the General Motors stock received exceeds his cost of the Du Pont stock.

A question that has arisen with respect to all of the legislative proposals is, how would they affect the tax revenue that might otherwise be collected in an antitrust divestiture? It is difficult to calculate precisely the amount of tax the Government would realize under H.R. 8847 since we have insufficient information as to the cost basis in the hands of all of our stockholders. Our best estimate is that the total for both individual and corporate stockholders would be in the neighborhood of $850 million.

Under present law, as I have said, the stock distribution proposed 3 years ago by the Department of Justice would result in total tax revenue estimated at that time at $700 million to over $1 billion. These tax estimates, however, are no longer relevant: The very size of the tax and, associated with it, the staggering capital losses through depression of market values, clearly rule out such a distribution when other methods of divestiture are available.

Other methods are available. The Supreme Court's mandate calls for divestiture, not distribution, and the Department of Justice has shown a willingness to accept flexibility in methods of divestiture. The Department of Justice stated in its appeal brief to the Supreme Court that Du Pont should be—

> * * * free to exercise its own judgment as to the methods of divestment, and combination of methods, most advantageous to it, its stockholders and General Motors stockholders * * *.

Accordingly, our proposed final judgment filed with the district court in Chicago provides that Du Pont shall divest itself of its General Motors stock—

> by distribution to its stockholders or by such other means as it may select.

After a great deal of thought and study, we have concluded that a flexible program which would permit use of a combination of methods would be least harmful to stockholders under present law. For example, we estimate that Du Pont could dispose of around 15 million shares of General Motors stock over a 10-year period by paying some part of its regular dividend in General Motors stock rather than cash. There would be no additional revenue to the Treasury because stockholders would be paying no more than the tax they now pay on the cash dividends.

Senator LONG. Would you mind explaining why that would be the case? Would you not be in the position that you would have to reduce the amount of cash dividend that you would otherwise be paying to someone?

Mr. GREENEWALT. No, it would work this way, Senator Long: Let us suppose that we pay a cash dividend of $6 normally.

Senator LONG. Correct.

Mr. GREENEWALT. Under this proposal we would be paying, roughly, 25 percent of that $6 in the form of General Motors stock so that the stockholder would get $4.50 in cash from us and $1.50 worth of General Motors stock.

Senator LONG. You would be, in effect, then piling up in your Treasury additional cash and paying less dividends?

Mr. GREENEWALT. We would, indeed and we would propose to reinvest that.

Senator LONG. I see.

Mr. GREENEWALT. Du Pont, also, could offer to exchange.

Senator LONG. Let me just take that point. What you are saying is that it is within the power of your company to adopt a plan under which the Government would not receive any additional revenue, so far as Du Pont is concerned—is that correct?

Mr. GREENEWALT. That is correct, only in theory. I would like to impress upon the committee the magnitude of this problem. It is really huge. We feel, in making these estimates, that the maximum we could properly pay out in the form of General Motors stock is something of the order of 25 percent of our regular cash dividend. The reason for this is that our stockholders rely on the cash, naturally, to eat, to send their children to school, or for whatever reason they desire the cash. Obviously, we can pay no more in General Motors stock than we think there is some possibility of their being able to retain. The rest we must pay in cash, we feel. So this places a

practical limit on the percentage of our regular cash dividend that we can pay out in stock. Have I made that clear?

Senator LONG. Yes, sir.

Mr. GREENEWALT. Du Pont also could offer to exchange General Motors shares for shares of Du Pont common and preferred which could then be retired. Assuming certain statutory tests are met, as we believe would be the case, the exchanging stockholders would be subject to capital gains tax. As an incentive, it would be necessary to offer a suitable premium. In that event, exchanges might appeal to stockholders with a tax-exempt status, such as religious, educational, and charitable institutions, and to those Du Pont stockholders whose cost basis for Du Pont stock is high enough so that there would be little or no tax incident to the exchange. We believe we could dispose of as many as 10 million General Motors shares through essentially tax-free exchanges.

It thus appears that we could dispose of as many as 25 million shares of General Motors by methods which would produce no additional tax revenue. If we are correct in these estimates, there would still be left more than 35 million shares which we expect the company would have to sell within the 10-year period. Du Pont would be required to pay a tax on any capital gains realized on these sales, and the tax revenue yield on all this would be in the neighborhood of $330 million based on current market value of General Motors stock.

Under present law, then, tax revenues under the combination of methods of divestiture which now appears most favorable would total about $330 million. A distribution under H.R. 8847 would yield tax revenues of about $350 million.

If I may, I might take this opportunity to comment on the Treasury statement this morning about an alternate plan which would produce something of the order of $130 million in tax revenue. That was really not an alternate plan. What I was attempting to show the Treasury was the range of what might be accomplished under the so-called flexible approach. I might preface this by saying that this is a financial operation that is simply the most complex in the history of the United States. Nobody has ever tried to dispose of $3 billion worth of common stock of another company in a 10-year period—nobody has tried to do that. So that there is a certain amount of uncertainty with respect to the success of any of these matters we have described under the flexible plan.

In speaking to the Treasury about these possible tax consequences, what I was attempting to show them is the range within which this one plan might work; for example, the 15 million shares in lieu of cash dividends is on the assumption of 25 percent of our regular cash dividend being paid in that form. If we could get it up to 30 percent we could dispose of 20 million shares.

On the exchange offers we have taken the conservative approach. There are estimates that indicate that, perhaps, as many as 30 million shares might go in the exchange offers which, of course, would reduce the amount we would have to sell. The point that I really wish to make to you is that there was no new plan discussed with the Treasury. What I was discussing with them was the range of results under the three-pronged plan I have just outlined to you. Unfortunately, this is something on which we cannot be precise. This

question of exchange offers, for example, is a very uncertain thing because all we can do is to make the offer. The acceptance is still another matter. We feel that the $330 million estimate which I just built up, as it were, is a conservative one. And, quite frankly, I do not want to try to underplay the revenues that the Government would receive under the present law. I tried to be just as accurate as I could possible be.

Senator LONG. I think the point should be clear for the record. If I understand it, under the law, you do not have to have anybody's consent to adopt anybody's alternate plan. It is within your power. You have to divest. You could adopt any plan that you wanted to so long as it achieved divestiture. Is that not the size of it?

Mr. GREENEWALT. That is quite right. You know, Senator Long, when Senator Gore or, perhaps, Senator Douglas referred this morning to the "iffy" situation, there is one unfortunate fact about which there is no "if." We must divest ourselves of 63 million shares of General Motors stock in 10 years. There is no alternative to that—on "ifs" on this at all.

Why, then, you may ask, if the taxes are approximately the same, am I here urging enactment of this legislation?

The answer is simple. I am seeking protection for a million innocent stockholders from unwarranted economic penalties. In the absence of corrective legislation the various means of divestiture that Du Pont might use would all have a substantially depressing effect upon the market value of General Motors stock.

The Du Pont Co. itself, under the circumstances I have outlined, would be selling about 35 million General Motors shares over a 10-year period. In addition, many individuals who received General Motors shares in lieu of part of their cash dividends, or who exchanged Du Pont stock for General Motors stock, would sell at least some of these shares to pay taxes, for living expenses, or for a variety of personal reasons. Financial experts believe that this could well bring the total number sold up to a yearly average of 4 million shares or more.

To put these figures in perspective, let me observe that the average annual trading in General Motors on the New York Stock Exchange has been above 7½ million shares and total trading on all domestic exchanges has been under 9 million shares.

This means that, if the Du Pont Co. and its stockholders were to attempt to sell 4 million shares a year, we would be adding nearly 50 percent to the amount of stock which would have to look for and find new buyers. This huge amount of stock would be hanging over the market year after year, and for a decade potential buyers would know that there was still more to come. Financial experts tell us that this would seriously depress the market value of General Motors, with a total depression somewhere in the range of $1 to $2 billion felt by a million stockholders. Every holder of General Motors stock who had to sell at any time during the 10-year period to raise cash for taxes, for education of his chlidren, for other living expenses, or who had to put stock as collateral for a loan, would be the innocent victim.

Under H.R. 8847, the picture would be quite different. If Du Pont were to distribute all its General Motors shares, a Du Pont share-

holder would receive 1.37 shares of General Motors, with a current market value of about $60, for each Du Pont share. The cost basis of the Du Pont share held by an individual would be reduced by $60 for computation of capital gain or loss upon disposition of the share. The cost basis of the General Motors stock received would be its market value, or $45 a share. If the Du Pont share been acquired at less than $60, its cost basis would be reduced to zero, and the stockholder would pay an immediate tax at the capital gains rate on the amount by which the value of the General Motors stock received exceeded the cost of the Du Pont stock. For example, suppose you bought one share of Du Pont common some years ago for $40, you would receive, as a return of capital, $60 worth of General Motors stock. Your capital gain, accordingly, would be $20, on which you would be immediately liable to pay a tax of not more than 25 percent or $5. The cost basis of your Du Pont share would be reduced to zero, and the cost basis of your General Motors stock would be its market value, or $45 a share.

Du Pont stock last sold below $60 in 1949. We estimate that the shares acquired since then and now held by individual stockholders, plus the holdings of tax-free institutions, aggregate about 10 million shares. Therefore, we believe that holders of around 35 million Du Pont shares, or about 75 percent of the outstanding stock, would be subject to tax under H.R. 8847. But, since the number of Du Pont shareholders has more than doubled since 1949, a numerical majority of Du Pont stockholders, including more than 50,000 of our 87,000 employees, would receive the General Motors stock without paying a tax at time of distribution. The remaining individual stockholders, who acquired their Du Pont stock for less than $60, together with corporate shareholders, would become liable for about $350 million in taxes.

This figure assumes a redistribution of the stock received by Christiana Co.

Senator KERR. That alone involves what amount of the $350 million?

Mr. GREENEWALT. I have the figure here, sir. I have it on this basis. Under the Boggs bill, in the original distribution of General Motors stock from Du Pont to Christiana, Christiana would be liable for $65 million in taxes. On the subsequent distribution by Christiana to its stockholders, the individual shareholders as well as we can estimate would become liable for $120 million additional taxes.

Senator KERR. Is that a part of the $350 million?

Mr. GREENEWALT. That is a part of the $350 million, yes, sir.

Senator KERR. Could you tell us the basis of your assumption that Christiana would pass that stock on to its shareholders?

Mr. GREENEWALT. I am willing to discuss it.

Senator KERR. I am sure that there is interest in it.

Mr. GREENEWALT. Well, my friends from the Department of Justice over here are really in a better position to discuss it than I am. All I can say is this, that in the last hearing in Chicago the Justice Department appeared to be violently opposed to Christiana retaining the General Motors stock allocable to it on distribution by Du Pont. As a matter of fact, they went so far, as I have said in my statement, to suggest that these shares of General Motors stock allocable to

Christiana be held by a trustee and sold for the account of Christiana and the proceeds passed on to Christiana.

Senator KERR. In that event, would not that liability be in the neighborhood of $120 million or more or less?

Mr. GREENEWALT. It would be slightly more. As nearly as I can calculate it, of course, all of these figures are about like this——

Senator KERR. I understand.

Mr. GREENEWALT. In the event that Christiana passed through the General Motors stock to its shareholders the tax paid by the individual shareholders, over and above the $65 million that Christiana will pay, is about $120 million—$120 million to $130 million. If, on the other hand Christiana was required to sell the stock, the additional tax capital gains tax on the sale would be in the neighborhood of $160 million or $165 million.

Senator KERR. That is in addition?

Mr. GREENEWALT. In addition to the $65 million which would be the tax resulting from the distribution of the General Motors stock from Du Pont to Christiana. Then, depending upon what the court in Chicago finally orders, Christiana might have to sell the stock or redistribute it to its stockholders. I already have indicated the tax situation in either event. We have assumed that the pass through would be a preferable thing. I think as a matter of fact, I do not want to pretry this matter—one of the equities in it is this: there are 8,000 shareholders of Christiana shares. I hope this disposes of the idea that there is only a handful of people who own Christiana stock. Ten percent of the outstanding shares of Christiana are held by charitable organizations. It is very popular for endowment funds and charitable organizations. The pass through, of course, would relieve the shartholders of any tax since they are tax free by law, whereas the sale by Christiana, of course, would indirectly affect the charitable shareholders by a tax.

This would, also, be true for the more than 3,000 very recent shareholders of Christiana. As a matter of commonsense and equity it seems to me that the pass through if, indeed, Christiana is required to dispose of its General Motors stock, is the sensible course of action. I have therefore, assumed a redistribution by Christiana in my calculations.

Senator KERR. Your assumption was made by reason of the position of the Justice Department who seeks a directive that this company, Christiana, divest itself either by a pass through or by sale?

Mr. GREENEWALT. All I can tell you, Senator Kerr, is the last time we were all together in Chicago the Justice Department was most eloquent in attempting to persuade the Court to order Christiana to divest itself of any General Motors stock. I have no reason to think that they have changed.

Senator KERR. What I would like the record to show is the basis, at least in part, for the assumption being the position of the Department of Justice who seek that.

Mr. GREENEWALT. That is correct. What they will actually seek now I do not know.

Senator KERR. I understand, but that is the position that they have heretofore announced?

Mr. GREENEWALT. They have taken the position with great emphasis that they do not wish Christiana to retain the General Motors stock.

Senator KERR. Would it be more accurate to say that they very much wish that it not be permitted?

Mr. GREENEWALT. Indeed, sir.

Senator KERR. To retain it?

Mr. GREENEWALT. Yes. So from the point of view of revenue estimates under the proposed legislation I would like to say that the two alternatives do not really make much difference. It is true that we are talking about millions of dollars, but the possible errors in making these estimates are, also, quite large.

Senator KERR. On the possibilities for errors

Mr. GREENEWALT. To pass the General Motors stock through to the individual Christiana shareholders would result in something in the order of $130 million in taxes paid by the shareholders themselves. The sale by Christiana would result in something like $160 million in taxes. And then you take that $30 million difference and set it alongside a very large number of $350 million total, in one case and $330 million in another, there is really very little difference.

Senator KERR. I understand.

Mr. GREENEWALT. On a percentage basis.

Senator KERR. The only thing I was trying to do Mr. Greenewalt was to have the record show, No. 1, the basis for the assumption and, therefore, the validity of the assumption.

Mr. GREENEWALT. Yes, Senator, I must say that I am doing some guessing, not only in what the attitudes of the Antitrust Division will be, but, also, that I am guessing twice.

Senator DOUGLAS. Mr. Greenewalt, would you say that the Department of Justice has been very successful in the past in convincing Judge LaBuy that he should give an order in the same form that the Department is advocating?

Mr. GREENEWALT. Senator Douglas, the Department of Justice has been unsuccessful with Judge LaBuy, but very successful with the Supreme Court. After all, it is just who wins the horserace that counts.

Senator DOUGLAS. So the fact that the Department of Justice may recommend either sale or pass through does not mean at all that the court will so order.

Mr. GREENEWALT. No, it does not.

Sentor DOUGLAS. In fact, as you say, in the two previous cases the court has directly taken the position contrary to that which the Department advocated.

Mr. GREENEWALT. I do not want to give my friends over here any comfort at all, Senator Douglas. I hope you will not lead me into doing so. I am sorry to admit that while the court in Chicago is seeing things our way, the Supreme Court is not. And the Supreme Court in this instance also is the court of last resort.

Senator DOUGLAS. But the margin in the first case was four to two and in the second case it was four to three.

Mr. GREENEWALT. You mean we might——

Senator DOUGLAS. That is decreasing margin.

Mr. GREENEWALT. You mean we might win one. [Laughter.]

If you will guarantee that, we might want to appeal.

Senator DOUGLAS. I do not guarantee anything.

I simply say that you can, if we depend upon the position presumably of the Department of Justice, and believe that they will advocate that, that is a very tenuous reason and we might wind up with no pass through.

Mr. GREENEWALT. Of course, Senator Douglas, if that is the case, then, of course, Christiana is in the same posture as many other corporate shareholders.

Senator DOUGLAS. You may continue with your statement.

Senator BENNETT. May I ask a question? In calculating this $40 million difference between the two systems, have you taken into account the possible adverse effect on the market if Christiana were required to sell this stock through a trustee—would that not tend to reduce the capital gain by reducing the income?

Mr. GREENEWALT. Yes. This is, of course, if Christiana alone had to sell, then there would be 20 million shares to be sold or, roughly speaking, 20 million shares to be sold over the 10-year period, under the present law.

The plan that I have just outlined to you, would involve nearly 40 million shares being sold over the 10-year period. There are certain consequences in both cases, but they would be much more severe in the 40-odd million share case than in the 20 million share case; but there will be market consequences if 20 million shares have to be sold in 10 years.

Senator BENNETT. I was not in the room to hear all of the testimony of the Justice Department, but I have the impression that they think 10 years is too long.

Mr. GREENEWALT. Well, I think that the Supreme Court may have taken it out of their hands, Senator. You know I am really very much embarrassed at this because Mr. Metzger is sitting here breathing in every word, and he may not agree with me at all; probably, as a matter of fact, does not. The Supreme Court did order divestiture in a period not exceeding 10 years. It seems to me very unlikely that under the present law there would be any requirement to divest in less than that; as a matter of fact, divestiture in even 10 years is an enormous task.

Senator BENNETT. I realize that.

Mr. GREENEWALT. What we may be getting into is a shorter period if the Boggs bill should become law. Under those circumstances, we see no serious market impact, and we believe that the divestiture under the Boggs bill could be done in a considerably shorter period of time. How short we do not really know. But, certainly not more than 5 years.

Senator BENNETT. I was putting two or three things together, saying that the Department of Justice was trying to persuade Judge LaBuy to force you to dispose through a trustee and in the same operation, having read of their attitude in the testimony today, trying to persuade Judge LaBuy that this program would have to be carried out in a much shorter period than 10 years.

Mr. GREENEWALT. Well, I did not think that they would take it both ways. At least, I hope they will not. Now he is here. I told Mr. Metzger he might be trying the case before you.

Mr. METZGER. No comment. [Laughter.]

Mr. GREENEWALT. He does not want to comment, but I think it is extremely unlikely that under present law we will be required to divest in less than 10 years.

Senator BENNETT. I would just state parenthetically to Mr. Metzger that he had better stay with Judge LaBuy. It is much more difficult to convince us than even Judge LaBuy.

Mr. GREENEWALT. Should I continue?

The CHAIRMAN. Yes.

Mr. GREENEWALT. This sum is roughly equivalent to the value of some 7 million shares of General Motors. I have no way of knowing how many shares would have to be sold to pay these taxes, but even assuming that as many as 5 million shares would be sold over a 5-year period, the impact on market values would be relatively small. Moreover, since the major part of the tax liability would be concentrated in a relatively small group of shareholders, it is likely that sales of their shares could be made on an organized basis through underwriters, avoiding indiscriminate dumping of stock on the market. Thus, the economic consequences in terms of market impact of a distribution under H.R. 8847 would be minimized.

There is one feature of the bill which gives me serious concern.

Gentlemen, I put my hand up in anticipation that Senator Douglas will laugh.

Senator DOUGLAS. No.

Mr. GREENEWALT. That is section 2, which would base the tax on stock distributed to corporate stockholders in an antitrust divestiture on its fair market value irrespective of its cost to the distributing corporation. The Supreme Court has said that divestiture in antitrust cases "is a remedy to restore competition and not to punish * * *" yet the effect of section 2, applying solely to intercorporate stock distributions under antitrust divestitures, is to single out corporate stockholders for special punishment by an increase in the tax. In our case, corporate stockholders would have to pay 20 times as much tax as they would pay in a divestiture carried out under existing law. Moreover, the tax proposed is 20 times as much as it would be if the stock distribution were voluntary and not required by an antitrust divestiture order.

Because it would impose special punishment on a single class of stockholders, I would prefer to see section 2 eliminated from the bill. Nevertheless, if Congress should decide that section 2 is an essential feature of corrective legislation, it seems to me that H.R. 8847 with section 2 is far more desirable than no legislation at all because it would minimize the market consequences of divestiture.

Let me summarize briefly: Under present law, revenue realized would be about $330 million; revenue under H.R. 8847 would amount to about $350 million. Loss of capital assets under present law would be from $1 billion to $2 billion; loss of capital assets under H.R. 8847 would be relatively small.

The bill, H.R. 8847, would permit prompt and sure divestiture without drastic market consequences for the stockholders of the two companies. Moreover, there would be no loss of revenue to the Government.

One thing is certain: These stockholders are worthy of your consideration. As you know, there was in this case no finding of monopoly, intent to monopolize, restraint of trade, or conspiracy. The Supreme Court stated explicitly that:

*** * * all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including Du Pont's competitors.**

In these circumstances, no informed person has ever suggested that the owners of Du Pont stock—described by Mr. Justice Frankfurter as "the hundreds of thousands of truly innocent stockholders"—could, by any stretch of the imagination, be guilty of any wrongdoing.

Legislation is required to protect these stockholders as well as stockholders of other corporations who may find themselves similarly situated in the future.

Reaction of the Nation's press to the Supreme Court decision has been overwhelmingly in favor of remedial legislation to protect the interests of the stockholders. Leading newspapers in every section of the country have called for favorable legislation, including the few papers approving the Court decision requiring divestiture. To date, we have discovered more than 100 newspaper editorials throughout the United States favoring legislation; only two newspapers have opposed it.

With your permission, Mr. Chairman, I should like to offer, as exhibit C, copies of a few representative editorials as part of the record of these hearings.

The CHAIRMAN. You may do so without objection.

Mr. GREENEWALT. I am sure this committee is familiar with the precedents, such as in dispositions of property required by the Public Utility Holding Company Act and Bank Holding Company Act, for corrective legislation. It is plain that only Congress can act to save a million American citizens from unwarranted economic punishment. If corrective legislation is enacted, this case, drawn out too long, can be concluded promptly without the drastic market consequences which are inevitable under present law.

(Exhibit A, exhibit B, and exhibit C follow:)

EXHIBIT A.—*E. I. Du Pont De Nemours & Co. common stock domestic stockholders of record as of Dec. 31, 1960*

State	Stockholders	State	Stockholders
Alabama	771	Nebraska	283
Alaska	19	Nevada	131
Arizona	558	New Hampshire	1,110
Arkansas	197	New Jersey	17,954
California	12,085	New Mexico	233
Colorado	1,276	New York	32,348
Connecticut	7,966	North Carolina	2,949
Delaware	17,781	North Dakota	66
District of Columbia	1,907	Ohio	7,300
Florida	4,355	Oklahoma	666
Georgia	2,557	Oregon	701
Hawaii	349	Pennsylvania	18,947
Idaho	118	Rhode Island	1,820
Illinois	7,965	South Carolina	5,017
Indiana	2,297	South Dakota	145
Iowa	1,626	Tennessee	4,282
Kansas	680	Texas	4,124
Kentucky	2,853	Utah	326
Louisiana	846	Vermont	767
Maine	1,573	Virginia	8,353
Maryland	4,673	Washington	1,426
Massachusetts	12,502	West Virginia	3,970
Michigan	8,763	Wisconsin	2,221
Minnesota	1,437	Wyoming	141
Mississippi	300		
Missouri	3,443	Total stockholders in United States	209,467
Montana	290		

EXHIBIT B.—*General Motors Corp. common stock domestic stockholders of record as of Aug. 11, 1960*

State	Stockholders	State	Stockholders
Alabama	8,685	Nebraska	2,593
Alaska	112	Nevada	608
Arizona	3,380	New Hampshire	4,382
Arkansas	1,590	New Jersey	49,113
California	60,633	New Mexico	1,234
Colorado	5,172	New York	135,845
Connecticut	22,688	North Carolina	8,124
Delaware	7,776	North Dakota	716
District of Columbia	7,460	Ohio	41,472
Florida	23,452	Oklahoma	3,350
Georgia	7,848	Oregon	3,434
Hawaii	1,817	Pennsylvania	68,707
Idaho	792	Rhode Island	4,572
Illinois	48,140	South Carolina	8,825
Indiana	14,499	South Dakota	1,114
Iowa	7,145	Tennessee	6,080
Kansas	3,914	Texas	14,221
Kentucky	8,447	Utah	1,579
Louisiana	4,766	Vermont	2,978
Maine	5,097	Virginia	14,522
Maryland	13,894	Washington	5,498
Massachusetts	35,608	West Virginia	5,475
Michigan	71,048	Wisconsin	14,906
Minnesota	7,780	Wyoming	880
Mississippi	2,219		
Missouri	19,119	Total stockholders in United States	785 114
Montana	1,805		

EXHIBIT C

[New York Times, May 25, 1961]

THE DU PONT DECISION

After 18 years of litigation the Supreme Court in 1957 decided that ownership of 23 percent of the outstanding stock of General Motors Corp. by E. I, du Pont de Nemours & Co. violated the Clayton Antitrust Act. This week the Court has ruled that complete divestiture of the 63 million shares is necessary to remove the danger of lessened competition.

The point in law has been settled. The problem of fair administration has not. Taxpayers and Congress still have before them the economic consequences of the decision.

The Court requires Du Pont, over the next 10 years, to get rid of its General Motors stock. One way would be to offer it for sale through ordinary stock exchange or investment market channels. But when exceedingly large supplies of stock become available—and 63 million shares spread over 10 years would virtually double the average daily offerings of General Motors—the market usually marks down the price drastically.

The other way is for Du Pont to distribute most or all of its General Motors stock to Du Pont shareholders. The difficulty here is that the present law makes such a "dividend" taxable at the rates of ordinary income. Such action would lead to virtually confiscatory results in the high income tax brackets. Even holders of Du Pont in lower brackets might find themselves selling General Motors stock in order to raise the cash with which to pay their taxes.

At the moment the debate is on a highly emotional level. We hear slightly hysterical demands for tax relief from Congress. We hope that there will be tax relief, but we are spilling few tears for the holders of Du Pont who have known that the antitrust action has been in progress for a dozen years and who realized—or should have—that they were "buying a gamble."

But remedial tax legislation is needed. The Du Pont Co. is being forced to do something that it would not ordinarily do in the conduct of its business.

The action that it will take, unless a rescuing law intervenes, will oblige it to throw many of its stockholders against the sharp spikes of the upper income tax brackets.

The principle involved has already been established by the law that makes a divestiture ordered by the Securities and Exchange Commission free of tax, with an adjustment in the base price against which capital gains taxes will eventually be figured. This provision has been in the tax code since 1939.

Extending this principle to divestitures ordered by the Supreme Court under the Clayton Act would be both fair and logical.

[Washington, D.C., Post and Times Herald, May 25, 1961]

DIVESTITURE

Now that it has won a crushing double victory in the *du Pont* case, the Government can afford to be magnanimous. There is no reason why the internal revenue laws should not be amended to allow the shareholders of E. I. du Pont de Nemours & Co. to receive the divested General Motors Corp. stock without paying income taxes on it.

The distribution of the stock would represent a transfer of assets the Du Pont shareholders already collectively own, rather than new income. Beyond generosity, there is the consideration that tax-free transfer would permit the two companies to be disentangled at once rather than over the 10 years the Supreme Court has allowed. This would be worth a good deal, and if undue hardship to stockholders can be averted here, it may be easier to obtain divestiture orders in other cases still to be fought.

The Justice Department's first victory came 4 years ago, when the Supreme Court held that the bare fact that one gigantic corporation owned 23 percent of the stock of another gigantic corporation was enough to constitute a threat of monopoly. The second victory came Monday when the Court overturned a trial judge's attempt at a compromise. Under the compromise Du Pont would have continued to hold its $3 billion worth of General Motors stock, but would have passed the voting power to the 200,000 individual Du Pont shareholders.

With very good reason, four Justices thought poorly of this proposal. "We are not required to assume, contrary to all human experience, that Du Pont's shareholders will not vote in their own self-interest," Justice Brennan said, speaking for the majority.

But Justice Frankfurter's reply for the three dissenters was trenchant. He vigorously defended the trial judge's right to weigh the impact of divestiture on the companies and on the Du Pont shareholders. "The evidence indicated that divestiture of legal title would visit upon thousands of innocent investors adverse tax and market consequences * * *" he wrote. He emphasized that the Government's intention was to prevent, not to punish; and there was no evidence of conspiracy or criminal practices by the two corporations.

Fortunately it lies within the power of Congress to avert the "great and unjustifiable loss" of which Justice Frankfurter spoke. The loss would result from the heavy income taxes levied by present law on the General Motors shares received by Du Pont shareholders. The law can be changed to take account of such forced divestitures. If the recipients resell, of course, they should then pay capital gains taxes on the full difference between the average price originally paid by Du Pont, $2.09 a share, and the current market price, now about $46.

The outcome of the *du Pont* case reflects great credit on the Justice Department which, under three Presidents, pressed steadily onward through 12 years of litigation. But the public has no particular interest in eroding the capital of Du Pont and, indirectly, General Motors shareholders. Soaking the rich is a laudable activity in due season. But one must decide what it is, after all, that one is after. The purpose of this suit was to break up a particularly flagrant case of corporate handholding. If the Justice Department has brilliantly succeeded in that, it should not be asked to undertake the balancing of the Federal budget at the same stroke.

[St. Louis Post-Dispatch, July 27, 1961]

A Case for Tax Relief

Legislation to ease the tax effect of the Du Pont-General Motors divestiture decision has received tentative approval of the Treasury Department though the Justice Department says it is unnecessary for "antitrust law enforcement reasons." Perhaps the Justice Department is right in guessing that future enforcement of the antitrust laws will not be affected either way. But ample reasons of equity call for legislative action.

Du Pont acquired its General Motors stock years ago, and now the Supreme Court says it must dispose of the stock in order to comply with the antitrust laws. Du Pont is expected to distribute the stock to its own stockholders.

We believe the Court's ruling was in the public interest, and that free competitive enterprise will be strengthened by compelling Du Pont to give up its favored position as an owner-supplier to General Motors. But to gain these public benefits it is not necessary to work a tax injustice on stockholders of either firm—and surely it is an injustice to tax an involuntary stock distribution at regular income tax rates.

The principle that special tax treatment is due stockholders in such cases is already recognized in the case of stock divestitures required by statute, as in the divorce of utility holding companies from operating films. Why should not the same principle apply to stock divestitures required by Supreme Court action? Whether a divestiture be ordered by Congress or by the courts, it should not involve a tax windfall to the Government coupled with a tax inequity to stockholders who did not create the situation thus being corrected. Legislation laying down reasonable ground rules for such cases is needed, and the Kennedy administration ought to sponsor it.

[New York Herald Tribune, May 27, 1961]

In the Wake of the Du Pont Decision

The Supreme Court's curious performance in the marathon *du Pont-General Motors* case leaves several disturbing questions hanging in the air about its future approach to such litigation. Not least of these is its cavalier dismissal of the interest of Du Pont's more than 200,000 stockholders and G.M.'s more than 800,000.

At issue this time was not whether Du Pont's G.M. holdings (23 percent of the common stock outstanding) constituted an antitrust violation, but what to do about it. In 1957 the High Court found that it did, and sent the case back to District Judge Walter LaBuy with instructions to use his "large discretion" in fashioning an appropriate remedy. He did, and after exhaustive hearings issued an order designed to insulate G.M. from Du Pont influence without requiring the actual divestiture by Du Pont of its enormous holdings—63 million shares, currently worth some $3 billion.

The Supreme Court has now in effect reversed its earlier instructions to Judge LaBuy, holding that complete divestiture is the only appropriate remedy.

The consequences of such divestiture could be incalculably harsh. Forced sale of such magnitude would raise havoc with the market, even if spread over the 10 years the Court allows. Distribution of the shares to Du Pont's stockholders would subject these stockholders to a walloping tax blow, probably in turn forcing a mass sale to pay the taxes.

The Supreme Court dismissed these consequences as irrelevant to the central issue, which it deemed to be the public interest in assuring an absolutely effective means of restoring competition. It refused to give Judge LaBuy's elaborately safeguarded alternative a try. But these consequences are not irrelevant to the search for a just and equitable settlement of what is, after all, a civil suit.

Du Pont's GM holdings went unchallenged for 30 years; the present case has dragged through the courts for a dozen years more. The hundreds of thousands of stockholder-owners are acknowledgely innocent of any wrongdoing.

One imperative is congressional action to alleviate what now threatens to be a grossly unfair tax burden. If the GM shares are distributed to Du Pont stockholders (the most likely course), under present law their value would be fully taxable as ordinary income. Yet plainly, the distribution would leave Du Pont as a corporation $3 billion poorer, and the value of its own shares correspondingly less; transfer of title would simply mean that Du Pont's shareholders would own their General Motors stock directly rather than through Du Pont. For the Government to order such a distribution, then snatch it away in taxes, is clearly confiscatory. It makes no sense either in economics or in ethics.

What the Court has done, is done. But Congress can and should move promptly to prevent a grave inequity which could bring economic chaos.

[Louisville (Ky.) Times, July 22, 1961]

A Fair Deal for Stockholders

Just 50 years ago E. I. du Pont de Nemours & Co. lost an antitrust suit and was ordered to sell some of its holdings in other explosives companies. In 1918, using some of this piled up cash, Du Pont bought a big chunk of the stock of General Motors, then a struggling automobile firm. In 1921, Du Pont bought some more, giving it in all roughly 23 percent of GM's stock. It paid for that stock approximately $130 million; the stock now is worth around $3 billion.

A few weeks ago, at the end of another antitrust case, Du Pont was ordered by the Supreme Court to divest itself of its GM holdings. It sounds simple, but it isn't.

If Du Pont were to sell the stock on the open market, even over an extended period of time (the Court has allowed 10 years), the market value of GM shares certainly would be depressed. That would be a loss not only to Du Pont and Du Pont's stockholders but to all who hold GM shares.

Du Pont could, of course, ration out its 63 million GM shares among its own shareholders. But under present law this dividend would be considered ordinary income and therefore would be subject to ordinary income tax rates, which in some cases would mean virtual confiscation of the stock.

This week Senator Williams of Delaware, one of whose corporate constituents is Du Pont, offered legislative proposals that would ease the tax burden for Du Pont stockholders. The somewhat complex plan has been worked out with the Treasury Department, Williams says, and presumably it has the approval of the administration. We feel that Congress ought to give the proposal sympathetic consideration. The individual stockholders should not be penalized.

[Washington, D.C., Star, May 24, 1961]

Justice in Blunderland

"We are asked, in essence," said dissenting Justice Frankfurter, "to enter Alice's Wonderland where proof is unnecessary and the governing rule of law is 'sentence first, verdict after.'"

This is not all that will be found by anyone who follows the Supreme Court into Wonderland, or, more appropriately, Blunderland. He will also find there the trampled interests of a great many wholly innocent people who own stock in Du Pont or General Motors—stockholders who are the victims of a needlessy harsh and punitive judicial decision.

In this case, the Court divided 4 to 3, with the majority opinion being written by Justice Brennan and concurred in by the Chief Justice and Justices Black and Douglas. Its effect is to require Du Pont to dispose of 63 million shares of General Motors stock without regard to the effect on the market or the stockholders. The Government, Justice Brennan said, "cannot be denied the latter [divesture] remedy because economic hardship, however severe, may result."

In this summary fashion, the interests of the stockholders, numbering up to a million, are brushed aside. Without proof of any actual restraint on competition, the Court majority accepts the Department of Justice contention that

somehow, in the absence of divestiture, a restraint on competition might arise—that on a speculative basis, the antitrust laws might be violated. To say the least, this zealous concern for the public interest is in striking contrast to the complacency with which our Government views the abuse of the public interest by monopoly unions operating with full sanction of law.

This suit was filed by the Department of Justice in 1949. Federal Judge Walter LaBuy, after a long trial, ruled against the Government. The Department of Justice, he said, "failed to prove conspiracy, monopolization, a restraint of trade, or any reasonable probability of restraint." In 1957 the same four Supreme Court justices (with two justices dissenting) reversed the lower court and sent the case back for further proceedings. Judge LaBuy was told that he had "large discretion" in formulating an equitable judgment.

Another long hearing followed, and Judge LaBuy approved a decree which he thought was equitable and which, at the same time, would prevent Du Pont from exerting any stockholder influence on General Motors. Again the Department of Justice appealed and again the Supreme Court reversed. Far from having a "large discretion," it seems that Judge LaBuy had no discretion. Instead, he now is under instructions from the Supreme Court to see to it that Du Pont gets rid of all its GM stock within 10 years.

If Du Pont transfers its GM holdings to its own stockholders the stock will be taxable as income at the prevailing market value per share. Judge LaBuy thought this might result in an overall tax and market loss of $5 billion to stockholders of both companies. To permit this result to flow from a punitive decision would be unconscionable. Legislation to provide some tax relief in the situation has been previously approved by House and Senate committees. The Court's inequitable ruling makes it imperative that this legislation be revived and enacted.

[Des Moines, Iowa, Register, May 24, 1961]

DU PONT-GENERAL MOTORS DIVORCE

Two problems arise out of the U.S. Supreme Court's ruling that the Du Pont Co. must divest itself of its 63 million shares of General Motors stock.

One is the company's. How can it dispose of the stock with the least loss? If the stock were sold in the open market, this would depress the market price of General Motors stock, even though sales were spread out over 10 years, as the decision permits.

The effect of the court's decision would then be that not only the Du Pont Co. and its stockholders but other General Motors shareholders would be subjected to losses if they wanted to sell their stock.

The other problem is that confronting Du Pont stockholders. The company, presumably, could distribute its shares of GM stock to each of its stockholders in proportion to the number of DuPont shares owned.

The Du Pont Co. is big enough and prosperous enough to withstand a $3 billion reduction in its assets. The distribution of GM stock to Du Pont stockholders would have a less depressive effect on the market price than sales in the market.

But Du Pont stockholders who receive GM stock would be taxed on that stock at regular income tax rates. Under the present tax laws, they could not treat the value of the stock as a capital gain. For some stockholders in high tax brackets, it could mean that as much as 50 to 85 percent of the value of the stock would be paid to the Government in taxes. In addition, the value of their DuPont stock would be reduced in proportion to the reduction in that company's assets.

DuPont's ownership of GM stock dates back as long as 40 years. Some of it was purchased in those early days for as little as $2.50 a share. Even if stockholders were taxed only on capital gains, the tax for some of them could be burdensome.

There can be little question that the Supreme Court's decision was based on the simplest line of reason and justice. Disposal of the GM stock is the surest way to eliminate all pressure and influence the Du Pont Co. might exert over General Motors to buy its products.

Except for the tax problem and its effect on investors, the Court's ruling could be heartily applauded. It does provide a legal precedent in the enforcement of the antitrust laws that should discourage the formation of interlocking corporations that could create monopolies.

Congress and Government tax officials can and should take steps to prevent investors in both corporations from being forced to bear the brunt of the penalty for a situation that after 40 years has finally been held to be illegal.

The CHAIRMAN. Any questions?

Senator DOUGLAS. I just want to defer any questions until the senior members of the committee have asked theirs.

Senator LONG. Could I ask you something unrelated to this bill? You are president of DuPont as I understand it.

Mr. GREENEWALT. I am.

Senator LONG. Your company has developed a number of important products and has a very extensive research program. Is this the DuPont Co. which has the patent on nylon?

Mr. GREENEWALT. Yes, it is.

Senator LONG. As a matter of financial bookkeeping, do you set those patents up on your books based on what you estimate those patents to be worth?

Mr. GREENEWALT. No. We charge off research annually on each of the patents. I think the patents are carried on the books at a nominal value. I have a financial man behind me. Would you mind if I asked him?

Senator LONG. All right.

Mr. GREENEWALT. They are set up on our books, I am told, at $1.

Senator LONG. You just charge off the research program?

Mr. GREENEWALT. We charge off the research program annually.

Senator LONG. Is that standard practice, so far as you know for major corporations?

Mr. GREENEWALT. I believe so.

Senator LONG. If you were trying to arrive at the value of your patent portfolio or someone wanted to know that, where would they go to find that information?

Mr. GREENEWALT. Senator Long, I think that is a question that would be almost impossible to answer. Using the nylon patent as an example, very shortly after we started our first manufacturing unit, we had no idea at that time as to how far nylon would go, whether big, little, or indifferent—whether or not it would fade out of the picture very shortly.

If you were to ask me to appraise the value of our nylon patents in, say, the early forties I would, probably, have placed it at a much smaller value than it turned out to be. On the other hand, the other thing frequently happens. A patent issues to you for which you have the highest hopes and it turns out to be no good at all.

So, if you tried to appraise a patent at the time you are hopeful for it you might put a very high value on it. It is really very difficult.

Senator LONG. My thought about the subject, in trying to explore the patent field in various connections has been that it would be interesting to know just what the people who hold some of the more valuable patents think they are worth. The answer to that, as I understand it, is that you people do not attempt to assess that value.

Mr. GREENEWALT. It is a thing that you really do not assess until after the fact. You have to do it then. That is the difficulty. If we were to assess our nylon patents now, of course, we would put a very high value on them, because it has been a most successful develop-

ment. On the other hand, there are other patents which we might have appraised in the initial stage equally valuable but, actually, were not worth a cent, as it turned out, commercially.

Senator LONG. Thank you.

The CHAIRMAN. Are there any further questions?

Senator DOUGLAS. First, let me say in case you have any doubt about it, that you have a very fine reputation not only as a businessman but as a citizen. I know that you cherish that reputation very much. And it has been of value.

I wonder if you would tell us something about Christiana.

Mr. GREENEWALT. Shall I start at the beginning?

Senator DOUGLAS. If you will, please, tell us roughly.

Mr. GREENEWALT. I think it might be interesting to you.

Christiana was formed in 1914. And, as you recall, this was in the beginning of World War I but before the United States was involved in that war. At that time, the principal stock of the Du Pont Co. was held by three cousins, and one of them Coleman Du Pont appeared at that time to have lost his interest in the Du Pont Co. as a chemical manufacturing enterprise and was turning his energies elsewhere. At that stage of World War I, we were very important suppliers of munitions to the Allies, and they were greatly concerned that Coleman might try to sell his stock and that it might fall into unfriendly hands. So, to avoid that difficulty, the other owners who were concerned in the business formed Christiana in order to give assurance to the Allied military commissions that here was a block of stock which would control the Du Pont Co. activities, so that whatever Mr. Coleman Du Pont did with his stock, it could not fall into unfriendly hands.

Senator KERR. It could not affect the control of the company.

Mr. GREENEWALT. That is right.

Senator KERR. Or permit the control of the company to fall into such hands.

Mr. GREENEWALT. That is right. So this is the reason for the beginning of Christiana.

Since that time more or less the company has stayed more or less as it was. The interest in Du Pont has been, I think, as it was initially. It owns about 30 percent of the stock and then quite a number of years ago it began to be traded on the market, so that other owners besides members of the Du Pont family came into being. Actually, over the years, it turned out to be a favorite investment for charitable endowment funds. The value of the shares was very high, until the recent stock split. College endowment funds would buy it simply because it was Du Pont at a discount and they were quite willing to hold on forever if need be.

I think that is why such a large percentage of the outstanding stock of Christiana is held by charitable institutions, something over 10 percent. Then this year the stock was split 8 for 1, so, of course the market price is less than the market price of Du Pont. It has, roughly speaking, one share of Du Pont back of it. Since that time the number of stockholders has grown by leaps and bounds. I believe the last figure is something like 8,000.

Senator DOUGLAS. That has happened in the last 2 months has it not?

Mr. GREENEWALT. Before the stock split the number of stockholders, if my memory serves me correctly, was about 4,000.

Senator DOUGLAS. Yes, sir.

Mr. GREENEWALT. And since the stock split the number has virtually doubled. Since the value of the stock has gone down and at $190 a share many more people can own a share.

Senator DOUGLAS. Who are the officers and directors?

Mr. GREENEWALT. It has a board of directors of which I am a member.

Senator DOUGLAS. Could you give me the names of the other members?

Mr. GREENEWALT. If you will let me scratch my head a minute.

Mr. Henry B. Du Pont is the president. Mr. Copeland is on the board. Mr. Walter S. Carpenter is on the board. Mr. Robert Carpenter, who in connection with his other interests, manages the Phillies.

Senator KERR. Manages what?

Senator DOUGLAS. That is not much of a recommendation.

Mr. GREENWALT. Manages the Phillies. [Laughter.]

Here we are. I have been handed the complete list.

Mr. Henry B. Du Pont, Mr. Ellison Downs, Mr. S. Hallock Du Pont, Mr. Bayard Sharp, Mr. Pierre S. Du Pont, Mr. Irenee Du Pont, Jr., Robert R. M. Carpenter, Jr. This is the Phillies Carpenter. Mr. A Felix Du Pont, Jr., myself, Mr. Lamont Du Pont Copeland and Mr. Walter Carpenter, who is chairman of the Du Pont Co. board.

Senator DOUGLAS. I hope you will not regard this question in any sense as invidious.

Mr. GREENEWALT. No, sir.

Senator DOUGLAS. May I ask to what degree is Christiana primarily a family holding company for the members of the Du Pont family?

Mr. GREENEWALT. Well, I do not think it is quite correct to characterize it as a family holding company. Actually, it came into being for the reasons I have outlined. Because of deaths and distributions ownership of the stock has become widespread. There are many members of the Du Pont family that own no Christiana stock, whose ownership is Du Pont stock, so it is really, I do not think, fair to say that it is a family holding company. There are many members of the family that own Du Pont stock directly, and their ownership of Christiana would be just a happenstance.

Senator DOUGLAS. Of course, the Du Pont Co. has many branches, and branches have many twigs and so forth and so on.

Mr. GREENEWALT. Yes.

Senator DOUGLAS. Have you ever made an estimate as to the proportion of Christiana stock which would be held by members of the family so-called?

Mr. GREENEWALT. I think that has been done. I am sure that has been done in connection with our little quarrel with the Department of Justice.

If you would like to have it, I could dig it out and send it to you.

Senator DOUGLAS. Thank you very much.

Mr. GREENEWALT. We will leave it that way.

Senator DOUGLAS. This leads up to the following questions I wanted to ask.

The Treasury stated this morning that in the petition which you filed on the 1st of September in court you did not make provision for the passing through of the General Motors shares to the stockholders of Christiana, and that if your petition were to be granted by Judge LaBuy it would then be possible for Christiana to retain these shares itself.

Mr. GREENEWALT. I was wishing as I listened to the questions on this earlier today that I could deal with that, because I would like to have clarified this situation. Perhaps I may do it now.

Senator DOUGLAS. I shall be glad to have you do so.

Mr. GREENEWALT. This proposed judgment before the court in Chicago is on behalf of the Du Pont Co. It simply tells Judge LaBuy how we would propose as E. I. du Pont de Nemours & Co. to conform to the judgment of the Supreme Court.

I might say that in our plan as submitted to the court in Chicago no individual stockholders were mentioned, whether corporate or otherwise.

Senator DOUGLAS. I understand.

Mr. GREENEWALT. We thought it was completely inappropriate for us, E. I. du Pont de Nemours & Co., to suggest to the court in Chicago what any of our stockholders should do with the General Motors stock once received.

Senator DOUGLAS. I am not saying that. I am not saying that. I am merely trying to get to the point——

Mr. GREENEWALT. But the point is that we were making no suggestions with respect to any stockholder. You see, there is the other curious thing here, Christiana is not, in fact, a defendent. I understand that the legal term is that they were held in the action as a party in interest. Presumably the Justice Department, in its proposal to the court in Chicago, will deal not only with the proposal that the Du Pont makes with respect to its problem, but will deal, also, with what they think the court should decree with respect to what Christiana does with the stock it may receive. But you see, strictly speaking, as I understand the legal situation, Christiana is not now before the court.

Senator DOUGLAS. I understand that. Some speak of duplicity in this matter. I do not quite see it. I am merely saying that since your proposal does not carry with it a provision for a pass through of General Motors stock to the stockholders of Christiana, if it were to be put into effect by Judge LaBuy, there would not be such a pass through, and in that event the taxes the Government would collect from the divestiture to Christiana would be between $120 million and $136 million less than if such provision were in it.

Mr. GREENEWALT. That is correct.

As I told you, all of the estimates have been on the presumption that the results in Chicago would be for Christiana to pass through the stock. If that were not so, then the total revenues under the Boggs bill would be $243 million; in other words, of course, there would be the tax on Christiana that it would have under the Boggs bill on the receipt of the shares; but there would be nothing further. I have rationalized that, sir, only on this basis, that if that should be the outcome it will be because no one has been able to persuade either the judge in Chicago or the Supreme Court, if it goes that far, what

Christiana is guilty of anything that warrants punishment. So in that case, Christiana takes a position along with many other corporate shareholders in E. I. Du Pont de Nemours & Co.

Senator DOUGLAS. This difference arises from the difference in treatment accorded to individuals as compared to corporations.

Mr. GREENEWALT. Yes.

Senator DOUGLAS. Between individual shareholders and corporate shareholders as we have developed this morning and this afternoon. In the case of individual shareholder they pay a tax on the capital gains, and in the case of corporations, they pay a tax on the basis of the corporate dividends, the intercorporate dividends.

Mr. GREENEWALT. Yes.

Senator DOUGLAS. And this creates a financial inducement to retain the General Motors stock in the corporation rather than to pass it on to the shareholders, because the rate of taxation is 7.8 percent compared to the general average, roughly, of 25 percent.

Mr. GREENEWALT. On the other hand, the potential liability is still there.

Senator DOUGLAS. I see. This is a suggestion which was made this afternoon. Why not tax both on the basis of capital gains—and apply to the corporation the same principle of capital gains that you apply to the individual. In that event it would not matter whether the stock is retained by Christiana or passed on the stockholders. They will pay 25 percent as capital gains in either case.

Mr. GREENEWALT. Well, I heard that colloquy this morning. As you can imagine I heard it with a great deal of interest. The point that you make may have philosophical logic; nonetheless I would ask you to look at it this way: The Congress in its wisdom on general revenue matters has written the tax laws as relating to intercorporate transfers of property of any sort in a certain way. This produces a certain tax result. For example, the present law, today's law, if the Du Pont Co. voluntarily—not under any antitrust divestiture—would pass on to Christiana X shares of General Motors stock under the present law the tax on each share would be 16 cents—this is the present law——

Senator DOUGLAS. That is the proposal of last year and it was the proposal——

Mr. GREENEWALT. This is not a proposal—this is the law as it is today. I am not proposing anything. I am just simply reciting what the law is.

Senator DOUGLAS. That is as the bill is.

Mr. GREENEWALT. As I understand it, sir, the present law—Mr. Stam is the expert here—the present law on intercorporate stock dividends passes shares of General Motors stock at, roughly, 16 cents a share. This is the law. I have no comment on the law. That is just what it is.

What you seem to be suggesting is that in these special cases, sir—I do not understand you to say that the general law should be revised—I understood you to say that in these special cases there was merit to the notion that the tax on the passing from Du Pont to Christiana should be at the capital gains rate. And to this I must object. The effect of that is that you take the tax under the present law on shares passing from Du Pont to Christiana, a distribution which could be

made on a completely voluntary basis, and you say, "No, I am going to multiply that by a very large factor, from 16 cents to $11, in effect."

This would seem to me to single out a particular class of shareholders for special and very severe punishment, over and above what he could, under the present law, do. What you are really saying is, if I can introduce some philosophical logic, sir, that you are considering for individual shareholders a solution to their problem which at worst brings in no additional tax over the plan we have outlined. You are singling out the corporate shareholders and saying that those fellows ought to pay nearly 100 times as much tax as they would be subject to under the present law. This is another way of looking at it, sir. The position I took on the original section 2, which was a general change in the tax laws affecting intercorporate property distributions, was this: It would seem to me that if the Congress felt that that was better tax legislation, I would have no opinion.

On the other hand, the thing that I do have an opinion on is singling out one type of shareholder and increasing the tax upon that one class of shareholder hundredfold over what he would ordinarily pay. That, I think, is inequity.

Senator DOUGLAS. You see, the situation that we deal with is this, that, roughly, Christiana paid about $2.16 a share, and over the passage of 40 years the value of the General Motors stock has gone up to something like $45 a share. They bought it for $2.16, or thereabouts. There has been a gain of, approximately, $43. I regard that as a capital gain, but under the present law, which I think is inequitable, it is 52 percent times 15 percent of the original price. This would be only, as you say, 16 cents a share. I think that is something of a sense of injustice to a great many of us. I rather compliment the Senator from Delaware, Mr. Williams, for voting against it.

May I just go on? But this is the problem with which we are dealing. There is a huge capital gains here to individuals and to corporations. This bill does not purport to change the general law. It singles out this antitrust divestiture case for special treatment and I see nothing more objectionable in applying the capital gains treatment to both than in changing the basis of the assessment from original cost to present value, making a change in both cases. What I am trying to say is that if you get at the realities of the case, what has happened has been an accretion in capital value.

Let me say that I would be opposed to taxing it as ordinary income. It has been said that this would yield, approximately, $1 billion in revenue. I think that would be too severe. Yet, if the present law continues, that would be, approximately, the total tax which would be paid.

Mr. GREENEWALT. Yes.

Senator DOUGLAS. I mean, unless you develop methods to—I will not say evade, but to avoid this—and I think that would be unfair. I want to make it clear that I would not tax this as income, but I do think it is a case of capital gains. And if it is a case of capital gains, why should it not be applied to the corporation as well as to the individual? That is what I am saying.

Mr. GREENEWALT. If you stay on the philosophical gambit, Senator, you are proposing this, a change in the general law if the property is

transferred to corporations. There would be a basis of argument there. This is not what is being done.

What you are doing, in effect, is to say that corporations ordinarily may pass property to their corporate shareholders under the present law, but in the case of divestiture under the antitrust law the corporation must pay 100 times the tax that we would pay under the present law. If you are talking about a change in the general law, then we might still have an argument, but it would be an argument in principle. But the thing that I object to is leaving the present law alone, but singling out a given class of shareholders in divestiture cases for particularly harsh treatment.

Senator DOUGLAS. I think it is true that we move forward in law not by changing great sweeping general principles, but we edge forward step by step in specific cases and then gradually when a precedent is established in one field, if it demonstrates it is correct, then apply it elsewhere. This is the whole history, I think, of the growth of the common law. I see no reason why it should not be applied to the tax law.

Believe me, to change the whole tax structure of this country would be outrivaling the labors of Hercules.

Mr. GREENEWALT. I am sure of that. I still stick to my guns. I know you expect me to do so.

Senator DOUGLAS. I appreciate the courtesy of your answers.

Senator BENNETT. May I make a comment as to the question:

If I understood it correctly, the Senator would like to require Christiana to pay capital gains on the stock it receives from Du Pont.

Senator DOUGLAS. That it receives from General Motors.

Senator BENNETT. That is, 25 percent.

Senator DOUGLAS. I do not know whether it would go through Du Pont. It might well go directly from General Motors.

Mr. GREENEWALT. No.

Senator BENNETT. Du Pont owns the General Motors stock. It has to divest itself. It has to turn over a certain amount of that stock to Christiana.

Senator DOUGLAS. Yes.

Senator BENNETT. It is my understanding you think that when that stock passes from Du Pont to Christiana it should be taxed at 25 percent.

Senator DOUGLAS. I am not saying that it should be taxed twice. I am saying that the capital gain of some $43 should be taxed at the capital gains rate.

Senator BENNETT. By whom?

Senator DOUGLAS. Whoever receives it.

Senator BENNETT. That is Christiana in this case.

Senator DOUGLAS. In that event I would not, as I say, tax Du Pont if it served as an intermediary.

Senator BENNETT. Du Pont is the initiator—it owns the stock. If Du Pont is not involved——

Senator DOUGLAS. If it is just a question as between Christiana and the stockholders——

Senator BENNETT. I am talking about Du Pont and Christiana.

Senator DOUGLAS. I prefer to talk about Christiana and the stockholders of Christiana, and to give you an assurance that I would not

favor any measure which would apply two sets of capital gain taxes. I only want one capital gains tax, that is all.

Senator BENNETT. The point the Senator is trying to make is that if we should change the law with respect to Christiana and require that Christiana pay a capital gains tax of 25 percent on its gain, the difference between Christiana stock and General Motors on the current market—then if Christiana is not allowed to pass that onto its stockholders it would have to pay, not capital gains, but the normal income tax rates.

Mr. GREENEWALT. That is correct.

Senator BENNETT. That would be a tremendous thing.

Senator DOUGLAS. The capital gains tax would be the same whether it passes through, or does not pass through, and let Christiana make the decision as to which it is going to do, because there would be no tax advantage attached to either one, and they would consider this simply from the standpoint of convenience.

Senator BENNETT. Suppose that Christiana decides that it will pass the stock on to its stockholders under the present law. If this were capital gains the only way it could get that stock to its stockholders would be on the basis of full income tax.

Senator DOUGLAS. I am not arguing the present law. I am ready to accept a large portion of the Boggs bill which applies the capital gains treatment, as I understand it, to individuals. I merely think that in my judgment as of this moment the same capital gains treatment should be accorded to corporations, also. I am not proposing that we hold to the present act. I want to say I think this bill is an improvement over that of last year, a very distinct improvement, and I only hope that we can carry out the full logic by applying the capital gains treatment to corporations as well as to individuals. That is what I am saying.

The CHAIRMAN. Thank you very much, Mr. Greenewalt.

Mr. GREENEWALT. Thank you.

The CHAIRMAN. The next witness is Mr. Sumner B. Emerson of Morgan Stanley & Co., New York City.

STATEMENT OF SUMNER B. EMERSON, MORGAN STANLEY & CO., NEW YORK, N.Y.

Mr. EMERSON. Mr. Chairman and members of the committee, I am Sumner B. Emerson, of Morgan Stanley & Co., New York City.

I have been in the securities business since 1922. Our firm, with which I have been connected since 1936, is generally regarded as one of the leading underwriting houses in the country. We are also members of the New York Stock Exchange.

Our firm has been retained since 1957 to advise the Du Pont Co. with regard to the estimated market effects of various procedures which the Du Pont Co. may choose to adopt or may be forced to adopt under the divestiture proceedings. In the hearings held by the district court of northern Illinois in early 1959 before Judge LaBuy, I testified for Du Pont as to the probable effect on the market price of its common stock and on the market price of General Motors common stock in case the court were to adopt the particular total

distribution plan which had been submitted to it by the Antitrust Division of the Department of Justice.

You are already informed as to the Chicago hearings. The Department of Justice there proposed a divestiture which would have provided annual distributions to stockholders over a 10-year period of an aggregate of about 43 million shares of General Motors stock, and annual sales for the accounts of certain stockholders of their share of the allocations, aggregating over the period an additional 20 million shares.

The Commissioner of Internal Revenue ruled that the distributions to Du Pont stockholders under the plan would be taxed as dividend income. In the case of individual shareholders, the tax would have been based on the market value of General Motors when distributed.

An independent research organization, after a thorough sampling of Du Pont stockholders, testified that there were about 230,000 individual beneficial owners of Du Pont common stock, including beneficiaries of trusts, and that their aggregate taxes on the General Motors received by them would have been in the area of $800 million over the 10-year period. This was on the assumption that General Motors would then be selling for just under $40 a share. These figures would, of course, have varied upward or downward, depending upon the market value existing at the time of distribution.

In addition to the approximately $800 million of taxes on individual shareholders, there would have been other taxes, such as income taxes to corporations and capital gains taxes on the stock that the trustee would sell. The aggregate taxes payable over the 10-year period would probably have been in the area of $1 billion. I wish to emphasize that these estimated tax consequences were those which would have been incurred only under the specific plan proposed to the Court by the Department of Justice and are no longer applicable.

The Supreme Court in its decision of May 22, 1961, ordered that Du Pont divest its holdings within 10 years, but did not endorse the plan of total distribution originally proposed by the Department of Justice and did not specify the manner in which divestiture should be accomplished. It is thus fair to believe that Du Pont will be given broad freedom, as suggested by the Department of Justice to the Supreme Court, in the method, or methods, of divestiture that it decides to employ, and its proposed plan of divestiture filed with the district court at Chicago on September 1, 1961, is on this basis.

A number of different methods of divestiture presumably will be available to Du Pont, and it will be free to choose from them or to use any combination of methods that seem wisest in the light of conditions that then exist.

Mr. Greenewalt has indicated some of the methods available to Du Pont, and his estimate is that the total tax that would be payable under present laws by Du Pont and its stockholders would be in the area of $330 million. It has been estimated that these taxes payable under H.R. 8847, as amended, would be in the area of $350 million.

It would appear therefore that the Treasury has little to gain or lose in direct taxes from Du Pont and its stockholders whether or not the proposed bill is enacted. The public, however, particularly the 230,000 beneficial shareholders of Du Pont and the nearly 850,000

common shareholders of General Motors, have much to gain from its enactment. They would be helped in two ways:

First, all of the great uncertainties that hang over the present and prospective shareholders of both corporations should be cleared up in 5 years instead of in 10.

I testified in Chicago that under the distribution plan then before the court the estimated market shrinkage of the stock of Du Pont would have been at least 25 percent and that of General Motors 20 to 25 percent from prices that would have otherwise prevailed. This would have meant aggregate market shrinkage of over $4½ billion, assuming market value of $215 for Du Pont and $50 for General Motors. This estimate shows the magnitude of the uncertainties that the shareholders have had to face.

This case was initiated in 1949 and from then on the stockholders of both Du Pont and General Motors have been faced with unusual uncertainties in analyzing their investment positions. Since June 1957 when the Supreme Court first reversed the district court, these have been magnified. Du Pont stockholders have not known the tax to which they would be subjected nor the market pressure that such taxes would produce. General Motors stockholders have not known how many shares of their company would be offered in the market and what effect this would have on the market price of their holdings. These uncertainties will surely continue until divestiture is completed.

These uncertainties were shown by the market actions of the two stocks at the time of the recent Supreme Court decision handed down on Monday, May 22. I think you will find most interesting the discussion of that day's market which appeared in the Wall Street Journal of the following day. I would like to read these paragraphs from it:

> Stock prices ended with a decline yesterday reversing a morning advance, after the Supreme Court ruled that Du Pont must get rid of its 63 million shares of General Motors over a 10-year period. * * *
>
> Sharp moves in Du Pont and General Motors stocks accounted for much of the wide fluctuations in the Dow-Jones Industrial average from hour to hour yesterday. The selling in these two issues during the afternoon, however, spread throughout the general market late in the day. * * *
>
> Du Pont common opened at 223, 3 points above Friday's close, and worked up to a 1961 high of 229½ by 12:20 p.m., apparently in anticipation of a Supreme Court decision that would have allowed the company to divest only its voting rights to GM stock. When the Supreme Court ruling that Du Pont must totally surrender its GM shares was published, Du Pont stock quickly sank from 229½ to 212.

I agree with the reasons attributed to this selling, which continued less spectacularly for the following 3 days. On Thursday, May 25, Du Pont closed at 207¾, off 21¾ points, or over 9 percent from its Monday high. General Motors, which went through similar gyrations, hit a high on Monday of 49½ and closed 3 days later at 44, down 5½ points or 11 percent from its price just before the announcement of the Court's decision. These price reactions show how investors in general feel about the impacts inherent in this divestiture.

If the divestiture period can be cut at least in half, as would seem probable under the proposed legislation, the enactment of H.R. 8847 would in this respect alone have a constructive effect on the positions of all of the stockholders of Du Pont and General Motors. Since the

companies concerned and the market values of their stocks are very large, and since the holdings of their shares are widespread among investors, it seems to me fair to believe that enactment of the bill would have a constructive effect on the general market and on our economy as a whole.

The second and most important reason why the enactment of this bill would be helpful is that divestiture under present laws, even though Du Pont is given freedom to choose the method or methods, is bound to involve substantial impacts on the market values of the stocks involved, particularly on General Motors. It should be again emphasized, as Mr. Greenewalt has already pointed out, that, like the Du Pont stockholders, the General Motors stockholders had absolutely nothing to do with this case but suffer from it.

There is no historical yardstick by which one can measure the combined market effects of dividend payments, exchange offers and outright sales involving the divestiture of 63 million shares of stock which now have a market value of about $3 billion, even though it would be spread over a 10-year period. The values involved have no precedent and market conditions over the 10-year period are bound to vary.

In spite of this, some rough idea of the market effects of divestiture under present laws can be formed.

Almost any step that Du Pont takes to divest 63 million shares of General Motors, in the absence of remedial legislation, will affect the market value of both Du Pont and General Motors. To the extent that Du Pont distributes General Motors stock in lieu of some of its cash dividend, Du Pont itself will suffer marketwise, since investors prefer dividend payments in cash to those payable in the stock of another corporation. Dividends in securities are not spendable unless the securities are sold, and this involves bother, costs, and accounting problems. Some holders would sell Du Pont to avoid the tax and legal questions that will arise under divestiture. Many of the General Motors shares distributed as dividends will have to be sold to raise funds for taxes or for living expenses. Some stockholders may sell the General Motors shares received because they already have such holdings or prefer not to be direct investors in the automobile business. I estimate that 30 percent of the General Motors shares distributed as dividends will be rather quickly sold by the recipients.

If an offer is made to exchange General Motors for outstanding common or preferred stocks of Du Pont, it will require some premium in market value of General Motors shares to be successful, since shareholders can at any time make the exchange by selling and buying in the market.

In other words, by selling Du Pont and buying General Motors.

In the case of exchange offers, the shareholders of Du Pont who do not exchange will have given up part of their equity by reason of the premium offered. In such exchange offers arbitragers would be active in the market buying Du Pont and selling the equivalent General Motors represented by the offers.

Mr. Greenewalt has indicated that around 35 million shares of General Motors might be sold directly by Du Pont. New buyers would have to be found for these shares of General Motors, a task whose size has no precedent in our financial history. Even though

these are sold in an organized way through a nationwide underwriting group, there would be heavy market impacts involved as well as selling costs, and these impacts would hang over our securities markets for 10 years.

As a result of all such sales and distributions of General Motors stock Du Pont would generate large amounts of cash, even after allowing for the capital gains tax involved. Such cash could not easily be put to use. The sum of these losses to Du Pont stockholders from premiums, lower prices on sales of General Motors and costs of sales and of putting the resulting cash "to work" would, I believe, aggregate in the area of $500 million which would, of course, be in addition to the taxes that would have to be paid.

There would also be a loss to the shareholders of General Motors. In 1960 the volume of General Motors sales on domestic stock exchanges was nearly 9 million shares. If 9 million shares of General Motors stock continue to be sold annually and because of the amounts being distributed and sold, General Motors stock were to sell in the market for $5 a share less than it would otherwise have sold, and I personally feel that this is a conservative estimate, the losses imposed through lower selling prices on sellers of General Motors, apart from Du Pont and its shareholders, would be somewhere in the area of $400 million over the 10-year period. This is after allowing for the fact that some of the shares sold would also have been bought at prices reduced by the impact.

A reduction of this magnitude in these selling prices of General Motors, I might add, would cost the Treasury about $100 million in capital gains taxes that would otherwise be payable, and this reduction is not allowed for in Du Pont's estimate of the taxes payable under present laws.

Thus the realized losses to holders of Du Pont and of General Motors from a divestiture under present laws, in addition to the applicable taxes, would aggregate about $900 million.

The market impact on the holders of General Motors not held by Du Pont who do not sell would cause a market shrinkage in the value of their holdings of one billion to a billion and a half dollars. This development could shake investors' confidence, which could well have an adverse effect on stock prices generally. This would be deflationary, to put it mildly.

Even though all of the above figures are necessarily estimates, they are adequate to show that divestiture under present laws would be extremely costly both to the 230,000 beneficial stockholders of Du Pont and to the 850,000 of General Motors. These would include 50,000 employees of Du Pont and many thousands of employees of General Motors. In making these estimates I have not allowed for unforeseen adverse factors that might be present, such as strikes against General Motors or poor years in automobile sales. Under such circumstances, the losses would be definitely greater.

If H.R. 8847 becomes law there would be some market impact on General Motors, but it should be materially smaller and it should be felt over a significantly shorter period of time. Under H.R. 8847, the stockholders who would become subject to a capital gains tax, based on the present market value of General Motors, are those whose Du Pont shares have a cost basis of about $60 or less. In number

these represent a minority of the shareholders. Based on current market values, the total estimated tax bill of $350 million is equivalent to over 7,500,000 shares of General Motors. Not all shareholders facing a capital gains tax will have to sell General Motors shares to raise the funds required to pay the taxes. Many will meet this obligation out of other resources. Some will sell their General Motors because they already have enough or do not wish a direct investment in automobile manufacturing.

I believe that the aggregate selling of General Motors from a divestiture under H.R. 8847 would be less than one-quarter of that which would take place from a divestiture under present laws, and this is why, gentlemen, I hope Congress will enact the bill. Also, with a shorter divestiture period and a clear picture of the problems facing Du Pont and General Motors, there should be more buying interest than if the bill is not enacted, and to me this factor has real importance.

From the point of view of Du Pont's shareholders, obviously the most favorable solution would be for them to obtain their 1.37 shares of General Motors without any recognized gain or loss, which would be similar to divestiture under the Public Utility Holding Company Act of 1935 and the Bank Holding Company Act of 1956. They already own this stock indirectly, and such a solution would simply mean that the ownership, instead of being in the form of one Du Pont share selling now around $225, would be in the form of 1.37 shares of General Motors selling at about $60 in the market, plus a share of Du Pont having a market value of around $165.

It seems probable from the estimates made that the enactment of H.R. 8847 would not decrease the tax revenues of the Treasury. Since the enactment of the bill would greatly accelerate the completion of the divestiture and result in the avoidance of loss of values running into very substantial figures, it is my earnest hope that your committee will recommend the bill and that in due course it will be enacted into law. H.R. 8847, based as it is on the concept of return of capital in connection with a compulsory divestiture, in my opinion is a great improvement over existing law.

The CHAIRMAN. Thank you very much, Mr. Emerson.

Senator DOUGLAS. Mr. Emerson, on your argument in part it seems to hinge upon your belief that H.R. 8847 would cut the divestiture period approximately in half.

Mr. EMERSON. At least in half, yes, sir.

Senator DOUGLAS. And it is so stated in your memorandum.

Mr. EMERSON. Yes, sir.

Senator DOUGLAS. May I ask what the basis of this assumption is?

Mr. EMERSON. It is my belief that it could be done without undue impacts in a period of 5 years because much less stock would reach the market. And my belief is that if this bill is not passed the Du Pont Co. would certainly take 10 years in which to complete the divestiture; they would be very foolish if they did not.

Senator DOUGLAS. Is this a general impression, or do you have specific reasons for this?

Mr. EMERSON. Well, I talked with officers of the Du Pont Co. who feel that in the circumstances outlined they could do this in 5 years.

Senator DOUGLAS. You are not producing any new evidence aside from the statement Mr. Greenewalt has made?

Mr. EMERSON. No, sir, I am not.

Senator DOUGLAS. Now, you say:

To the extent that Du Pont distributes General Motors stock in lieu of some part of its cash dividend, Du Pont itself will suffer marketwise, since investors prefer dividend payments in cash to those payable in the stock of another corporation.

Mr. EMERSON. Yes, sir.

Senator DOUGLAS. Now, we had a long argument in that matter today. And I brought this up as a possibility that in this way Du Pont would be able to reduce its tax liability. The Senator from Oklahoma said that section C on page 7, I believe, of the bill would directly prohibit this. Now, you evidently think that this is a possibility, because you say that to the extent that Du Pont distributed General Motors stock in lieu of some of its cash dividend.

Mr. EMERSON. That is assuming that the Boggs bill is not passed.

Senator DOUGLAS. That the Boggs bill is not passed?

Mr. EMERSON. Yes. This discussion on page 6 is all prior to my discussion of what the situation would be were the bill to be passed.

Senator DOUGLAS. Thank you very much.

The CHAIRMAN. Any further questions?

Thank you very much, Mr. Emerson.

The next witness is David Schenker.

STATEMENT OF DAVID SCHENKER, NEW YORK, N.Y.

Mr. SCHENKER. I am a practicing attorney at 217 Broadway in the city of New York.

And I am a new voice in this hearing. My brother and myself own 1,500 shares of the $3.50 preferred stock of the Du Pont Co. And I have read all the testimony before the House, and I have sat here and listened attentively, and I have heard not one word what the effect of this legislation is going to be on the preferred stockholders.

Now, when my brother and myself bought this stock we were not buying a missile stock and we were not buying one of these hot over-the-counter issues; we were buying a stock which was rated triple-A, and a stock which the asset coverage, by reason of the Du Pont-General Motors holding alone, was $1,500 a share, and by reason of the income coverage from the dividends of General Motors alone was 12 times the requirement of the preferred.

Senator DOUGLAS. Do I understand that your 1,500 shares of Du-Pont is worth $1,500 apiece?

Mr. SCHENKER. No, my 1,500 shares of Du Pont have a market of $120,000.

Now, I bought this stock because I was buying a stock which I thought had security which was as good as a U.S. bond. Here it is covered merely by the assets—and by the assets I mean the General Motors stock, $8 billion worth—the coverage on the preferred stock by reason of that fact alone was $1,500 a share. And I will discuss that in a little more detail hereafter. And I had this tremendous

income coverage derived from the General Motors stock held by Du Pont.

Now, I was not the only one who bought these preferred stocks on that basis. The fact of the matter is, there are 1,688,850 shares of preferred which is selling at $103, and there are 700,000 of the $3.50 preferred which is selling at approximately 80, 82. So that the aggregate market value of the preferred stock is a quarter of a billion dollars. That is what I am talking about. And it is carried on the books of Du Pont at $238 million, $100 a share.

Now, this preferred stock has been outstanding the entire time that the General Motors stock was in the portfolio of Du Pont. Du Pont acquired its General Motors stock in the period from 1917 to 1919, and these preferreds were issued in 1937 and in 1939.

So that you have got people who, in reliance upon the presence of this General Motors stock, were making an investment for their old age and for their security.

Now, what are we confronted with?

The common stockholders come in and say that they are compelled to make the divestiture of the General Motors stock owned by Du Pont and that a grave injustice is going to be done them by reason of the fact that the Du Pont stock marketwise will be depressed and that the General Motors stock will be depressed.

Senator WILLIAMS. Would you yield for a question, Mr. Schenker?

Mr. SCHENKER. Surely.

Senator WILLIAMS. I do not quite follow you.

In what way would the enactment or the failure to enact this bill influence your preferred stock?

Mr. SCHENKER. In this way, Senator: Immediately $3 billion of asset coverage is taken away from my preferred stock. Not only is $3 billion of the asset coverage taken away, but the earnings coverage derived from the dividends received on the G.M. stock is being taken away.

Now, when I buy a preferred stock, I am buying it not simply for a boom period, I am buying it because it is covered by $3 billion of apparently readily marketable security, the General Motors stock owned by Du Pont.

Senator WILLIAMS. May I ask you this question?

The court is the one that has ordered this divestiture. And this divestiture of this asset to which you refer is ordered under existing law. And we here are not dealing with that question. And as I understand it, under the court order this is going to be distributed, regardless of whether this bill passes or not, is that not true?

Mr. SCHENKER. Senator, that is absolutely true. And I have absolutely no difficulty, Senator, with your giving them tax relief which will not impose any undue burden upon them, or which will not depress the price of the General Motors stock or the Du Pont stock.

But what I am asking the Senate to do is not by an affirmative act on your part to ruin my preferred stock.

Senator DOUGLAS. How could this be done?

Mr. SCHENKER. The preferred stock——

Senator WILLIAMS. May I ask you a question?

Are you asking us to pass a law overriding the court decision that they can distribute this?

Mr. SCHENKER. No. This is a simple matter.

In one sentence I can do justice to the common stockholders and I can do justice to the preferred stockholders.

If you go to section 7, page 7, section c-1—and this is a matter of consequence, Senator, not only in this case, you are passing an act of general application—and you may be confronted with situations where you have got debentures and bonds outstanding as well as preferred stock in a company not of the caliber of Du Pont. You should not permit a distribution to the common stock with tax consequences which will induce such a distribution of the assets of the company.

Now, if you will turn to the act, page 7, subsection b, all this requires, Senator, just one sentence. It says:

It shall not apply, (a)—

and then—

shall not apply to any transaction, i, one of the principal purposes of which is the distribution of earnings and profits of the distributing corporation or of the corporation whose stock is distributed or, ii, whenever any senior security of the distributing corporation is outstanding.

All they have to do is to retire the preferred stock and the harm will not be done to the preferred stock.

Senator WILLIAMS. May I ask you a question. I want to understand this point.

Then, in simple language, you are neither testifying for or against the bill before us other than recommending this amendment?

Mr. SCHENKER. That is exactly right, Senator.

Senator WILLIAMS. This amendment, the effect of it would be to force the company to call in its preferred stock; is that correct?

Mr. SCHENKER. Not to force them. They could do this, Senator.

Mr. Greenewalt has indicated that among the possibilities he may use as a means of divestiture is to offer an exchange to the preferred stock where he says, "the stock is callable at $103, I will give you $103 of General Motors stock if you will turn in your preferred."

Immediately, if that is accepted, a quarter of a billion dollars of General Motors is out of their portfolio.

Senator WILLIAMS. But you are asking us to incorporate in the bill a provision which will make it mandatory that they call in their preferred at the call price by offering stock in payment thereof, or cash; is that correct?

Mr. SCHENKER. That is right.

Senator WILLIAMS. Now, may I ask you this question? And I think I understand your point.

How long have you been a stockholder?

Mr. SCHENKER. My brother has been a stockholder since 1957, 1958, and 1959. He owns a thousand shares.

Senator WILLIAMS. And you bought——

Mr. SCHENKER. We paid $78 to $80, $82.

Senator WILLIAMS. And you have about a $120,000 investment?

Mr. SCHENKER That is exactly right, Senator.

Senator WILLIAMS. If we incorporate this provision in the bill, that will require the company by law then to call this preferred in at $103.50; is that correct?

Mr. SCHENKER. Now, Mr. Greenewalt is a very able man. He may be able to devise some other method whereby he could take care of it.

Maybe he does not have to offer $103. He can offer maybe less than that, or something in between.

Senator WILLIAMS. May I ask this question?

Suppose you were offered the equivalent of $90 worth of stock and you rejected it. Then if this amendment was put in he would still have to pay you off in stock or offer you enough cash so that it would be attractive and you would accept it?

Mr. SCHENKER. That is exactly right.

Senator WILLIAMS. So in effect, he would have to offer you $103 in cash or the equivalent thereof in stock?

Mr. SCHENKER. That is right.

Now, I do not think that is so horrendous, Senator, because my contract with them is that——

Senator WILLIAMS. I am not debating the merits; I am just trying to understand it.

Mr. SCHENKER. Yes.

Senator WILLIAMS. Now, if that is done, using your own case, that would overnight convert your $120,000 investment into about a $35,000 profit?

Mr. SCHENKER. Less my capital gains tax.

Senator WILLIAMS. Yes.

And you are asking us to include in this bill a provision which will make it mandatory that they call in their preferred which you bought at around $78 to $80, and which is selling around $80 today, and pay it off at $103.50?

Mr. SCHENKER. That is correct, sir.

Senator WILLIAMS. And you are asking us to include in this bill a provision which will make it mandatory?

Mr. SCHENKER. That is right.

Senator WILLIAMS. And by so doing you are realizing about a $35,000 profit?

Mr. SCHENKER. That is exactly right.

Senator WILLIAMS. Thank you.

Proceed.

Mr. SCHENKER. But I am trying to look at the other alternative. The rationale for this legislation is that you do not want to do an injustice to the common stockholders of Du Pont. There is nothing in the world to prevent Du Pont from meeting this divestiture decree tomorrow morning; all it has got to do is distribute the General Motors stock to the common stockholders, and they have met the divestiture decree. But they come to you and they say, please do not do that, because you are imposing a grave injustice upon them. You are forcing me to take stock because of a decree of a court, and I may be subjected to income taxes.

Now, I do not see why the Senate committee should be motivated by a sense of justice to the common stockholders and forget about the preferred stockholders who do not have a vote, who do not participate in the management, who did not cause this company's predicament, who have no representation on the board of directors, and will not have a voice in connection with the formulation of the ultimate plan which the court is going to decree.

And furthermore, I could not even go to the court and ask to be heard, because I am not a party to that proceeding, and I have absolutely no standing.

The common stockholders having come to this committee on the basis of justice, then they have got to do justice to the senior security holder as well as to the common stockholder.

That is our position.

Senator WILLIAMS. I am not debating the merits of your position; I am just trying to get it in a situation where I can understand it.

Now, as I understand it further, you bought this since 1957, beginning in 1957, and years thereafter. That was after the court decision had been rendered wherein you knew at the time you bought it that it was going to be forced to divest itself of this stock.

Mr. SCHENKER. That is absolutely not so, Senator, because the first decision, at the time we bought our stock—I may have bought 100 shares after that, I had 400 shares—the first decision of Judge LeBuy did not require them to divest at all. It said, all you have got to do is sterilize the vote. And at that time we bought this stock, I bought it on the reliance that there was $3 billion in liquid assets behind this stock, and that there was $120 million in income coverage.

Now the common stockholders are asking you affirmatively to do this, to take away from me and the holders of a quarter of a billion dollars of preferred stock, $3 billion of liquid asset coverage and $120 million of income. And once that stock is out of the portfolio, that $120 million of income, as far as my protection is concerned, is gone forever.

Senator WILLIAMS. Mr. Schenker, I am not debating the merits of——

Mr. SCHENKER. I would love to debate it, Senator. I have no fear of it.

Senator WILLIAMS. I would just like to make this clear.

I think in the distribution of their assets, any corporation should give consideration to their prior leins, there is no disagreement on that. But I am wondering if the situation here is one where you feel that the distribution of these assets by the company without calling the preferred would jeopardize the security of the preferred, I am wondering if this is not a case for the courts rather than a case for our committee to determine.

Mr. SCHENKER. No.

Senator WILLIAMS. Could you not go to the court?

Mr. SCHENKER. I have no standing to the court; I am not a party to that proceeding; the stockholders are; they were dropped. And when you come to measure the advisability of passing this type of legislation, when you look at what the basis and the rationale for this enactment is, namely, to do justice to the common stockholders, they had the use of our money and the leverage of our money over the years, and now, after they have gone through this boom period, and after they have had the effect of the leverage on the income, they are just going to take the $3 billion out of the portfolio, a billion of which is going to go to the Christian Security Corp. And not only are they depriving me of this asset coverage, but the increment in 5 years in the book value of the General Motors stock on their books has been $296 million. I am being deprived of the safety of that increment. I have lost that.

I have lost by asset coverage; I have lost by income coverage; I have lost by increment coverage; and everybody is concerned about

the common stockholder who created this situation, and nobody has got a word to say about the preferred stockholder.

Senator BENNETT. May I ask a question or two, Mr. Schenker?

Mr. SCHENKER. Surely.

Senator BENNETT. Suppose this committee does nothing. Suppose we let the present law stay as it is, does this change the situation created for you when the court ordered divestiture?

Mr. SCHENKER. I think it does. And I will tell you why.

I might be able to make out a cause of action that it is a breach of trust by the Du Ponts, who control this company, to take a method of divestiture where they wind up with one-third of $3 billion; I can make out a pretty good case there.

Senator BENNETT. You have not answered my question.

What reduced your asset coverage? Was it the action of this committee, or was it the decision of the court?

Mr. SCHENKER. I say that the action of this committee is going to reduce my asset coverage, because at the present time, although legally they can distribute the General Motors stock, the consequences will be sudicidal for them. The distribution will depress the market of the General Motors stock; it will depress the Du Pont stock; they will have to pay tough taxes. That is why they are here. They do not want to do that.

Senator BENNETT. You are not answering my question.

Mr. SCHENKER. I thought I was.

Senator BENNETT. No, you are going all the way around it.

Is it not a fact that it was the decision of the court that requires divestiture? This committee had nothing to do with the decision of the court, and it was the decision of the court that reduces your asset coverage, not this committee.

Mr. SCHENKER. No.

I say in reality—and I am trying to explain that to the Senator—I say in reality it will be your affirmative voluntary act that the common stockholders are coming before this committee and asking you to do for them, to get them out of their predicament that is going to cost me my asset coverage and my income coverage.

Senator LONG. I think if you will let him talk a little longer he will explain it.

I think what he was saying was prefatory to the answer of your question.

Mr. SCHENKER. That is exactly right. That is the point I made.

If you ask me—if you do not give them the relief, what can they do? They can distribute the stock to the common stockholders, in which event they predict this calamity that is going to happen to them. And I will have something to say about that in a moment.

Secondly, they say, "Taxwise it is a calamity, marketwise is it a calamity, and, therefore, we come to you and we say, Do not let this calamity happen to us. We can divest, and from a sense of justice happen to us. We can divest, and from a sense of justice you ought to pass this tax relief legislation."

What I am saying is, They should be relegated either to (1) distributing all the common stock to the common stockholders, or (2) to making me an offer to take my preferred stock, or (3) selling the General Motors stock in the open market, in which the company will

receive $3 billion less the 25 percent capital gains tax and these funds will go behind my preferred stock.

So that if, under those circumstances, they went ahead and gave themselves that $3 billion of worth by way of a distribution to the common stock I would have a pretty good case in court as a preferred stockholder to stop the distribution.

Now, they come to you, if you do what they wish you are giving them the inducement and you are giving them the mechanics, and you are giving them a tax beneficial method of accomplishing the result which is disastrous to me. Without this tax relief, they will not dare distribute the General Motors stock to their stockholders, for tax reasons alone.

Senator BENNETT. Mr. Schenker, without this tax relief, if this committee just sits and does nothing, the court ordered them to distribute, and they must distribute.

Now whether they distribute according to the three-pronged pattern that Mr. Greenewalt mentioned today or whether they go out and sell it on the market is a matter of policy. They have no right to decide that they do not like it, so they will not distribute it at all.

Your asset coverage was reduced when the court ordered the distribution. And this committe will not change that whether it passes this law or some other law.

Mr. SCHENKER. No. But I will repeat, Senator, when they come to you there is no basis for their appeal to you. They can comply with this decree decreeing divestiture tomorrow morning. All they do is distribute the General Motors stock; they either make me an offer as a preferred stockholder, they sell some to the public, or they distribute it to the common stockholders. They have complied with the law.

But they do not want to do that. They are coming to you for an affirmative act. They are coming to you to ask a special dispensation, and they are doing that in the name of justice to the common stockholders.

I say I have no difficulty with that. It may very well be that injustice is being done to these people. But I say that it is your duty not to do justice to the common stockholders at the expense of the preferred stockholders.

Mr. BENNETT. May I continue just a minute. I would like to address this question either to Mr. Metzer or to Mr. Greenewalt.

Did the court order require the company to include the preferred stockholders on the same basis as the common stockholders with respect to the distribution of the General Motors stock, or is this problem only of the common stockholder?

Mr. METZER. The court prescinded from who would receive it; it said merely that the stock must be disposed of, divested by whatever means Du Pont chose to do so.

Senator BENNETT. But there was no consideration at all of the position of the preferred stockholder?

Mr. METZER. Or of the common.

Senator BENNETT. Or of the common. And the preferred stockholder is preferred and the company has a way of handling that situation under its contract with the preference stockholder. The problem that we are facing is the problem of the tax effect on the common

stockholder, not the tax effect on the preferred stockholder. Frankly, I do not see that the situation presented by Mr. Schenker has any effect on the problem that we have to consider here.

Mr. SCHENKER. I do not see why not, frankly, Senator.

Now, let's get down to basic thinking here. Why do you have the tax problem?

Because the common stockholder has come to you and said, "Listen, under the present law, if I divest myself of this stock, I am going to have very undesirable tax consequences, I am going to have very undesirable consequences on the market value of my stock, therefore please give me this dispensation which will make it possible for me to do"—what? To distribute the stock to the common stockholders, and he can forget about the preferred stockholder.

Senator BENNETT. Suppose under the order the stock is distributed to the common stockholders, you still have from my point of view adequate coverage for your preferred position.

Have there been any major effects to the price of the preferred as a result of this court activity?

Mr. SCHENKER. The point is—I would say no. But I might indicate this. The Congress hasn't passed the bill. That is one thing. Let this Congress pass the bill. They are all sure of the depressive effect that the distribution will have on common stock, but everybody seems to be convinced that taking away $3 billion of assets coverage and $120 million of income coverage from the preferred stock market is going to have no effect upon the preferred stock at all. The fact of the matter today is that on a yield basis Du Pont is selling at a higher price than comparable preferred stocks. It is doing that because it has $3 billion of General Motors stock, and it is doing that because it has $120 million of income coverage derived from the General Motors stock. Once you take that away, then you will see what the effect on the preferred stock is. I think it is selling at a 20 percent premium above similar preferred stocks. I am going to lose at least that 20 percent.

Senator BENNETT. No, Mr. Schenker, I would like to give you a little private advice. Get busy tomorrow morning and sell your Du Pont preferred before Congress can act on this bill, if that is the way you feel about it.

Mr. SCHENKER. Senator, I have heard that argument before. I was with the SEC for 10 years, I conducted the investment trust study, and everybody we ran across who was mismanaging an investment company said, "If you don't like it, why don't you sell your stock?"

That argument didn't persuade me at all.

Senator BENNETT. I didn't expect it to.

Mr. SCHENKER. That is the classic argument used by every manager. If the stockholder is dissatisfied with the management of a company the managers say: "Why don't you sell your stock?"

I bought my stock as an investment. They have a duty to me. They wanted me to buy my stock. They desired to furnish liquidity for the preferred stock, and if I didn't buy it or somebody else, then the preferred stockholders wouldn't have the market liquidity that they had because of my purchase of the stock. And I don't think it lies within the province of the Senate when I indicate that an injustice is being done to the preferred stockholders to tell me to sell

the stock, because if a quarter of a billion stockholders had the same reaction I believe you know what would happen to the market price of the preferred stock.

And you don't seem to be concerned about the preferred stock. You worry about what the effect is on the common stock.

Senator LONG. It seems to me—and I am a lawyer of sorts, I am not a high financier, and these financial matters escape me from time to time—but as a lawyer my impression is that when the court says to Du Pont, "You have got to get rid of stock, and we order you," you either get rid of it or go to jail. So Du Pont decided to get rid of the stock rather than go to jail. That is the alternative they had. If they get rid of the stock what difference does it make to you what is the effect on the common stockholders of stock that Du Pont has to get rid of it?

Mr. SCHENKER. Senator Long, I was trying to explain that.

As I said before, Du Pont can distribute the General Motors stock tomorrow morning. It doesn't need this tax law, in order to comply with the decree.

Senator LONG. It could sell the stock, couldn't it?

Mr. SCHENKER. Then I have got $3 billion in cash behind my preferred stock or he can make me an offer of exchange and I will get my money.

Senator LONG. Suppose they sold the stock and then proceeded to declare a cash dividend to their common stockholders?

Mr. SCHENKER. They would have to have a committee appointed for themselves also before they did it because, they would take and in effect be turning the dough right over to the U.S. Government. The point I am trying to make clear is, today there is a deterrent to that method of distribution of the stock, and that deterrent is the tax consequences that follow from it.

Now, they come to you and say, "Don't subject me to that tax consequence, because it is an injustice." And I say, "I have no difficulty with that. If you feel an injustice is being done to the common stockholders, that is all right, give them the relief."

But by the same token, I say, don't, when you are handing out with one hand this special dispensation, and you ought to have some regard for seeing that the preferred stockholders are protected.

Senator LONG. I can see your problem all right, but I can't for the life of me see that you have any vested interest in the tax liability of another taxpayer. It seems to me as though this is an entirely different matter. And you are the man who made the point that you have no standing to sue in court. And I don't see that you have any standing to complain when we are talking about the tax problem of another taxpayer——

Mr. SCHENKER. But when that other taxpayer's problem——

Senator LONG (continuing). That you have a vested interest in his problem.

Mr. SCHENKER. But when that other taxpayer's problem affects my rights, and you are going to give him a special dispensation and aggravate the injury to my rights, I think I have a right to come to the Senate and say, "Don't you relieve this man of this tax consequence, because if you do you are going to do this injury to me."

Senator DOUGLAS. Now, that raises just a question of what your rights actually are. And that involves the nature of the preferred stock of Du Pont. It does not have voting rights.

Mr. SCHENKER. That is right.

Senator DOUGLAS. Does it have any claim to—what is the normal rate of dividends?

Mr. SCHENKER. It has a $4.50 preferred and a $3.50 preferred.

Senator DOUGLAS. Is there any claim to residual earnings after a given level of dividend on common stock has been paid?

Mr. SCHENKER. No.

Senator DOUGLAS. Now, even if Du Pont divests itself of General Motors, are you dubious as to whether the assets of General Motors will be adequate to pay you the 4½ percent? I notice that Du Pont even exclusive of General Motors, is very prosperous, and there would be no loss of earnings.

Mr. SCHENKER. In the first place, there is a loss of $120 million from earnings. And it is all right to talk about the situation where you have got boom times. But I can remember 1929, and I brought this preferred stock and limited my earnings to $3½, although the common stock had the advantage of the leverage of my money. I was perfectly satisfied because I believed that I had a triple A security by reason of the assets coverage and the income coverage.

Senator DOUGLAS. Are you doubtful that Du Pont cannot earn some $8 million a year, which would seem to be adequate to meet the claims of the preferred stock?

Mr. SCHENKER. But the point is, Senator, when you take out $120 million of earnings—I have the figure here——

Senator DOUGLAS. How much does that leave Du Pont?

Mr. SCHENKER. Their dividends income from General Motors was $126 million, which netter them $115 million. Their net operating income was $248 million plus 25. Now, that was a reduction percentagewise of income, I think——

Senator DOUGLAS. I understand it is, too.

Isn't $240 million exclusive of income from General Motors?

Mr. SCHENKER. That is right.

Senator DOUGLAS. And the total claims of the preferred stock would be 3½ to 4½ percent upon——

Mr. SCHENKER. That is $10 million.

Senator DOUGLAS. The earnings are 25 times the claims of the preferred stock.

Are you really seriously worried about that?

Mr. SCHENKER. I am worried about what the effects upon the market value of my stock is going to be.

Senator DOUGLAS. The market value of the stock would certainly depend largely upon the ability to earn the 3½ or 4½ percent.

Mr. SCHENKER. Oh, no, because if you take it on a yield basis, comparable companies are selling at a much lower price than this preferred stock is. It is by reason of its assets coverage and income coverage that the preferred stock of Du Pont is selling where it is. I think a duty is to owed to the preferred stockholders. I think they just can't distribute such a substantial part of their liquid assets and let me look primarily or to a greater extent now to the brick and mortar the plant and equipment and the goodwill.

Senator BENNETT. Will the Senator yield to me?

Senator DOUGLAS. Certainly.

Senator BENNETT. If Du Pont sells part of its General Motors, as it must if this bill does not pass, it will replace the General Motors with money. It doesn't take that asset out of its hands completely, it replaces that with money. And that money can be used to buy other assets.

So when you say you are going to reduce the assets in General Motors, this is not quite accurate, is it?

Mr. SCHENKER. Senator, you may have misunderstood me. That is precisely the point I am making. If they didn't have this easy way of distributing the stock, the General Motors stock to the common stockholder of Du Pont then their other alternative is to sell the General Motors stock, reduce it to cash. I then get $3 billion in cash behind my preferred stock that can be invested in other securities, in plant development, in expansion, and that is behind my——

Senator DOUGLAS. What good does it do if you in fact and your fellows only have a claim to $10 million a year? That is what worries me.

Senator WILLIAMS. Mr. Schenker, isn't it a fact that when any company sells preferred stock or sells bonds, when that company begins to liquidate its assets, if the bondholders or the preferred stockholders has reasons to think that the liquidation of those assets is being done where it is going to jeopardize the security of his investment, he can go into court, and if he can show it, the court will stop the liquidation of those assets until they are paid off, that is a fact, is it not?

Mr. SCHENKER. Yes. I visualize, Senator Williams, the first point——

Senator WILLIAMS. Just a moment. Let me finish. And in this instance, if there is any doubt in your mind that in this liquidation, the distribution of this 63 million shares of stock, is going to jeopardize the security behind the preferred which you feel you have, you could go into any court of the country, and if you could prove your case—it seems to me that if you feel this is a liquidation that is going to jeopardize the liquidation of the preferred stockholders, I think you can go to court.

But, frankly, I don't think you have a case.

Mr. SCHENKER. May I have a moment to answer that, Senator?

There are two difficulties I have with your argument. In the first place, it is by reason of your affirmative act in granting this tax relief that you are putting the onus on me to go to court. And in the second place, I can readily visualize the first point in the brief of Du Pont, that the august Congress of the United States, after a careful consideration of all the facts, enacted legislation which said that the distribution of the common stock not only was not wrong, but was entitled to tax relief.

And that is the burden you are putting on me.

What I say is, they are coming in on the ground of justice. The common stockholdlers want to take away $3 billion of preferred stock assets coverage, they want to take away $120 million of preferred stock income coverage. I say this committee is dutybound to say,

something ought to be done to compensate the preferred stockholders or to protect the preferred stockholders from that sort of action.

Senator BENNETT. I think we understand your position very clearly. We may not agree with it.

Senator LONG (presiding). Any further questions?

Mr. SCHENKER. I just want to make one other observation. In urging this legislation they have made an analogy to the involuntary divestiture which was compelled in the case of public utility companies and in the case of bank holding companies.

Now, in the case of public utility holding companies the procedure was this: There was a plan submitted to the SEC, testimony was taken as to the fairness of the plan, initially the securities of the underlying operating companies were first given to the senior security holders, and if there was anything left it went to the common stockholders—there is nothing analogous to this SEC procedure in this picture.

And in the case of the bank holding companies, I am not sure of this, but it is my feeling that there are no senior securities in bank holding companies, and you don't have this conflict of interest.

And then, in addition to that, this is a statute of general application. There is no assurance that you may not get some company that is not of the investment caliber of Du Pont.

What, primarily, our position is is that the common stockholders have come in and said that injustice is being done to us if you don't give use this tax relief. "Therefore let us distribute $8 billion of General Motors, and let us thus deprive the preferred stockholders of that asset and income coverage."

I say, the committee has some duty to the preferred stockholders to take some steps to see that they are not hurt by that.

Now, nobody can prognosticate what the effects of the legislation is going to be on the market, just as they can't prognosticate what the effect is going to be on the common stock.

And I think the committee is duty bound under those circumstances to say, "You have got to do something to protect these senior security holders."

Senator LONG. Thank you very much, Mr. Schenker. Your testimony will be considered when this matter comes up, and perhaps we can work out something to meet your problem.

Mr. Robert J. Bird, Hilton Hotel Co.

STATEMENT OF ROBERT J. BIRD ON BEHALF OF HILTON HOTELS CORP.

Mr. BIRD. Mr. Chairman and members of the Finance Committee, my name is Robert J. Bird. I am an attorney with offices in Washington at 1000 Connecticut Avenue. I am appearing here today on behalf of the Hilton Hotels Corp. to express our opposition to H.R. 8847 as reported by the Committee on Ways and Means.

So that the members of the committee will understand why we are opposed to this legislation in its present form, I think a little history might be in order.

On July 28, 1956, Senator Bridges offered an amendment to a pending bill on the floor of the Senate, which amendment would have

alleviated the harsh tax consequences of divestitures under the antitrust laws by providing involuntary conversion treatment where property was sold or disposed of pursuant to consent decrees entered in antitrust proceedings. This amendment would apply to all types of property, stock, securities, hotels, real estate—I repeat, all types of property.

At that time, the chairman asked Senator Bridges to withdraw his amendment so that the proposal could be given further study.

Subsequently, at the direction of the Chairman, the tax treatment of forced sales under the antitrust laws was included in a list of areas for study by the staff of the Joint Committee on Internal Revenue Taxation. It is my understanding that that study has been complete for some little time.

About a year later, on August 29, 1957, the Committee on Ways and Means favorably reported H.R. 7628. That bill would have provided involuntary conversion treatment for property disposed of as a result of a civil antitrust proceeding instituted under the Sherman or Clayton Acts. That, too, applied to all types of property.

No action was taken by the House on that bill.

Senator LONG. May I ask you, was that bill a part of the bill that would have made it possible for the Du Pont Co. to have received some relief?

Mr. BIRD. That is correct, Senator.

Senator LONG. So the bill that the Ways and Means Committee reported in 1957 applied to facts existing today would have benefited—as it turned out both the Du Pont Co. and the Hilton Corp.?

Mr. BIRD. That is correct, yes.

In August 1958, when the Senate considered H.R. 8381, the Technical Amendments Act of 1958, Senator Bridges again offered an amendment to H.R. 8381 which would have provided involuntary conversion treatment for the forced disposition of all types of property pursuant to antitrust proceedings under the Sherman and Clayton Acts.

The proposed amendment was substantially the same as that contained in H.R. 7628, which had been previously reported by the Committee on Ways and Means.

At the time, August 12, 1958, there was considerable discussion on the Senate floor as to the wisdom of the amendment and since there appeared to be objection from certain Senators on the ground that the proposal would benefit the Du Pont Co., the amendment was not pressed.

In September 1959, the Committee on Ways and Means again favorably reported a bill, H.R. 8126, which attempted to alleviate the harsh tax consequences of the exchanges of property or distribution of stock pursuant to orders enforcing the antitrust laws. That bill contained two sections.

Section 1111 of H.R. 8126 is substantially similar to the matter now under consideration by this committee, but H.R. 8847 has been refined to meet the objection of the Treasury Department which I understand was directed to the tax treatment of intercorporate dividends of appreciated property.

Under H.R. 8847, where the distribution consists of stock and is made pursuant to an antitrust decree, the recipient corporation takes

up the entire value of the dividend in kind as ordinary income subject only to the dividends-received deduction.

Section 1112 of H.R. 8126 dealt with the disposition of property other than stock or securities and provided involuntary conversion treatment where such property is sold or disposed of as a result of judgment, order, or decree of a court, commission, or board in a proceeding under the antitrust laws.

In considering the many proposals for tax relief where the antitrust laws are concerned, it is interesting to note that the American Bar Association and the U.S. Chamber of Commerce have in the past urged that any new legislation in this area apply to all types of property. Proposals similar to H.R. 8847 have been criticized by these groups as being too restrictive and as not recognizing the business fact that frequently other types of property are made the subject of divestiture decrees.

It is for this reason that we are opposed to H.R. 8847 in its present form.

I find it very difficult to appear here today to oppose H.R. 8847 when we of the Hilton Hotels, Corp. have been advocating general legislation in this area for over 5 years.

We are grateful to the proponents of H.R. 8847 that have focused public attention on a little known problem under the antitrust laws. The Hilton Hotels Corp. has been unable to generate the public interest in the tax consequencies of antitrust dispositions and for that reason, if for no other, we are grateful to the proponents of this legislation, the Du Pont interests.

Be that as it may, we are opposed to it in its present form because it is not broad enough and it does not take into account the fact that all types of property can be the subject of a forced sale.

I am not going to bore this committee with the many precedents in the tax laws which support our conviction that where property is sold or disposed of against the wishes of the owner there should be no recognition of gain or loss for tax purposes.

Senator LONG. Would you provide us a memorandum of those illustrations?

Mr. BIRD. I have one with me, Senator.

Senator LONG. I suggest that that be included as an attachment to your statement.

(The memorandum referred to follows:)

INTERNAL REVENUE LAW PRECEDENTS FOR POSTPONING TAX ON SALES OF PROPERTY PURSUANT TO ANTITRUST PROCEEDINGS

In the chronological order of their adoption by the Congress, they are:

1. Section 1033(a) of the 1954 Code, first enacted in 1921, provides that no gain shall be recognized for income tax purposes where property is destroyed, requisitioned, or condemned and the taxpayer uses the proceeds received to replace the property destroyed or taken with similar property.

2. 50 USCA, App. 24c, enacted in 1928, as part of the Settlement of War Claims Act, provides that any sales or exchanges by the Alien Property Custodian in dealing with assets vested during World War I are involuntary conversions within the meaning of the tax laws and no gain or loss shall be recognized.

3. 46 USCA 1160, enacted in 1936, provides that transfers of obsolete vessels to the Maritime Commission shall be treated as involuntary conversions for tax purposes.

4. Section 1081 of the 1954 Code, first enacted in 1938, permits public utility holding companies to break up their utility systems without recognition of gain or loss if such breakups are ordered by the Securities and Exchange Commission.

5. Section 1321 of the 1954 code, first enacted in 1942, provides that taxpayers using the life method of inventory accounting who cannot replace their inventories because of wartime shortages can in effect postpone their taxes on inventory gains if they replace their inventories by the end of the war period.

6. Section 1071 of the 1954 code, first enacted in 1943, provides that the sale or exchange of radio or television stations to effectuate policies of the Federal Communications Commission shall be treated like involuntary conversions and no gain or loss shall be recognized.

7. Section 1033(d) of the 1954 code, first enacted in 1954, provides that land sold because of Federal reclamation laws shall be treated as involuntary conversions within the meaning of the tax laws.

8. Section 1033(e) of the 1954 code, first enacted in 1954, provides that livestock destroyed because of disease shall be treated as involuntary conversions.

9. Section 1033(f) of the 1954 code, first enacted in 1956, provides that sales of livestock because of drought shall be treated as involuntary conversions within the meaning of the tax laws.

10. Section 1101 of the 1954 code, first enacted in 1956, as part of the Bank Holding Company Act of 1956, provides that a bank holding company which is required to divest itself of nonbanking assets by the Federal Reserve Board may distribute such assets tax free to its shareholders.

Mr. BIRD. At the hearings before the Committee on Ways and Means on H.R. 8847 and at the hearings before this committee on previous occasions, any number of witnesses testified in support of these proposals and enumerated the precedents in the tax laws for the type of legislation now under consideration.

The report of the Committee on Ways and Means accompanying H.R. 8847 speaks only of the harsh tax consequences to the individual shareholders of Du Pont and General Motors because of the requirement that Du Pont rid itself of its General Motors stock.

I would like to point out to this committee that the stock of the Hilton Hotels Corp. is publicly held. The last figure I have is approximately 7,500 shareholders. They, too, will suffer for substantially the same reasons unless the Congress takes into account that the direct ownership of property without the intervention of a corporate entity has been, and will continue to be, the subject of antitrust proceedings.

Hotels, newspapers, radio stations, and other types too numerous to mention can be forced onto the market by an antitrust proceeding. In such cases, the shareholders of the company involved can see their investment reduced by the unintended tax consequences of an antitrust proceeding.

In summary, we earnestly believe that in its present form H.R. 8847 is too narrow in its intended application. It is obviously piecemeal legislation intended to meet the needs of a particular situation, that is, the pending Du Pont-General Motors litigation.

In the committee report accompanying H.R. 8126 in the 86th Congress, there appears the statement:

> Your committee wishes to make it clear that it believes this legislation will be of value in facilitating enforcement of antitrust laws generally and it is not the purpose to provide tax relief for any one case.

It is interesting to note that the present committee report accompanying H.R. 8847 makes no such statement, which indeed it cannot.

I urge this committee to amend H.R. 8847 to provide that the harsh tax consequences of the antitrust divestitures be alleviated where any type of property is disposed of pursuant to any such antitrust proceeding. We believe there are sufficient safeguards in our proposal to meet any objections raised by the Department of Justice or the Treasury Department. There is no tax relief—there is only tax postponement, all in line with the postponement granted in other involuntary conversion cases.

The Department of Justice and the district court or commission or board which orders the breakup of the business has direct supervision and control of all reinvestments.

In conferences with representatives of the Department of Justice, I have been assured that inasmuch as our proposal would apply only to the taxable years beginning after December 31, 1960, there would be no objection on the grounds of retroactivity. Since there are no refunds involved and there is precedent in the existing tax laws, there should be no objection from the Treasury Department.

I appreciate very much your waiting and bearing with me today.

Senator LONG. Let me say that personally I would be willing to vote to do for the Hilton Co. what I would be willing to vote to do for Du Pont. But the bill that the Hilton Co. was supporting last year, if I recall, was a bill that would permit Hilton Corp. to divest itself of a hotel and buy other property, perhaps a hotel, which acquisition would be in compliance with the antitrust laws, without a recognition of gain on that transaction.

That is my impression.

Mr. BIRD. That is correct, Senator.

Senator LONG. And Hilton would have owed no taxes on that transaction, not at that point, at least; it could be regarded as a tax deferment, but no taxes on the transaction at that point.

And at the time the bill was reported out by this committee, that would have been an answer to the Du Pont problem, providing very little taxes on the Du Pont Co.

But now the Du Pont Co. comes in here and supports a piece of legislation in which the company is going to pay $350 million.

If we tried to amend this bill to make it of more general application, how would you propose that the bill be amended to have the Government receive a similar amount of revenue related to the size of the transaction from the Hilton Co.?

In other words, I take it that you are not asking to be treated better than Du Pont, you are asking to be treated as well.

Mr. BIRD. Two comments, Senator——

Senator LONG. In other words, how would you apply your philosophy to a situation in which Du Pont will pay $350 million, if the bill passes.

Mr. BIRD. Senator Long, there are 11 precedents in the tax laws which I have asked to be made a part of the record, which show that the involuntary conversion treatment has been extended in these 11 areas. We are only suggesting that the precedents in existing law apply to a sale under the antitrust laws.

In other words, if the Government had gone in and condemned the Mayflower Hotel to take it over as an office building, we would have paid no taxes. We could have taken that money, and we could have

bought the hotel up on Florida Avenue which I see by the papers is in progress, and our basis for the Mayflower would be continued over into the new hotel.

Under the court order that broke up this alleged monopoly we were given complete freedom to invest abroad. This actually had no effect on our operations except in four cities.

And I am only suggesting, sir, that we are trying to apply existing law, condemnation suits—we have got cases where a farmer sells his livestock on account of drought and disease, and he takes the proceeds and buys other animals, or if he sells his land for reclamation, no tax is paid.

Senator LONG. When was the first tax on income imposed by this Government?

Mr. BIRD. 1909.

Senator LONG. I am told the income tax was about 1913. Actually, the Sherman Act, which would make divestiture possible, was passed in 1890. And the income tax came along later.

My guess is that the kind of problem that your corporation is confronted with is one that just happened by accident. I do not think anybody ever planned it that way at all.

Mr. BIRD. That is true, Senator Long.

And witnesses before this House, the Committee on Ways and Means, have pointed this out, that antitrust law has been a court-made development rather than statutory law. In fact, the *Dupont* decision in the Supreme Court has been criticized as being court-made law rather than statutory laws intended by Congress.

Senator LONG. Now, my guess is that if you people had come seeking the kind of modification of the law that you are seeking now, if you had been here 10 years ago you could probably have obtained it without any difficulty at all. But when you have a tax bill staring you in the face, not a proposed law, but the kind of bill under which you are supposed to pay money, it is much more difficult to get that kind of relief.

I am sure you realize that.

Mr. BIRD. I am very much aware of that, Senator.

Senator LONG. Senator Douglas.

Senator DOUGLAS. Mr. Bird, the bill before us does not bear on its face "the Dupont bill," instead it is the reference to the distribution of stock made pursuant to an order enforcing the antitrust laws.

What are the provisions in this bill which exclude you from it?

Mr. BIRD. This bill applies only to the distribution of stock or securities. It does not deal with physical assets.

Senator DOUGLAS. Now, what is your intention, that you should pay on tax at all on any accrual of values which occur between the time of purchase of the hotel and the sale of a hotel, or that you should pay capital gain rates?

Mr. BIRD. Our contention, Senator Douglas, is this: That when the Department of Justice says to the Hilton people, "Sell the Mayflower Hotel for antitrust reasons" that they are no different than the highway commission that condemns a thousand feet of frontage for a highway.

Senator DOUGLAS. What I am trying to get at is, is it your contention that if you bought the Mayflower Hotel for $5 million and sold

it for $8 million—and if these figures are inaccurate, as I suppose they are, you can supply the correct ones—that you should pay no tax?

Mr. BIRD. I can.

Senator DOUGLAS. Now, there has been an increase in value of $3 million.

Now, is it your contention you should pay no taxes at all on that $3 million?

Mr. BIRD. Yes, Senator Douglas, because it is a paper problem. It is an illusory profit. If we take that money to stay in business and buy another hotel, we haven't realized anything.

Senator DOUGLAS. I had never thought that $3 million was illusory.

Mr. BIRD. There is ample precedent for it, sir.

Senator DOUGLAS. There is a degree. But you have got $3 million more in your assets than when you started out.

Mr. BIRD. Well, the merchant that sells his inventory, sir, has $3 million, but he goes out and replaces it.

Senator DOUGLAS. Of course, the whole problem here is whether the dollar is a proper index of value. And that is involved, too, of course, and it may well be there is a fluctuation in prices. But until that is done, assuming the price level to be constant, and you made $3 million on the transaction, don't you think that should be taxed at capital gains?

Mr. BIRD. No, I don't.

Senator DOUGLAS. Why not?

Mr. BIRD. Because we are taking that money—we didn't ask to sell that hotel.

Senator DOUGLAS. You didn't ask to do it, but you have made the gain.

Mr. BIRD. It is an involuntary gain.

Senator DOUGLAS. Should you get a tax benefit because the courts compel you to carry out what they believe the antitrust law is, that is, should you get a bonus for carrying out the decisions of the antitrust laws as interpreted by the courts?

Mr. BIRD. I don't think that is strictly accurate, Senator Douglas. It isn't a question of getting a bonus. The witnesses here today have testified repeatedly that a civil action in an antitrust proceeding is an equitable one, that the object is to break up the combination and not to punish anybody. And all I am saying is that action of the Department of Justice in making us sell these hotels, or the newspaper in Kansas City, which is another case, or whatever the property might be, is no different in principle and in sound tax thinking, in my judgment, than when the Air Force condemns land for an airport, or the road commission takes it for a highway, or the farmer sells his livestock on account of drought. The farmer that sells his livestock on account of drought gets money, and if he has other livestock he is all right.

Senator LONG. Frankly, I am inclined to think you are right.

My general thought about it goes somewhat along this line. If there is a farmer with a piece of land and it is decided that a highway is to be put through there—that farmer was content to sit on that land his whole lifetime, he had no intention of selling it, and he owed you no taxes on income—he must move out and find himself other pieces

of land. And he takes the money that you give him and buys another piece of land.

Now, with the exception that he is sitting on a different piece of land, he is right back where he was. And if you have made the right kind of settlement with him he has a house as he had before, and the same old pigs and goats. He is not a bit better off. But someone has made him move. And the Government in that situation says he doesn't owe any taxes.

If you recall what the facts were in your case, you people don't have a monopoly of the hotel business, but you have pretty much of a monopoly of the banquet halls in this town, is that not right?

Mr. BIRD. The convention business.

Senator LONG. You are in a position to dominate the convention business here in this city, so you must get rid of one of your big hotels. And you say, "Fine, we will sell this hotel that has convention halls and buy one that doesn't have convention rooms.

So you are still in the hotel business, you are no better off than you were before, but you no longer control the convention rooms, you might say.

But by being forced to move from one hotel to another hotel somebody socks you with a big tax bill.

Mr. BIRD. That is correct.

Senator LONG. And what you are saying is that your situation is like that old farmer's.

Mr. BIRD. Identically, Senator Long.

Senator LONG. You are not any better off than before, you are worse off. You have a less stable situation from your point of view.

And in addition, somebody socks you with a big tax bill because the public wants you to see the degree of control that you have of the meeting rooms in this city. That is about the size of it.

Mr. BIRD. I am glad you expressed it so well, because that is exactly our position.

Senator LONG. It makes good sense, because if you had come in before you had the tax bill handed to you I think you could have gotten it without much trouble. I doubt if you could get it now.

But I do think there is much logic to recommend your position.

Any questions?

Thank you very much, Mr. Bird.

Mr. BIRD. Thank you, Senator Long.

Senator LONG. That concludes this hearing. The committee will be on call of the Chair.

(By direction of the chairman, the following is made a part of the record:)

STATEMENT BY GENERAL MOTORS CORP. ON PENDING LEGISLATION PERTAINING TO THE TAXATION OF EXCHANGES AND DISTRIBUTIONS PURSUANT TO ANTITRUST DECREES

This statement sets forth the position of General Motors with respect to the proposed legislation being considered by your committee, which would modify the tax treatment of certain exchanges and distributions made pursuant to orders enforcing the antitrust laws. We ask permission to file this statement for the consideration of your committee and for inclusion in the printed record of the hearings.

General Motors Corp. is filing this statement on behalf of itself and particularly on behalf of the 842,000 owners of nearly 285 million shares of General Motors

common stock. This legislation is very important to these shareholders. If enacted, it will greatly influence the form of impending divestiture by Du Pont of 63 million shares of General Motors stock owned by it. This, in turn, will influence the effect of the divestiture upon the value which the market places on the investment in the common stock of General Motors held by General Motors shareholders.

OWNERSHIP OF GENERAL MOTORS

Our current list of 842,000 owners of General Motors common stock includes thousands of institutional shareholders and miscellaneous groups, each of which holds its stock for the benefit of numerous persons. Included in this category are insurance companies investing for the benefit of policyholders and shareholders, employee benefit and pension funds, hospitals, colleges and many other organizations and mutual funds. Nearly 800,000 of our accounts, or about 95 percent of the total, are in the names of individuals, joint tenants or custodians for minors. General Motors shareholders reside in every one of the 50 States, the District of Columbia, 6 U.S. possessions and some 80 foreign countries. Some have large stockholdings but over 500,000 are of 100 shares or less. In other words, a large majority of our shareholders are individuals or joint tenants whose holdings are relatively small. However, these seemingly small holdings may well, in many instances, represent a substantial part of the investments of these shareholders.

General Motors common stock has always been one of the most popular stocks acquired under the monthly investment plan of members of the New York Stock Exchange—in fact, for nearly 3 years it has been the most popular monthly investment plan stock. Under this plan stocks listed on the New York Stock Exchange may be purchased by regular quarterly investments of as little as $40.

REASONS FOR GENERAL MOTORS STATEMENT

It would concern us greatly at General Motors if the value of the investments of these thousands of small shareholders were seriously impaired because of the tax consequences of a court decision holding that a stock investment acquisition and retention in which they had no participation was illegal. It would be all the more unfortunate in this instance since the forced divestiture is to correct an acquisition made by the Du Pont Co. more than 40 years ago. In fact, the suit against Du Pont was not filed until 30 years after the acquisition.

General Motors is supporting this proposed legislation in order to protect its shareholders from some part of this potential economic loss. Divestiture, with or without new tax legislation, would have no effect on the day-to-day operations of General Motors. Nevertheless, under present tax laws a substantial increase in the market supply of General Motors stock during the period of disposal of such stock must be anticipated. To the extent that this should take place—and because of the effect of the law of supply and demand—it could have a serious adverse effect on the market price of General Motors stock for a period of 10 years.

Moreover, a depressed market price for General Motors stock could be of serious concern to those of our employees who are acquiring the corporation's stock, many for the first time, under one or more of our employee plans such as the savings-stock purchase program. For example, more than 93,000 of General Motors' salaried employees in the United States alone are now investing in General Motors stock as well as in Government bonds through the General Motors savings-stock purchase program. As of July 31, the trustees of this program were holding nearly 6 million shares of General Motors common stock and Government securities with a value of $115 million for the accounts of these employees.

TAX AND OTHER ECONOMIC CONSEQUENCES UNDER EXISTING LAWS

It is General Motors' opinion that this divestiture cannot be accomplished under present tax laws without hurting thousands of innocent shareholders of General Motors. This opinion has been formed after study of the testimony of many experts who appeared as witnesses during the trial of the Du Pont suit.

During the hearing in Chicago in 1959 on the Government's proposal for divestiture, there was testimony of the adverse effect on the market value of General Motors stock irrespective of the applicable tax laws. Further, there was testimony that the impact on the individual shareholder would be far

greater if the divestiture were accomplished by a distribution of stock under then existing (and current) tax laws which would subject the distribution to tax as a dividend.

In the course of the Du Pont trial in 1959 economists and investment experts advanced several reasons why many Du Pont shareholders would dispose of the General Motors stock. Some would sell in order to maintain the desired balance and diversification in their investment portfolios. Others might regard General Motors stock as unsuitable for their investment programs. Many Du Pont shareholders with relatively few shares not presently owning General Motors stock would be unwilling to retain the small amounts distributed to them as dividends. Representatives of two leading banks testified that in many cases trusts holding Du Pont stock would sell the distributed General Motors stock to facilitate the allocation of trust income among life tenants, as distinguished from remaindermen; another banker testified at the trial that his bank had already begun to sell Du Pont stock in order to avoid the serious problems of allocation between principal and income that would arise under the Government plan of divestiture.

The available supply of General Motors stock on the market would also be increased by disposals by many of our own shareholders. These would be shareholders interested, as many investors are, in the market value of their investments and not merely in the income therefrom. They would be moved to sell their General Motors stock by the knowledge that the price of the stock would either decline or fall behind the rest of the market. They would wish to reinvest their funds in stocks which they believed had better prospects for appreciation in value.

In a letter dated August 14, 1961, to the Du Pont shareholders, the President of the Du Pont Co. stated that the company was studying the use of a combination of methods of divestiture, as follows:

"We are studying the use of a combination of methods, such as (1) offers to exchange GM shares for Du Pont common and preferred stock which stock would then be retired; (2) distribution of GM shares in lieu of cash as a portion of Du Pont's common stock dividends; and (3) sale by Du Pont of GM shares, with Du Pont paying a capital gains tax on the proceeds."

Under the second method proposed, namely, distribution of General Motors shares in lieu of cash as a portion of Du Pont's common stock dividends, under present tax laws, any shares distributed as dividends would be taxable to individual shareholders, based on the market value of the General Motors stock received, at income tax rates ranging from 20 to 91 percent less the 4 percent dividends received credit. To secure the funds required to pay these income taxes, many Du Pont shareholders would unquestionably find it necessary to sell the General Motors stock so received, with resulting depressing effects upon the market value of General Motors stock.

As to the third method of divestiture, suggested by Du Pont, namely, the sale by Du Pont of General Motors shares, with Du Pont paying a capital gains tax on the proceeds, the direct sale by Du Pont of General Motors stock, extending over a 10-year period, could also have a continuing depressing effect on the price of General Motors stock.

Under present tax law, it is evident that the divestiture by Du Pont would result in a substantial increase in the available supply of General Motors common stock on the market. The increased supply with no increase in demand could only result in a decline in price. The price would be depressed throughout the period of divestiture which, under the Supreme Court decree, could be as long as 10 years. This reduction in market value would be a burden on all General Motors shareholders and would result in an irretrievable injury to those General Motors shareholders who for any reason would have to dispose of their stock investments during the divestiture period. It would seem most inequitable that these shareholders should sustain such financial losses since they were in no way connected with the acquisition and retention by Du Pont of its holdings of General Motors stock.

The proposed legislation provides for equitable tax treatment for the shareholders of Du Pont upon receipt of General Motors stock distributed for divestiture purposes. Furthermore, there is ample precedent for not taxing as a dividend the forced divestiture of stock. Legislation similar to that proposed was passed by the Congress in 1938 in connection with the Public Utility Holding Company Act and in 1956 as a part of the Bank Holding Company Act. In fact, certain stock distributions under these acts, which meet specified conditions and

limitations of the Internal Revenue Code, are received completely tax free. On the other hand, even if the proposed legislation is enacted, distribution by Du Pont of General Motors shares will result in capital gains taxes for some Du Pont shareholders. Sales by these Du Pont shareholders of the General Motors stock received, to pay such taxes, will have some effect on the market value of General Motors stock.

OPINIONS OF TRIAL WITNESS

An officer of the largest security commission firm in the United States testified in the 1959 trial that if the divestiture decree proposed by the Government were adopted, his firm would remove General Motors from its list of stocks "preferred for purchase" and would, if asked, advise its customers to dispose of their General Motors holdings unless they were prepared to "go through a prolonged period of adverse price action." Another investment expert testified that "a great many of the smaller stockholders and the less well-informed stockholders would sell simply because they didn't understand the situation and were afraid of it and would rather reinvest the proceeds in a more stable stock where they didn't have these questions overhanging the market."

The impact of sales by present General Motors shareholders and by Du Pont shareholders receiving distributions of General Motors stock cannot be evaluated solely by the volume of such sales. These shareholders would be acting without guidance or organization, since there would be no practical method of forming a large secondary selling group to handle their sales. They would be motivated, according to one witness, by "two things—fear and confusion." Each individual seller would attempt to dispose of his holdings as quickly as possible in order to minimize losses, thus further increasing the pressure on the market for General Motors stock. Because such sales would be disorganized, their impact on the market would be far greater than that of an underwritten offering of comparable size.

EFFECT ON DEMAND FOR AND PRICE OF GENERAL MOTORS STOCK

While a diverstiture, under present tax laws, would cause a very substantial increase in the available supply of General Motors stock on the market, it would do nothing to increase the demand. On the contrary, Government witnesses as well as defense witnesses have testified that adoption of a divestiture decree would actually decrease the demand for General Motors stock. They also have stated that potential buyers would be deterred by the same factors which would induce present shareholders to sell their stock—the cloud of uncertainty surrounding General Motors stock. At the same time, existing demand would be partially satisfied by the distribution of General Motors stock as dividends to Du Pont shareholders, including institutional investors, many of whom might otherwise be prospective purchasers.

Thus the evidence is clear that divestiture under existing tax laws, while causing an increase in the supply of General Motors stock on the market would at the same time substantially decrease the demand for that stock. This would create an imbalance between supply and demand which could be corrected only by a decline in price sufficient to stimulate the entry of new demand into the market.

REACTION OF GENERAL MOTORS SHAREHOLDERS

The loss in the market value of General Motors stock would be imposed on 842,000 owners who were in no way connected with the acquisition and retention of the General Motors stock by Du Pont. As you may be aware, General Motors common stock is owned by more people than that of any other industrial company. General Motors, among all corporations, is second only to American Telephone & Telegraph in number of shareholders. Our shareholder group grew steadily, without interruption, from just over 460,000 in early 1955 to a peak of more than 849,000 at March 31, 1961. Since then there has been a decline of 7,000 shareholders. This is the first decline registered in any quarter since the latter part of 1954. While the decline in the number of General Motors shareholders is small, it could be indicative of a trend which, if continued, would be a cause for concern.

General Motors has always been keenly interested in the growth of its shareholder group. Since 1927 it has been our practice to write letters of welcome to new shareholders. It has also been our practice, dating back to 1930, to write to shareholders who close their accounts to ask whether the decision to dispose

of their General Motors stock was related to any aspect of the corporation's policies or operations. The views of people selling General Motors stock as well as the opinions of our existing shareholders are always important to us. Of late some of the replies from former shareholders have cited the uncertain status of the Du Pont decree as the reason for selling their General Motors stock. For example, a former shareholder who closed his entire holdings of 100 shares said:

"My reason was purely selfish—I have been concerned about the * * * reasoning of the courts in the matter of Du Pont's ownership and decided that disposing of 63 million or so shares of GM stock in 10 years would or could have a very serious effect on the market value of my stock. I decided I would not care to wait it out—and if I were correct I'd then pick it up again later. Possibly also I could be fooled on this—however that's the way I doped it out."

A woman who recently sold her holdings of 50 shares wrote in part:

"In response to your letter of May 29 I sold [my] General Motors stock with a great deal of regret. My husband will retire in 6 years and it was my intention to accumulate shares of General Motors and some other blue chips to add to our income. When the news broke about Du Pont having to dispose of GM stock the brokers were skeptical about the effect this would have and advised me to sell it since they felt that GM would drop substantially in price when Du Pont started to 'dump' the stock."

And still another former shareholder who disposed of his 100 shareholdings stated in part:

"However, you asked me why and I shall tell you: I am not by nature a speculator, preferring to hold good stocks and regard them as long-term investments. I did sell my General Motors stock because of the very unfavorable news which appeared in the newspaper on the Du Pont divestiture."

Furthermore, many General Motors shareholders would sell their stock during the divestiture period for a number of reasons—purchase of a home, sending children to college, liquidation of an estate, etc. Such persons would be directly affected by the adverse impact on the market price of General Motors stock. While it is not possible to determine exactly what proportion of the outstanding General Motors stock would be sold during the divestiture period, it is apparent that the amount, and consequently the direct injury to General Motors shareholders, would be substantial. Taking account of the normal volume of trading in General Motors stock and the additional sales which would be caused by a decree of divestiture under present tax laws, it is clear that any significant diminution in the market price of that stock would cause losses running into the hundreds of millions of dollars.

EFFECT ON RAISING EQUITY CAPITAL

In addition to depressing the market value of their stock divestiture under current tax laws would further injure General Motors' shareholders by increasing the cost to the corporation of raising equity capital should the need arise. Divestiture under existing tax laws would deter many investors from purchasing General Motors stock, and would create an additional supply of the stock. Any new issue would be forced to compete with this additional supply. Consequently, General Motors could market new common stock only at a price which would be lower than under normal conditions. At a lower selling price per share, more shares would have to be sold to obtain a given amount of capital.

Although General Motors could, of course, obtain capital through selling bonds instead of by issuing common stock, no corporation can successfully engage in debt financing indefinitely without seeking equity capital.

General Motors' management should, like any other company, be free to utilize whatever method of financing is most suitable to the future needs of the corporation. Moreover, equity financing has certain advantages: it is a permanent addition to capital which need not be repaid, and dividends, unlike interest, need not be paid unless earned. If equity financing would be preferable but for the divestiture plan, the availability of debt financing would hardly mitigate the injury to General Motors and its shareholders.

EFFECT OF PROPOSED LEGISLATION

General Motors believes that the proposed legislation is fair and should be enacted into law. Under this legislation, stock distributions pursuant to an antitrust order, as in the case of the Du Pont divestiture, would be treated for tax

purposes as a return of capital to the individual shareholders. This would mean that the receipt of General Motors stock by an individual Du Pont shareholder would be taxable, as a capital gain, only if and to the extent that the current market value of the General Motors stock received exceeded the tax cost of his related Du Pont stock.

Passage of the proposed legislation should reduce, to a substantial degree, the increase in the market supply of General Motors common stock which would otherwise be expected to occur during the years of divestiture. It is possible that this legislation would have the additional advantage of permitting the divestiture to be accomplished over a much shorter period of time than the 10-year maximum specified by the Supreme Court. Under these circumstances the possible adverse effect upon the market price of General Motors common stock as a result of the divestiture would be expected to be minimized. At the same time, the Du Pont Co. has estimated that there would be no loss of revenue to the Government if the proposed legislation is enacted. Thus the chief objective of this legislation would be to permit a more orderly disposal of the 63 million shares of General Motors common stock held by the Du Pont Co., with a minimum of adverse effect.

CONCLUSION

In conclusion, General Motors would like to stress again the great necessity for legislation such as this committee is now considering in order to minimize any adverse effect Du Pont's divestiture of 63 million shares of common stock would have on the investments of the hundreds of thousands of innocent shareholders and the literally millions of their beneficiaries. The situation was well summarized by Senator Stuart Symington of Missouri in his statement on the floor of the U.S. Senate on June 15, 1961, from which we quote:

"Thus the value of General Motors shares today represent the accumulation of many years of perseverence on the part of General Motors shareholders and the reinvestment of their profits by the corporation. To have this value destroyed through the tax route would take from the individual General Motors shareholder the fruits of many years of corporate income reinvested in the business to build up his equity.

"Both Du Pont and General Motors have been regarded as leaders in their respective fields for many years. As such, their shares have been bought by individuals, directly or through pension funds and mutual funds, as well as the monthly installment plan of the New York Stock Exchange, for safety, of principal and regular income to provide for living and medical expenses.

"Both principal and income now are subject to unnecessary shrinkage unless something is done to correct the present inequitable tax laws. Consequences are far reaching on retired workers, upon families struggling to educate their children, and upon widows and minors whose income is partially dependent upon Du Pont and General Motors shares.

"There is need for prompt and equitable treatment of this problem by the Congress of the United States."

STATEMENT OF JAMES RUSSELL FORGAN, SENIOR PARTNER, GLORE, FORGAN & CO.

I am James Russell Forgan, and I am senior partner of Glore, Forgan & Co. The primary business of our firm is investment banking. I have been in the investment banking business since 1927. Since 1931 I have been a partner either in Glore, Forgan & Co. or its predecessor Field, Glore & Co. Our firm is generally regarded as one of the leading underwriting houses in the country. We are also members of the New York Stock Exchange. My firm was retained by General Motors Corp. in 1957 and again in 1961 to advise it with regard to the market effect on General Motors common stock of procedures which the Du Pont Co. may adopt or may be directed to adopt under the divestiture proceedings for disposal of the common stock of General Motors Corp. owned by it. In hearings held by the U.S. District Court of Northern Illinois before Judge LaBuy in 1959, I testified for General Motors Corp. on the probably impact on the market price of General Motors common stock if the divestiture plan proposed by the Government to the district court were adopted.

After an exhaustive study of the problem by my firm, we estimated that the income tax aspects of the plan, without regard to anything else, would cause a drop in the market price of General Motors stock of at least 20 percent, or somewhere between $9 and $10 per share.

Recently we have restudied the problem, particularly in the light of various alternative plans of divestiture which have been suggested.

At first glance the problem appears deceptively simple. Sixty-three million shares of General Motors stock must be disposed of by Du Pont in one manner or another within a maximum period of 10 years. Each share of Du Pont common stock carries a beneficial interest in 1.37 shares of General Motors stock which, at the present market price of General Motors, has a value of approximately $65.

I believe the real difficulties of the problem can best be understood by examining two opposite and extreme methods of divestiture. On the one hand, consider the possibility of a distribution by Du Pont to its own shareholders of the entire 63 million shares of General Motors stock at one time. Except for the tax impact on Du Pont shareholders, this procedure would be the most straightforward and clearcut method of divestiture. Instead of holding one stock certificate, each Du Pont shareholder would own two certificates—one, representing his interest in General Motors, and the other representing his interst in Du Pont ex General Motors, and the job would have been done.

Under existing tax laws, however, the tax impact of such a procedure would be nothing less than appalling. Most of the many thousands of individual Du Pont shareholders would be forced to sell the General Motors stock received as a dividend in order to raise money to pay their income taxes. In our studies in 1959 of the original Department of Justice plan of divestiture we estimated that the average income tax rate payable by individual Du Pont shareholders would be in the neighborhood of 56 percent of the value of the General Motors stock received as dividends. Under the extreme plan suggested above, the average tax rate would obviously be much higher than 56 percent. The tax selling would be disorganized and chaotic, and I am convinced could only be accomplished by driving the price of General Motors stock down to somewhere between 30 to 50 percent below the present market value of the stock.

A similar situation would prevail with somewhat less disastrous results if Du Pont should distribute one-tenth of its General Motors stock during each of the 10 years allowed by the Supreme Court. Based on present market values, each Du Pont shareholder would receive annually an amount of General Motors stock equal or nearly equal in value to the cash dividend of $6.50 now paid annually by Du Pont.

I am convinced that the tax impact of such a plan would still be terrific, regardless of whether or not the stock distribution were accompanied by some cash dividends by Du Pont. Although the initial impact on the market price of General Motors would probably be less than that caused by a single distribution of all the stock, the influence of disorganized tax selling would be felt throughout the entire 10-year period. Potential investors would tend to avoid the purchase of General Motors stock unless available at bedrock bargain prices, and the market value of the stock would remain at severely depressed levels for most of the decade.

Now let us consider a method of divestiture at the opposite extreme. Suppose that Du Pont, in order to avoid the direct tax impact on its shareholders of stock distributions, should decide to sell in the market all of its General Motors holding in 10 annual installments. This would mean yearly sales of 6,300,000 shares. If we assume an average sales price of $40 per share for the General Motors stock, our security markets would be called upon to absorb about one-quarter of a billion dollars of additional General Motors stock during each of the 10 years.

I should like to make clear that the history of our securities markets shows nothing remotely comparable to such a vast outpouring of stock. There is today no large unsatisfied demand for General Motors stock. Aside from the Du Pont holding, there are some 220 million shares of General Motors common stock now outstanding in the hands of approximately 850,000 shareholders. Anyone wishing to purchase General Motors may do so in almost unlimited quantities on the New York Stock Exchange. The addition, therefore, of 63 million shares of stock to the present available supply would necessarily drive the price of General Motors down to a point where investors would feel they were being offered too attractive a bargain to forgo.

With knowledge in advance that 10 successive sales were scheduled to take place, I am convinced that investors would only absorb the initial offering of 6,300,000 shares of stock at a price sufficiently low to give them confidence that succeeding sales could not be expected to drive the market to even lower levels. Such a price, in my opinion, would be at least 30 to 40 percent below the present market level of General Motors stock.

It is important here to observe that the recent sales of Ford Motors stock by the Ford Foundation do not afford a valid basis of comparison. Prior to these offerings no Ford stock had ever been available to the general public. Ford was a glamorous name and many thousands of investors were determined to own some Ford stock almost regardless of price. Nevertheless, it is highly significant to note that the most recent offering of 1,750,000 shares of Ford stock caused a decline of almost 10 percent in its market price. In anticipation of the offering, Ford stock declined from a price of $88 per share to $80.50 per share, at which level it was offered to the public.

When we examine various alternative plans of divestiture that have been suggested, we find that all of them represent some variations of the two extreme methods outlined above. To the extent that Du Pont distributes General Motors stock to its shareholders present tax laws will have a direct impact on the market value of General Motors stock. To the extent that Du Pont, in order to avoid this direct tax impact on its shareholders, is forced to sell its holding of General Motors stock, the result will be an equally depressing influence on the market price of General Motors stock.

Du Pont, of course, could distribute a modest amount of General Motors to its shareholders in place of some small percentage of its present cash dividends without serious direct tax consequences. Thus, Du Pont, in place of its present $6.50 annual cash dividend, might distribute three-quarters of this amount in cash and one-quarter in General Motors stock. I am confident that this part of a divestiture program by itself would not have a seriously depressing influence on the value of General Motors stock. The trouble is that such a plan would only dispose of somewhere between 10 and 18 million shares of General Motors stock over a 10-year period.

Moreover, Du Pont might dispose of additional shares by offering to exchange General Motors stock for its own outstanding preferred and common stocks at some attractive ratio. Under the most optimistic assumptions, however, such a combined program would still leave to be sold in the open market somewhere around 60 to 70 percent of the General Motors stock now held by DuPont. One important weakness of such a plan is that the depressing influence of these huge stock sales would lessen the attractiveness of the exchange offers of General Motors stock for Du Pont preferred and common shares. The result would probably be to reduce the amount of stock disposed of through exchange offers and thus to increase the balance of General Motors stock to be sold.

The Du Pont Co. in a recent letter to its stockholders, estimates that a flexible plan, such as outlined above, would produce no greater tax revenue for the Government under existing law than would be the case if H.R. 8847 as amended should be enacted by the Congress. Nevertheless, the supply of General Motors stock would be increased by the very large amount of shares which would still have to be sold during the period of divestiture, and such huge sales would severely depress the market price of General Motors stock.

Thus, no matter what plan of divestiture we consider, we find ourselves impaled on either of the twin horns of a dilemma. Under existing tax laws, there can be no escape from the direct impact of tax selling, or from the effect of huge forced sales upon the market price of General Motors stock. Either route, or any combination of the two, will almost certainly cause a serious and protracted decline in the value of General Motors stock. The only way out of this dilemma is through the enactment of remedial tax legislation such as is proposed in H.R. 8847. It will minimize the supply of General Motors stock which otherwise would be thrown on the market and should greatly reduce the time necessary to accomplish divestiture. Finally, it will be a vivid demonstration of the fact that in our free society innocent victims of judicial action can expect to be protected by the legislative brauch of our Government.

Unfortunately, there is a widespread opinion that such legislation would represent an act of favoritism on behalf of two huge corporations—General Motors and Du Pont. Nothing could be further from the truth. No program of divestiture will have any direct adverse influence on the operations of either of these companies, although General Motors could be affected adversely in raising additional equity capital while its stock was selling at very depressed levels. The real sufferers under existing tax laws will be the more than 1 million shareholders of the two corporations.

Certainly there can be no basis in equity for inflicting serious economic damage upon innocent stockholders of General Motors who had nothing to do with

the investment by Du Pont in General Motors stock some 40 years ago. The principle of avoiding such unwarranted injury to innocent parties has been well recognized by the Congress under similar circumstances in the past, both in connection with the Public Utility Holding Company Act of 1935, as amended, and the Bank Holding Company Act of 1956.

As a matter of simple justice to a vast multitude of innocent American citizens, I urge upon you the prompt enactment of H.R. 8847, or of some similar remedial legislation.

STATEMENT OF WINTHROP C. LENZ, PRESIDENT IN CHARGE OF THE UNDERWRITING DIVISION OF MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

I am vice president in charge of the Underwriting Division of Merrill Lynch, Pierce, Fenner & Smith Inc., a securities investment firm which is engaged in practically all phases of the securities business. Merrill Lynch, as our firm is generally known, is the largest securities commission firm and is 1 of the 10 largest securities underwriting firms measured by business written in the last 5 years. The firm last year accounted for approximately 13 percent of the public round-lot trading on the New York Stock Exchange and for approximately 20 percent of the odd-lot trading. We have around 500,000 customers.

A substantial number of these 500,000 customers own Du Pont and General Motors stock. For example, we have registered in our name 3,133,868 shares of General Motors stock, which we hold for 33,421 customers. Likewise, we hold in our name 162,212 shares of Du Pont on behalf of 4,125 of our customers. A large number of these customers are people of modest means. I am urging support of this legislation because we at Merrill Lynch do not want to see the stockholders of Du Pont or the stockholders of General Motors get hurt because of the market consequences of divestiture.

I agree with Mr. Greenewalt and Mr. Emerson that these stockholders would be hurt under any methods of divestiture that might be employed under the present tax law. In fact, I believe that the market impact of the three-pronged flexible plan of divestiture during some parts of the 10-year period would be even greater than the percentages estimated by Mr. Emerson.

Mr. Emerson's estimates are reasonable, it seems to me, if we assume relatively favorable automobile business and steady market conditions throughout the 10-year period of divestiture; if we assume that each year for 10 consecutive years Du Pont will be able to sell an average of 3½ million General Motors shares successfully. But any 10-year period is apt to have its bad years as well as its good. If only one of these huge annual offerings should fail, that failure would have reverberations far beyond the market for Du Pont and General Motors. Such a failure would have a serious effect upon the market for new issues, and would affect the listed market as well. It would put a definite brake on industrial growth generally by making it more difficult for American industry to raise new funds.

Even if divestiture under present law presented no dangers to the general economy, the proposed legislation should be adopted to protect the stockholders of General Motors and Du Pont from unintended harm. Mr. Greenewalt said that he was testifying on behalf of more than 200,000 stockholders of Du Pont and indirectly on behalf of nearly 850,000 stockholders of General Motors. Actually, many more individuals are involved in the outcome of this legislation than these figures reveal. For example, on the General Motors' stockholders list, our firm, Merrill Lynch, appears as only one shareholder; whereas, as I have said, we hold General Motors shares on behalf of 33,421 customers. Similarly, our firm appears as a single shareholder on the Du Pont stockholder list, but we hold Du Pont stock for 4,125 customers.

I believe that if the General Motors' shareholder list could be traced through the brokers and nominees, it would be discovered that the beneficial owners would total well over 1 million, and possibly be as many as 1½ million. In the case of Du Pont, actual beneficial holders probably would exceed 300,000. It is likely, therefore, that this legislation directly affects the interests not of 1 million individuals, but much closer to 2 million.

Many of these shareholders are small investors who will be hard hit in absence of corrective legislation. We are vitally concerned because many of these

people are our customers. We know their individual circumstances and above all else we don't want to see them needlessly harmed.

As an illustration of the type of people who are involved, I should like to call your attention to the monthly investment plan, which was developed by the New York Stock Exchange in 1954. Under this plan an individual, for just over 44 cents a day, can gradually become a part owner of an American business enterprise. Currently 107,065 individuals are making investments in American business in this manner. Of these, 63,442, or 59 percent of the total, are making their investments through Merrill Lynch, and of these, 3,677 are investing in General Motors and 474 in Du Pont. More monthly investment plans are invested in General Motors than in any other stock—both on a nationwide basis and on the part of our own customers.

Investors in General Motors are already being badly hurt by the adverse impact of the divestiture proceedings on the market.

Just before the hearings in the district court in Chicago, as of December 31, 1958, General Motors sold at 49½. On September 8 of this year General Motors sold at 46¾—a decline of 5.5 percent. During the same interval, the Dow-Jones industrial average rose from 584 to 725, or 26 percent, and General Motors' competitor, Ford Motor Co., rose from 50⅝ to 96¾, or 92 percent.

No business development over which General Motors had any control could explain this enormous discrepancy in market action. The logical conclusion is that the poor market performance of this sound industrial company was caused by the financial uncertainties generated by the divestiture proceedings.

Our research division recently issued a study showing how an investor would have fared by investing $100 a month in any of the 20 stocks currently most popular with our customers during the entire period of the monthly investment plan's existence—from February 1954 through mid-1961.

When you consider that the dollar averaging principle inherent in the monthly investment plan results in purchase of more stock when the price declines and less stock when the price rises, it is disturbing to see that an investment of $8,900 in General Motors during the 89-month period would have appreciated by only $513 to a total present value of $9,413. During the same period American Telephone—an investment not generally noted for dynamic market qualities—grew from $8,900 to $14,875. International Business Machines increased to $87,300; Safeway Stores to $17,054; Sears, Roebuck to $17,743. Only 2 of the 20 stocks fared worse than General Motors and these did so because of special circumstances.

Without corrective legislation Du Pont presumably will be forced to employ its three-pronged flexible divestiture plan rather than distribute its General Motors stock to Du Pont stockholders. Under this combination of methods, sales of General Motors stock by the company, sales by some stockholders who received part of their dividends in General Motors stock, and sales by some who obtained General Motors stock in exchange for Du Pont stock, would have a severe impact on the market value of General Motors stock.

The innocent stockholders of General Motors—all of them—would be hurt. They look to Congress for fair treatment.

Passage of H.R. 8847, as amended, would greatly shorten the divestiture period and would substantially lessen the market impact of divestiture.

In helping all these people Congress would not cause the Treasury to suffer any loss in revenue. It has been pointed out that the Treasury would take in about $350 million under H.R. 8847 as against about $330 million under the three-pronged flexible program of divestiture. Thus, this is not a bill for tax relief, but a bill to protect innocent investors from damaging market consequences. Surely no one can believe that such needless destruction of market values serves any public purpose.

It is highly important from the standpoint of people's capitalism to encourage wider share ownership. It is important that workers who invest their hard-earned funds through a monthly investment plan, or through purchases of small odd lots, either directly or through payroll deductions, be assured of fair treatment in any case where they may become innocent victims of a forced divestiture.

For these reasons, I urge adoption of corrective legislation as beneficial to the country's welfare.

PROSKAUER ROSE GOETZ & MENDELSOHN,
New York, N.Y., September 12, 1961.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
New Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: We are taking the liberty of writing you regarding pending legislation to ease the income tax burden resulting from antitrust divestiture decrees, in view of the hearings scheduled on such bills by the Committee on Finance, and the favorable action taken by the House Committee on Ways and Means.

This firm represents trustees of a number of testamentary trusts with substantial and longstanding investments in stock of E. I. du Pont de Nemours & Co. Though none of the grantors, trustees, nor beneficiaries have had any connection with Du Pont, these trusts and their beneficiaries will suffer serious adverse effects from the income tax consequences of the divestiture of General Motors stock ordered by the U.S. Supreme Court. That Court granted the trustees we represent permission to file a brief amici curiae, enclosed herewith, which we believe graphically depicts the harsh impact of divestiture upon the innocent beneficiaries of these trusts.

No matter what course the trustees take, the net result will be a disastrous capital levy on the trusts and beneficiaries. The problems of these innocent victims of the *Du Pont* case, and of others similarly situated deserves, we believe, careful and sympathetic consideration.

We hope that this letter and the enclosed brief will explain our particular concern that favorable action be taken on legislation which will permit at least some mtigation of the tax impact resulting from the *Du Pont* decision. We also hope that this letter and the enclosed brief may be made part of the hearing record on this legislation.

Yours very truly,

PROSKAUER ROSE GOETZ & MENDELSOHN,
By WALTER MENDELSOHN.

In the

Supreme Court of the United States

October Term 1960

No. 55

United States of America,
Appellant,

—v.—

E. I. du Pont de Nemours and Company, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION FOR LEAVE TO FILE ATTACHED BRIEF FOR CLARA M. BLUM AND NORMAN S. GOETZ, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ALBERT BLUM; FRANCIS H. BLUM, JOHN A. BLUM AND ALFRED L. ROSE, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY L. BLUM; IRVING TRUST COMPANY, EMIL GOLDMARK, ALFRED L. ROSE AND LINDLEY G. PASKUS, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF BENJAMIN G. PASKUS; AND LINDLEY G. PASKUS, EMIL GOLDMARK AND ALFRED L. ROSE, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF KATHERINE PASKUS, AS *AMICI CURIAE*

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IN THE

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UNITED STATES OF AMERICA,

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—v.—

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The Trustees of the aforesaid Trusts, respectfully move for leave to file the attached brief as *amici curiae,* in support of the Appellees in this cause, pursuant to Rule 42 (3) of the rules of this Court. Attorneys for the Appellees have consented to the filing. Such consent was requested

of the Solicitor General by the Trustees' counsel in June of 1960. By letter, dated July 8, 1960, consent was refused.

The Trustees above named requested such consent upon learning that none of the stockholders of Appellee, E. I. du Pont de Nemours and Company (herein "du Pont") would be directly represented. The Trustees believed that they should advise the Court of the impact of the proposed divestiture upon the innocent beneficiaries of these Trusts who would be directly and adversely affected by divestiture. As these papers were being prepared, Trustees' counsel were informed that the Solicitor General has recently consented to the filing of briefs *amicus* by Messrs. Dallstream and Cowen, who served as *amici curiae* in the court below. However, as pointed out in the Government's brief (page 6), these *amici curiae* were not to be "partisan". The brief presented herewith is designed to be and is frankly partisan.

The aforesaid Trusts own in excess of 40,000 shares of du Pont common stock, as follows:

	No. of Shares	Date of Death	Cost* Basis
Trust u/W Albert Blum f/b/o Clara M. Blum	20,000	5/ 1/40	$691,400
Trust u/W Henry L. Blum f/b/o Frances C. Blum	16,000	8/22/45	$655,000
Trust u/W Benjamin G. Paskus f/b/o Lindley Garrison Paskus	4,000	1/28/51	$343,250
Trust u/W Katherine Paskus f/b/o Lindley Garrison Paskus	200	3/ 7/50	$ 25,000

The Trustees believe that through the filing of a brief on their behalf, this Court will be given a capsule picture of the injustice that would be visited upon du Pont stock-

* Value at date of death or optional valuation date.

holders, if their holdings of du Pont stock were divested, as requested by Appellant.

The annexed brief, for the filing of which we seek permission, will briefly point out that neither the earlier opinion of this Court nor Section 15 of the Clayton Act requires divestiture; that Judge LaBuy properly exercised a sound discretion in shaping his decree so as to prevent improper use of du Pont's voting power, etc., in violation of the Clayton Act, while at the same time avoiding untold hardship to innocent stockholders; and that the Government's request for immediate divestiture regardless of the effect on the stockholders of du Pont is unjustifiable and would constitute a reversal of this Court's earlier decision which called attention to the "large discretion" vested in the District Courts " 'to model their judgments to fit the exigencies of the particular case' " (353 U. S. 586, 607).

Such a presentation, which will emphasize the actual tax effect of divestiture upon the stock owned by these Trustees, will necessarily be different from and not repetitious of the more composite treatment of the situation which undoubtedly will be found in the briefs of the Appellees.

The accompanying brief

A. Considers the tax consequences upon the beneficiaries of the four Trusts in the event that the Government's proposed judgment below were adopted. It will analyze the tax effect in the event that the stock distribution were allocated to income, as well as the harsh consequences if allocated to principal. It will indicate that in the event of an allocation to income, all other income of the beneficiaries of some of these Trusts would be insufficient to pay the tax which would be imposed upon the distribution of the General Motors stock. If allocated to principal, a substantial portion of the stock would have to be sold to pay the tax on the distribution.

B. Indicates how the inevitable forced sale of General Motors stock by various du Pont stockholders would have a disastrous effect on the market value of the stock, thus compounding the difficulty that would confront these Trustees and their beneficiaries from the distribution which the Internal Revenue Service has already ruled would constitute ordinary income for tax purposes.

C. Sets forth the various estate problems which will be visited upon these Trustees, who must make the choice of allocating such a stock dividend between income and principal.

D. Finally, demonstrates that other suggested alternatives would have little less harmful tax and market consequences upon the shareholders of du Pont who, as noted by the court below, were entitled to consideration in carrying out this Court's direction for a solution of the problem through the exercise by the District Court of its "large discretion," so as to provide a judgment which would "fit the exigencies of the particular case."

The Trustees, therefore, respectfully move that they be granted leave to file the accompanying brief.

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—v.—

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Appellees.

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Interest of *Amici*

The interest of the *amici* is set forth in the motion for leave to file this brief.

Argument

Proceedings to Date.

In June, 1957, this Court held the acquisition by E. I. du Pont de Nemours and Company (hereinafter "du Pont") of approximately 63,000,000 shares of common stock of General Motors Corporation (hereinafter "General Motors") violative of Section 7 of The Clayton Act (15 U. S. C. A. 18), and remanded this case to the District Court

> "for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute" (353 U. S. 586, 607).

In doing so, this Court pointed out that the

> "District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.'" (*Ibid.* 607-608.)

The District Court initiated its proceedings on September 25, 1957 (R. 3) and, on the same day, appointed *amici curiae* instructing them that,

> "* * * it will be their duty to offer plans, to make such reasonable investigation of the situation as is proper to enable them so to do and to study the various plans proposed by the litigants and to make their recommendations to the Court * * *" (R. 10-11).

The District Court declared

> "that it is in the interest of the public welfare that the Court be fully informed of all aspects of the case and

particularly with respect to the effect which the plan or program finally worked out by this Court will have upon the public interest and upon the interest of the stockholders generally of both E. I. du Pont de Nemours and Company and General Motors Corporation" (R. 10).

Between October 25, 1957 and August, 1958, proposed final judgments were submitted to the District Court by the several parties (R. 3185).

Appellant's proposed judgment was submitted to the Commissioner of Internal Revenue. As stated in the opinion of the District Court, the Commissioner ruled that:

"under the Government's proposed judgment the annual dividends payable by du Pont in shares of General Motors stock would be taxable as ordinary income to the extent of du Pont's current earnings and accumulated earnings and profits. In the case of individual stockholders the Commissioner ruled that the amount of the dividend would be the fair market value . . . of the General Motors shares at the time of each annual distribution" (R. 3187).

Hearings commenced on February 16, 1959 after the parties had taken depositions and submitted interrogatories (R. 3185). Appellant presented its evidence on twelve hearing days between February 17th and March 16th, 1959. The Appellees and the *amici curiae* presented their evidence on twelve hearing days between March 16th and April 1st. After Appellant had presented its rebuttal on four hearing days, briefs were filed and the case submitted in June, 1959 (R. 3203).

The court rendered its opinion on October 2, 1959 (R. 3265). Its final judgment, dated November 17, 1959, provides in part:

"XII"

"Jurisdiction is retained in order to enable any party hereto or any person enjoined or restrained hereby to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of this Judgment or any of the provisions thereof, or for the enforcement of compliance therewith and punishment of any violations thereof. . . ." (R. 3300-3312, at 3302).

On the basis of this voluminous record* and assisted by the two impartial friends of the court, the District Court, in its well reasoned opinion, found that divestiture was not necessary "in order to prevent the consequences condemned by the Statute" (R. 3246), that divestiture would have "very serious adverse consequences," that "it would be unreasonable and unjust for the Court to adopt measures which are certain to result in losses to innocent stockholders when the effects offensive to the statute can be eliminated by measures which will not result in such consequences" (R. 3247), and that to "order a divestment of du Pont's title, with the resulting tax penalties and market implications . . . would . . . constitute a serious abuse of discretion" (R. 3260).

In reaching its decision, the court "considered whether there might be modifications of the Government's plan or other forms of divestiture of the legal title which might reduce or mitigate these adverse consequences" (R. 3248). It concluded that no plan or method of divestiture could be developed which "would not either impair the value of the property interests involved or impose severe tax conse-

* The printed record of the proceedings below consists of over 3,000 pages. Certain documents and exhibits were omitted by stipulation (R. 3321).

quences upon the stockholders of the du Pont Company" (R. 8249).

Notwithstanding the vast amount of material accumulated during this lengthy period and diligently considered by the District Court, Appellant now urges this Court to order divestiture and to direct the lower court to start anew on the road of exploration, to develop a suitable method of divestiture, which neither court nor counsel nor impartial *amici curiae* have heretofore been able to find.

I

Divestiture is neither required nor needed.

It is not the purpose of this brief to argue at length the question whether divestiture in this case is mandatory as a matter of law. That issue will undoubtedly be fully considered in the briefs of counsel for the parties. Suffice it here to point out:

A. *This Court's Instruction to the District Court on remand made no mention of divestiture.*

On the contrary, the District Court was directed to determine, after hearing,

> "the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute",

it being noted that the District Courts were

> "clothed 'with large discretion to model their judgments to fit the exigencies of the particular case'" (353 U. S. 586, 607-608).

B. *Section 15 of the Clayton Act differs from Section 11 in that it does not specify divestiture as the sole remedy.*

Section 15 (15 U. S. C. A. 25) does not even mention divestiture. It invests the District Courts

> "with jurisdiction to prevent and restrain violations of this Act"

and lodges with the several District Attorneys of the United States the duty to

> "institute proceedings in equity to prevent and restrain such violations."

Section 11 (15 U. S. C. A. 21), which governs proceedings before a commission or board hearing a Section 7 case, specifically provides that, upon finding of violation, it shall issue

> "* * * an order requiring such person to cease and desist from such violations, and divest itself of the stock . . . held * * *"

For the Government, therefore, to argue that "The Federal Trade Commission has from the outset required divestiture . . . " and that therefore a court of equity must do the same (see Government's brief, pp. 32 *et seq.*) is patently unsupportable.

The only logical conclusion that may be drawn from the difference between these two sections is that Congress did not intend to lodge discretion with the administrative agencies, but desired that courts of equity, before which Clayton Act cases would be tried under Section 15, continue to have their historical equitable powers to exercise their "'* * * large discretion to model their judgments to fit the exigencies of the particular case'" (353 U. S., at p. 608).

In *Hecht Co.* v. *Bowles*, 321 U. S. 321, dealing with the grant of jurisdiction to the District Courts to issue compli-

ance orders for the enforcement of the Emergency Price Control Act of 1942, this Court declared:

> "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made" (p. 329 of 321 U. S.).

From the foregoing, it is clear that divestiture is not mandatory in this case. Nor is divestiture needed where, as here, the judgment below is more than adequate to remedy the Clayton Act violation found by this Court.

C. *The District Court's judgment provides adequate remedy.*

The judgment below deprives du Pont, Christiana, Delaware, and their respective officers and directors, of voting rights in General Motors stock.

Except for General Motors stock allocable to Christiana and Delaware and to the officers and directors of the three companies, the voting rights with respect to the General Motors shares held by du Pont are passed through to the many thousands of du Pont stockholders.

All officers and directors of du Pont, Christiana and Delaware are prohibited from serving as directors or officers of General Motors. Likewise, General Motors is prevented from employing anyone in any capacity who is employed by any of these companies. In addition, the judgment contains prohibitions against preferential trade agreements between du Pont and General Motors.

Indeed, the judgment goes so far as to cancel existing requirements contracts between du Pont and General Motors, and to prohibit any new requirements contracts for a period of three years after which period such contracts

of not more than one year's duration will be permitted (R. 3264-3265).

To contend, as does Appellant, that the cumulative effect of the safeguards embodied in this judgment is inadequate and that the District Court abused its discretion, is insupportable on the record, on reason, and by any standard of business realities.

II

The District Court correctly held that divestiture in this case is not feasible without inflicting harsh punitive injury upon innocent stockholders.

During the two year period devoted by the District Court to the task of promulgating "a decree which will remedy the violation of Section 7 of the Clayton Act, without penalizing those who may become the innocent victims of this case, the stockholders and the beneficiaries in various trusts and institutions" (R. 3197), many alternative methods were considered and examined.

Appellant urged divestiture in its proposed judgment, regardless of the ruinous consequences to hundreds of thousands of concededly innocent stockholders (R. 3185-3187). *Amicus* Dallstream suggested a method of voluntary "take-down" of General Motors shares by du Pont stockholders which admittedly did not remove, but was designed to alleviate, the confiscatory consequences of Appellant's proposal (R. 3190-3192). The court below, after careful consideration of these proposals,* rejected them (R. 3260-3261, 3263).

If Appellant's position were correct that divestiture is the only proper remedy, despite the absence of any such

* The court acted on the proposed judgments of Appellant and *amicus* Dallstream only after each was submitted to the Commissioner of Internal Revenue for his detailed ruling as to their tax consequences (R. 3187, 3190).

requirement in the statute and the absence of any such direction in the earlier opinion of this Court, then nothing further need be said. But the Appellant goes further. It urges that divestiture should have been ordered here even if the trial court had discretion. It takes the further position that the stockholders of du Pont and General Motors need not be hurt by divestiture.

We have a right to assume that the Government's proposed judgment below, presented after many months of consideration, was the best possible plan that the Government could present which would provide for divestiture and at the same time avoid disastrous consequences to innocent stockholders.

The District Court, in its judgment, expressly retained jurisdiction "in order to enable any party hereto * * * to apply to this Court at any time * * * for the modification . . . of this Judgment or any of the provisions thereof * * * " (R. 3312).

Therefore, any proposal which the Government may wish to make which would resolve this problem by a new plan should be made in the trial court where full consideration may be given to it. It is not sufficient for the Government hopefully to assert here that some way will be found to have divestiture without visiting upon the stockholders the harmful tax and market consequences envisaged by the court below after a full consideration of all relevant factors.

We examine, therefore, the consequences of Appellant's proposed judgment below in order that this Court may have a picture of how it would have affected the four Trusts of which the *amici* are the Trustees.

The record indicates that approximately 24% of the total beneficial ownership of du Pont common stock is held by

trusts (DPX 24, R. 1378, 3030). Therefore, the position of the Trusts herein will be illustrative of the effect of Appellant's proposed judgment upon substantial numbers of du Pont stockholders.

A. *The impact of Appellant's proposed judgment upon the four Trusts herein and their beneficiaries.*

The *amici* are Trustees of four testamentary trusts holding du Pont common stock as indicated below:

	No. of Shares	Date of Death	Cost* Basis
#1: Trust u/W Albert Blum f/b/o Clara M. Blum	20,000	5/ 1/40	$691,400
#2: Trust u/W Henry L. Blum f/b/o Frances C. Blum	16,000	8/22/45	$655,000
#3: Trust u/W Benjamin G. Paskus f/b/o Lindley Garrison Paskus	4,000	1/28/51	$343,250
#4: Trust u/W Katherine Paskus f/b/o Lindley Garrison Paskus	200	3/ 7/50	$ 25,000

The governing instruments require that each of the above Trusts distribute its entire net income currently to a single life beneficiary (who is the same individual in the case of the two Paskus Trusts).

1. The Disastrous Tax Consequences.

Appellant's proposed judgment would require the distribution by du Pont of 1/10th of its General Motors stock during each of 10 years—*i.e.*, 6,300,000 shares per year (R. 3186). Under the ruling of the Commissioner of Internal Revenue, said distribution would be taxed to individual recipients (including trusts and their beneficiaries)

* Value at date of death or optional valuation date.

as ordinary income at the value of the General Motors stock at the time of distribution (R. 3187).

If such stock were allocated to income and treated as currently distributable to the life beneficiaries, its value would be taxed to such beneficiaries. 1954 I. R. C. §652. If the stock were allocated to principal, its value would be taxed to the trusts. 1954 I. R. C. §§641, 643(a)(4), 651.

Tax Consequences if Distribution Is Allocated to Income.

The following table* indicates the extent of the tax burden upon beneficiaries of said Trusts on the assumption that General Motors stock distributed as dividends over a 10-year period would be allocated to *income*:

Beneficiary Under Trust	Additional Taxable Income**		Taxes†		Balance After Taxes	
	Per Year	For 10 Years	Per Year	For 10 Years	Per Year	For 10 Years
#1	$107,640	$1,076,400	$88,424	$884,240	$19,216	$192,160
#2	$ 86,112	$ 861,120	$74,692	$746,920	$11,420	$114,200
#3 & #4††	$ 45,788	$ 457,880	$33,727	$337,270	$12,061	$120,610

* Figures used are predicated upon the assumptions that General Motors stock will be distributed in addition to normal cash dividend and will have a value of $40 per share. Calculations are based on 1959 tax rates and income of the present beneficiaries, with adjustments to eliminate nonrecurring items.

** After deducting trustees' income commissions.

† Total Federal and New York taxes, taking into account deductibility of New York tax in computing Federal tax.

†† On reaching his 40th birthday in 1960, half the corpus of each of the two Trusts (#3 and #4) of which Lindley Garrison Paskus is the beneficiary was distributed to him, under the terms of the Wills. The distributions included 4,200 shares of du Pont common stock, which Mr. Paskus now holds individually. Calculations with respect to the Paskus Trusts include GM stock to be distributed on both trust-held and individually-held du Pont stock.

In the case of the beneficiaries under Trusts #1 and #2, the taxes payable on the General Motors stock distribution, as shown in the foregoing table, would far exceed the beneficiaries' total net income from all other sources, taxable and tax-exempt, after taxes, even without taking into account the necessity for these beneficiaries, who are elderly widows, to spend a portion of such net income for their living expenses. Consequently, it is obvious that beneficiaries in the position of the beneficiaries under Trusts #1 and #2 would find it necessary to sell enough General Motors stock to pay the tax on the distribution.

The table which follows sets forth the number of shares to be received by the beneficiary of each Trust, the number of shares required to be sold in order to pay for the taxes thereon (assuming sale immediately on receipt at the same price at which the stock is required to be included in income) and the number of shares remaining after such sales:

Beneficiary Under Trust	No. of Shares to Be Received		No. of Shares Required to Be Sold*		No. of Shares Remaining	
	Per Year	For 10 Years	Per Year	For 10 Years	Per Year	For 10 Years
#1	2,760	27,600	2,211	22,110	549	5,490
#2	2,208	22,080	1,868	18,680	340	3,400
#3 & #4	1,159	11,590	844	8,440	315	3,150

* This figure is arrived at by dividing the total Federal and New York taxes which would be due on the distribution by $40, the assumed market price per share of General Motors stock.

Tax Consequences Assuming Distribution Is Allocated to Principal.

In the event that the distribution were allocated to *principal,* this would be the tax effect:

Trust	Taxable Income From General Motors Distribution*		Tax** on Said Income		Balance After Taxes	
	Per Year	For 10 Years	Per Year	For 10 Years	Per Year	For 10 Years
#1	$110,400	$1,104,000	$73,471	$734,710	$36,929	$369,290
#2	$ 88,320	$ 883,200	$55,888	$558,880	$32,432	$324,320
#3	$ 22,080	$ 220,800	$ 8,294	$ 82,940	$13,786	$137,860
#4	$ 1,104	$ 11,040	$ 196	$ 1,960	$ 908	$ 9,080

* It is assumed that this distribution will be the only ordinary income taxable to the Trusts. Figures used are predicated upon the further assumptions that General Motors stock will be distributed in addition to normal cash dividend and will have a value of $40 per share.

** Includes Federal and New York income tax.

Since the Trusts have no cash to pay the taxes on the General Motors stock received in kind, the Trustees would be forced to sell on receipt at least enough of the stock each year to provide sufficient cash for such taxes. If such sale is made immediately on receipt at the same price at which the stock is required to be valued for tax purposes, the tax effect would be as follows:

Trust	No. of Shares to Be Received		No. of Shares Required to Be Sold*		No. of Shares Remaining	
	Per Year	For 10 Years	Per Year	For 10 Years	Per Year	For 10 Years
#1	2,760	27,600	1,837	18,370	923	9,230
#2	2,208	22,080	1,399	13,990	809	8,090
#3	552	5,520	208	2,080	344	3,440
#4	27.6	276	4.9	49	22.7	227

* This figure is arrived at by dividing the total Federal and New York State taxes which would be due on the distribution by $40, the assumed market price per share of the General Motors stock.

These tables dramatically illustrate the ruinous tax consequences to the Trusts herein and their beneficiaries, whether the distribution is allocated to income or to principal. In either event, the result is the same: the beneficiaries of these Trusts would, at the end of the ten-year period of distribution, find the principal from which they derive their income sharply depleted. In short, they would have suffered the equivalent of a capital levy.

2. The Impact of a Declining Market.

The foregoing discussion and tables are based upon the assumption that the average market price of General Motors stock would remain stable during the period of distribution. It is obvious, however, that the market price of both General Motors and du Pont (see pp. 21-22, *infra*) would inevitably decline under the pressure of heavy selling by the innocent victims of the Government's proposed divestiture plan. The confiscatory nature of the Government's proposal becomes all the more apparent, when the tax burden is viewed in conjunction with such a declining market and its corrosive effect on the value of the stock distributed. This confiscatory aspect would be particularly stark if the price were to drop so substantially from the value at receipt that the entire proceeds of the General Motors stock sold would be insufficient to pay the taxes thereon, and other assets would have to be sold in order to make up the deficiency.

As was stated by David A. Lindsay, now the General Counsel for the Treasury Department, in testimony before the Senate Finance Committee on proposed amendments to the Internal Revenue Code dealing with the very type of antitrust divestiture here involved:

> "If people have to pay a dividend tax on a value of 50, and by the time they can turn around and sell the stock it is depressed because of other sales and

forced sales to a value of 25, that to me probably would be confiscation, not because of the tax law but because of the surrounding circumstances, * * * the surrounding circumstances would be, I suppose, the decree and the effect of the decree." Hearings Before Senate Committee on Finance on S. 200, 86th Cong., 1st Sess., 288 (1959).

3. Estate Problems Arising from Appellant's Proposal.

In addition to the tax and market problems presented by Appellant's proposed judgment of divestiture, said proposal raises difficult estate problems for the Trustees.

The Will of Benjamin G. Paskus and the two Blum Wills give the Trustees discretion as to allocation of the various types of corporate distributions between principal and income. The Will of Katherine Paskus requires the Trustees to allocate "extraordinary dividends" payable in stocks of other corporations to principal. However, "ordinary stock dividends paid regularly in lieu of or in addition to regular cash dividends" are, under said Will, to be considered income and not principal.*

The Trustees under the Katherine Paskus Will—or the Surrogate's Court—would have to determine whether under

* The pertinent provision of the Katherine Paskus Will is in part as follows:

"that all extraordinary dividends payable in stocks, whether of the corporation declaring the same or of any other corporation, * * * shall be considered principal and not income; that ordinary stock dividends paid regularly in lieu of or in addition to regular cash dividends shall be considered income and not principal; * * *. The determination of my trustees as to whether dividends payable in stock are ordinary or extraordinary, and their determination as to whether any such stock dividend should be apportioned or set apart in whole or in part to principal or to income * * * shall be conclusive and binding upon all persons interested in the trust estate."

New York law the distribution of General Motors stock regularly for 10 years would be an "extraordinary dividend" or a stock dividend "paid regularly" and whether any portion of the dividend allocated by the Trustees to principal could be subject to attack as an invalid accumulation.*

Despite discretion as to allocation vested in the Trustees named in the other Wills, the exercise of such discretion would, likewise, present a problem in view of the fact that the proposed distribution would, in the aggregate, represent 31% of the capital value at current market price** of the du Pont stock held by them.

If the distribution of General Motors stock were allocated to income, these are the approximate percentages of the capital value of each trust which would be transferred to the income beneficiaries:

Trust u/W Albert Blum	26.8%
Trust u/W Henry L. Blum	18.5%
Trust u/W Benjamin G. Paskus	13.1%
Trust u/W Katherine Paskus	5.7%

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* Under the New York cases, it is not clear to what extent a corporate distribution which is income, as a matter of law, may validly be required to be accumulated by a provision of a will defining it in such fashion as to require its allocation to principal. *Cf. Equitable Trust Co.* v. *Prentice*, 250 N. Y. 1 (1928). As to whether a distribution of the type here in question would be treated in the first instance as income or principal in its entirety, or as apportionable, compare *U. S. Trust Co.* v. *Heye*, 224 N. Y. 242 (1918) with *Matter of Benary*, 194 Misc. 271 (Surr. Ct. 1949) and *Matter of Villard*, 176 Misc. 852 (Surr. Ct. 1941).

** This percentage is computed on the basis of a market price of $41.50 for General Motors and of $184 for du Pont at the close of the New York Stock Exchange on December 9, 1960, and on the further basis of treating 1.38 General Motors shares as allocable to each du Pont share (R. 3186).

The allocation of such a large portion of trust assets to income quite obviously would pose difficulties for any trustee who is impartially discharging his fiduciary obligations to both life beneficiaries and remaindermen.

On the other hand, if the *amici* were to decide to allocate such stock distribution to principal, the allocation might be attacked as an unlawful accumulation.*

B. *The Consequences of Sale of the du Pont Stock by the Amici Prior to Divestiture.*

The Trustees, in view of the foregoing, may feel compelled, in discharge of their fiduciary obligations, to consider the sale of du Pont stock held by their Trusts prior to the time when a court-ordered divestiture might take place.

The unequal income tax consequences to the four Trusts herein, resulting from such sales are set forth in the table which follows:

Trust	Proceeds of Sale*	Cost Basis	Taxable Gain on Sale	Federal Tax**	% of Trust Principal Taken by Tax on Sale
#1	$3,680,000	$691,400	$2,988,600	$747,150.00	12.2%
#2	$2,944,000	$655,000	$2,289,000	$572,250.00	11.1%
#3	$ 736,000	$343,250	$ 392,750	$ 98,187.50	4.7%
#4	$ 36,800	$ 25,000	$ 11,800	$ 2,950.00	1.2%

* Assumed market price of $184 per share.

** There will also be a New York State tax, the bracket depending on the amount of other income realized in the year of sale and taxable to the trust.

The foregoing table illustrates the unequal tax results of Appellant's proposal in its brief on appeal that du Pont

* New York Personal Property Law §16. The amendment by c. 453, L. 1959, permitting accumulations beyond minority is inapplicable to Trusts under wills of decedents dying before September 1, 1959.

stockholders be allowed to exchange their du Pont stock for the equivalent in market value of General Motors stock held by du Pont, assuming the correctness of Appellant's assumption that capital gain would necessarily result.

It is obvious that many stockholders with a high tax basis, such as the Paskus Trusts (#3 and #4), who can escape the burdens involved in continuing ownership of du Pont stock by selling the stock prior to the effective date of any court-ordered distribution will do so. It is equally obvious and inescapable that such mass selling will result in further impairment of market price.

Those holding their du Pont stock at a low tax basis, such as the Blum Trusts (#1 and #2), are far less fortunate. Whether they sell or sit by to await the tax consequences of divestiture, these stockholders must ultimately see their investment shrink under the impact of a declining market on the one hand, and prohibitive taxation on the other—both a direct result of the proposed decree.

C. *The Consequences of a Distribution of the General Motors Stock by du Pont as a Stock Dividend in Lieu of All or Part of the Existing Cash Dividend.*

It is no answer to suggest that the impact on the beneficiaries and, therefore, the inducement to sell du Pont stock beforehand would be reduced if General Motors stock were paid by du Pont as a dividend in lieu of all or part of the existing cash dividend. Obviously this would not alleviate, but exaggerate, the severity of the tax impact on beneficiaries such as those here involved.

If beneficiaries who are already in very high income tax brackets have difficulty finding the funds to pay taxes on General Motors stock received in kind, where such stock is distributed in addition to the regular du Pont cash divi-

dend, the beneficiaries' problem would be far more difficult if heavy taxes on the General Motors stock would have to be met out of cash income which is depleted by a reduction in the normal du Pont dividend.

Furthermore, for du Pont to withhold normal cash dividends, during the period it is distributing the General Motors stock in kind, solely to alleviate the income tax burden on its stockholders would result in an accumulation of cash for which it has no foreseeable use (R. 3248). Du Pont might thus be subjected to the heavy penalty surtax imposed by Section 531 of the Internal Revenue Code of 1954.

The fact that du Pont is a publicly held corporation would not afford it any immunity from such surtax. *Cf. Trico Products Corporation* v. *Commissioner*, 137 F. 2d 424 (2 Cir. 1943); *Trico Products Corporation* v. *McGowan*, 169 F. 2d 343 (2 Cir. 1948).

CONCLUSION

Divestiture is not mandatory; it is not required by the governing section of the Clayton Act; it is not needed. The judgment below effectively cures the Clayton Act violation. The impact of a decree of divestiture upon the Trusts represented by the *amici* herein demonstrates that if divestiture were ordered as the Government requests on this appeal, unnecessary ruinous tax and market consequences would be visited upon the stockholders of du Pont.

The judgment of the District Court should, therefore, be affirmed.

Respectfully submitted,

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(Whereupon, at 6:45 p.m., the committee recessed, subject to the call of the Chair.)

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