

**AUTHORIZATION FOR DEPARTMENT OF JUSTICE
TO MAKE DEMAND FOR EVIDENCE IN
CIVIL ANTITRUST INVESTIGATIONS**

HEARING
BEFORE THE
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
EIGHTY-SIXTH CONGRESS
FIRST SESSION
PURSUANT TO
S. Res. 57
ON
S. 716 and S. 1003
BILLS TO AUTHORIZE THE ATTORNEY GENERAL TO
COMPEL THE PRODUCTION OF DOCUMENTARY MATERIAL
REQUIRED IN CIVIL INVESTIGATIONS FOR THE ENFORCE-
MENT OF THE ANTITRUST LAWS, AND FOR OTHER
PURPOSES

MARCH 3, 1959

Printed for the use of the Committee on the Judiciary



UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1959

COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

ESTES KEFAUVER, Tennessee	ALEXANDER WILEY, Wisconsin
OLIN D. JOHNSTON, South Carolina	WILLIAM LANGER, North Dakota
THOMAS C. HENNINGS, Jr., Missouri	EVERETT MCKINLEY DIRKSEN, Illinois
JOHN L. McCLELLAN, Arkansas	ROMAN L. HRUSKA, Nebraska
JOSEPH C. O'MAHONEY, Wyoming	KENNETH B. KEATING, New York
SAM J. ERVIN, Jr., North Carolina	
JOHN A. CARROLL, Colorado	
THOMAS J. DODD, Connecticut	
PHILIP A. HART, Michigan	

SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

ESTES KEFAUVER, Tennessee, *Chairman*

THOMAS C. HENNINGS, Jr., Missouri	WILLIAM LANGER, North Dakota
JOSEPH C. O'MAHONEY, Wyoming	EVERETT MCKINLEY DIRKSEN, Illinois
JOHN A. CARROLL, Colorado	ALEXANDER WILEY, Wisconsin
PHILIP A. HART, Michigan	

PAUL RAND DIXON, *Counsel and Staff Director*

CONTENTS

	Page
Kintner, Earl W., General Counsel, Federal Trade Commission; accompanied by Alvin L. Berman, Assistant General Counsel.....	24
Hansen, Victor R., Assistant Attorney General, Antitrust Division, Department of Justice, accompanied by Robert A. Bieks.....	9

EXHIBITS AND APPENDIX

Opening statement by Senator Kefauver.....	1
Text of S. 716.....	3
Text of S. 1003.....	7
Insertion from Report of the Attorney General's National Committee To Study the Antitrust Laws.....	30
O'Connor, Robert E., executive secretary, American Paper & Pulp Association.....	34
Department of Commerce, letter from Under Secretary of Commerce Frederick H. Mueller.....	29
National Association of Manufacturers.....	34
American Bar Association, committee on practice and procedure of the antitrust section, Richard K. Decker, chairman.....	37
Association of the Bar of the City of New York, E. Nobles Lowe, chairman, trade regulation committee.....	44

**AUTHORIZATION FOR DEPARTMENT OF JUSTICE TO
MAKE DEMAND FOR EVIDENCE IN CIVIL ANTITRUST
INVESTIGATIONS**

TUESDAY, MARCH 3, 1959

**UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.**

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 457, Senate Office Building, Senator Estes Kefauver presiding.

Present: Senator Kefauver (chairman).

Also present: Paul Rand Dixon, counsel and staff director; Donald P. McHugh, counsel; Peter N. Chumbris, counsel for minority; Theodore T. Peck, special counsel for minority; Horace L. Flurry, assistant counsel; and Gladys E. Montier, clerk.

Senator KEFAUVER. The committee will come to order. I have a brief opening statement.

The hearings by the subcommittee today are on S. 716, introduced by me on January 27, 1959, and S. 1003, introduced by Senator Wiley on February 9. We will hear testimony on these bills by Judge Victor Hansen and Mr. Robert A. Bicks, of the Department of Justice, and Mr. Earl Kintner, Chief Counsel of the Federal Trade Commission. I have not received any requests from others to testify concerning these bills.

Both bills are for the purpose of authorizing the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws, before the filing of suit.

I am glad that the President in his Economic Report to the Congress in 1959 has recommended that the power contained in these bills be granted to the Attorney General in civil antitrust cases. I want to thank Senator Wiley for his expression of his strong interest in the enforcement of our antitrust laws by the introduction of S. 1003. He has always freely expressed his views in favor of effective action under the antitrust laws.

Judge Victor R. Hansen, Assistant Attorney General in charge of the Antitrust Division, testified before the subcommittee in 1958, on its request, concerning the antitrust implications raised by the facts brought before the subcommittee during its study of administered prices in the steel industry in the 85th session of Congress. He expressed concern about the implications appearing in that study and their relationship to the inflation and high prices. It was his opinion at that time that the Antitrust Division had been aided by the subcommittee's hearings.

In the colloquy between the members of the subcommittee and Judge Hansen with respect to the investigations of possible antitrust violations in the steel industry and the sufficiency of the existing antitrust laws to restore price competition, he explained the lack of power of the Department of Justice to obtain, prior to filing a suit, needed evidence of antitrust violations for use in civil cases. I was impressed with Judge Hansen's recommendation that Congress grant such power to the Attorney General. The Congress gave similar power to the Federal Trade Commission in section 6 of the Federal Trade Commission Act, enacted in 1914. Of course, the Commission does not prosecute criminal cases. These bills would give the Attorney General such similar power only in civil cases. In criminal cases the Antitrust Division would still be required to proceed by grand jury investigations and use of the traditional subpoena duces tecum to produce evidence needed for criminal prosecutions. Individual persons would retain their constitutional protection against being required to give evidence against themselves in criminal cases.

At the present time in civil cases, when the Department believes the antitrust laws are being violated it does not have sufficient facts as to the violations, it must follow one of four courses. First, it may undertake to get the prospective violators to agree to furnish the evidence. This is not a satisfactory method of enforcement upon which the public welfare should be forced to depend.

Second, the Department may hold a grand jury investigation to obtain evidence for a civil case. Such a procedure seems harsh for both the Government and private business. It brings delay and inconvenience to the Department in its civil enforcement and sometimes criticism for use of a criminal proceeding to make a civil case. There may well be embarrassment and stigma brought on those required to appear before grand juries and even business injury may result. Third, the Department may file a suit without sufficient prior information as to the real nature of the violations and evidence of such violations. It would, after filing of suit, be necessary to undertake to obtain facts by use of discovery under the rules of civil procedure. Discovery can in many cases be delayed, and when finally obtained may necessitate substantial amendments of the original complaint. I believe that this course is wasteful of our already limited enforcement resources. Furthermore, in monopoly and restraint of trade cases in large and complicated industries, such as steel, automobiles, and numerous others, it is folly to expect effective enforcement based on such guesswork in the beginning of a suit. Effective enforcement in such industries requires extensive factual information and knowledge of both the industry and conduct within the industry before suit is filed.

Fourth, the Department could request the Federal Trade Commission to make an investigation for the Department. I can understand that such requests would cause budgetary problems for the Commission and interfere with the orderly planning of its work and the use of its personnel. I doubt the wisdom of frequent use of this method of investigation.

There appear to be three principal differences in substance between S. 716 and S. 1003. My bill, S. 716, would give power to the Attorney General to demand documentary evidence from individuals and or-

ganizations, such as corporations and associations. S. 1003 does not include individuals. I have been told that in some antitrust cases important evidence is obtained from files of individuals.

I am aware of the liaison between the Antitrust Division and the Federal Trade Commission by which records of one agency may be made available to the other. This serves a useful purpose and should not be prohibited by these bills. S. 716 would continue that cooperation while S. 1003 would prohibit the revelation to the Commission of evidence received by the Antitrust Division under the provisions of S. 1003.

In granting the power to require the delivery of documents to representatives of the Antitrust Division by business concerns, it appears to me that the law should expressly protect the rights of such concerns with respect to their business papers. S. 716 expressly does that by providing for a custodian of the records and prescribing his duties and responsibilities and for the enforcement of those duties. This does not seem to be spelled out in S. 1003.

With growing concentration in our economy and the consequent disappearance of free competition, particularly price competition, I believe we must now strengthen our antitrust laws and afford more effective enforcement tools. I am convinced that these bills would aid the Department of Justice in seeking permanent relief to the problem through more and better civil cases.

(The texts of S. 716 and S. 1003 follow:)

[S. 716, 86th Cong., 1st sess.]

A BILL To authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Civil Process Act".

DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "antitrust law" includes:

(1) Each provision of law defined as one of the antitrust laws by section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730, as amended; 15 U.S.C. 12), commonly known as the Clayton Act;

(2) The Federal Trade Commission Act (15 U.S.C. 41 and the following);

(3) Section 3 of the Act entitled "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes", approved June 19, 1936 (49 Stat. 1528; 15 U.S.C. 13a), commonly known as the Robinson-Patman Act; and

(4) Any statute hereafter enacted by the Congress which prohibits, or makes available to the United States in any court or antitrust agency of the United States any civil remedy with respect to (A) any restraint upon or monopolization of interstate or foreign trade or commerce, or (B) any unfair trade practice in or affecting such commerce;

(b) The term "antitrust agency" means any board, commission, or agency of the United States (other than the Department of Justice) charged by law with the administration or enforcement of any antitrust law or the adjudication of proceedings arising under any such law;

(c) The term "antitrust order" means any final order of any antitrust agency, or any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law;

(d) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation;

(e) The term "antitrust violation" means any act or omission in violation of any antitrust law or any antitrust order;

(f) The term "antitrust investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law;

(g) The term "person" means any corporation, association, partnership, or other legal entity;

(h) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document; and

(i) The term "custodian" means the antitrust document custodian or any deputy custodian designated under section 4(a) of this Act.

CIVIL INVESTIGATIVE DEMAND

SEC. 3. (a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material pertinent to any antitrust investigation, he may issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and produced;

(4) identify the custodian to whom such evidence is to be delivered; and

(5) specify a place at which such delivery is to be made.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation.

(d) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(e) Service of any such demand or of any petition filed under section 5 of this Act may be made—

(1) upon an individual by (A) delivering a duly executed copy thereof to such individual personally, or (B) delivering such copy to his office or residence by leaving such copy with any individual of suitable age and discretion in his employment at such office or residing at his residence, or (C) depositing such copy in the United States mails, by registered or certified mail, duly addressed to his office or residence; and

(2) upon a partnership, corporation, association, or other legal entity by delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any other agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity, by any of the means prescribed in paragraph (1).

(f) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

ANTITRUST DOCUMENT CUSTODIAN

SEC. 4. (a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as antitrust document custodian, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(b) Any person upon whom any demand issued under section 3 has been duly served shall deliver such material to the custodian designated therein at the place specified therein (or at such other place as such custodian thereafter may prescribe in writing) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). No such demand or custodian may require delivery of any documentary material to be made—

(1) at any place outside the territorial jurisdiction of the United States without the consent of the person upon whom such demand was served; or

(2) at any place other than the place at which such documentary material is situated at the time of service of such demand until the custodian has tendered to such person (A) a sum sufficient to defray the cost of transporting such material to the place prescribed for delivery or (B) the transportation thereof to such place at Government expense.

(c) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this Act. The custodian may cause the preparation of such copies of such documentary material as may be required for official use by any individual who is entitled, under regulations which shall be promulgated by the Attorney General, to have access to such material for examination. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than a duly authorized officer, member, or employee of the Department of Justice or any antitrust agency. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representative of such person.

(d) Whenever any attorney has been designated to appear on behalf of the United States before any court, grand jury, or antitrust agency in any case or proceeding involving any alleged antitrust violation, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court, grand jury, or antitrust agency through the introduction thereof into the record of such case or proceeding.

(e) Upon the completion of (1) the antitrust investigation for which any documentary material was produced under this Act, and (2) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material (other than copies thereof made by the Department of Justice or any antitrust agency pursuant to subsection (e)) which has not passed into the control of any court, grand jury, or antitrust agency through the introduction thereof into the record of such case or proceeding.

(f) When any documentary material has been produced by any person under this Act for use in any antitrust investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all documentary material (other than copies thereof made by the Department of Justice or any antitrust agency pursuant to subsection (e)) so produced by such person.

(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under any demand issued under this Act, or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian thereof, and (2) trans-

mit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

JUDICIAL PROCEEDINGS

SEC. 5. (a) Whenever any person fails to comply with any civil investigative demand duly served upon him under section 3, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of such demand, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(b) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which the office of the custodian designated therein is situated, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this Act, or upon any constitutional right or privilege of such person.

(c) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this Act.

(d) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this Act. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28 of the United States Code. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

CRIMINAL PENALTY

SEC. 6. (a) Chapter 73 of title 18 of the United States Code (relating to obstruction of justice) is amended by adding at the end thereof the following new section:

"§ 1509. Obstruction of antitrust civil process

"Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part, by any person with any civil investigative demand made under the Antitrust Civil Process Act, willfully removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person which is the subject of any such demand duly served upon any person shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

(b) The analysis to such chapter is amended by inserting at the end thereof the following new item:

"1509. Obstruction of antitrust civil process."

SAVING PROVISION

SEC. 7. Nothing contained in this Act shall impair the authority of the Attorney General, the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, or any antitrust investigator to (a) lay before any grand jury impaneled before any district court of the United States any evidence concerning any alleged antitrust violation, (b) invoke the power of any such court to compel the production of any evidence before any such

grand jury, or (c) institute any proceeding for the enforcement of any order or process issued in execution of such power, or to punish disobedience of any such order or process by any person.

[S.1003, 86th Cong., 1st sess.]

A BILL To authorize the Attorney General to compel the production of documentary material required in civil investigations for the enforcement of the antitrust laws, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Civil Process Act of 1959".

DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "antitrust laws", as used herein, is defined in section 1 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730, 15 U.S.C. 12), as amended, commonly known as the Clayton Act.

(b) The term "antitrust investigator" means any attorney employed by the Department of Justice who is charged with the duty of enforcing any of the antitrust laws.

(c) The term "organization" means any corporation, partnership, firm, association, trust, foundation, company or other legal entity not a natural person.

(d) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper communication, tabulation, chart, or other document in the possession, custody, or control of any organization.

CIVIL INVESTIGATIVE DEMAND

SEC. 3. (a) Whenever the Attorney General has reason to believe that any organization may be in possession, custody, or control of any documentary material relevant to the subject matter of an investigation of a possible antitrust violation he may, prior to the institution of a civil or criminal proceeding thereon, execute and issue in writing, and cause to be served upon such organization, a civil investigative demand requiring such organization to produce such documentary material and permit inspection and copying.

(b) Each such demand shall—

(1) state the statute and section or sections thereof alleged violation of which is under investigation, and the general subject matter of the investigations;

(2) describe the class or classes of documentary material to be produced thereunder with reasonable specificity so as fairly to identify the material demanded;

(3) prescribe a return date which will provide a reasonable period of time within which the documentary material is to be produced;

(4) identify the antitrust investigator to whom such documentary material is to be made available for inspection and copying.

(c) No such demand shall—

(1) contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged violation; or

(2) require the production of any documentary material which would be privileged from disclosure, or which for any other reason would not be required to be disclosed if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged violation.

(d) Any such demand may be served by any antitrust investigator or United States marshal or deputy marshal at any place within the territorial jurisdiction of any court of United States.

(e) Service of any such demand may be made by—

(1) delivering a duly executed copy thereof to any executive officer of the organization to be served; or

(2) delivering a duly executed copy thereof to the principal office or place of business of the organization to be served; or

(3) mailing by registered or certified mail a copy thereof addressed to such organization to be served at its principal office or place of business.

(f) A verified return by the individual serving such demand, setting forth the manner of such service, shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(g) An organization upon whom a demand is served pursuant to the provisions of this section shall comply with the terms thereof unless otherwise provided by an order of court issued under section 5 hereof.

(h) Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the organization served, or at such other times and places as may be agreed upon by the organization served and any authorized employee of the Department of Justice.

SEC. 4. (a) No documentary material produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by a district court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, other than an authorized employee of the Department of Justice, without the consent of the organization who produced such material: *Provided*, That, under such reasonable terms and conditions as the Attorney General shall prescribe, the copies of such documentary material shall be available for inspection and copying by the organization who produced such material or any duly authorized representative of such organization. The Attorney General or any authorized employee of the Department of Justice may use such copies of documentary material as he determines necessary in the performance of his official duties, including presentation of any case or proceeding before any court or grand jury.

(b) When documentary material produced pursuant to a demand is no longer required for use in connection with the investigation for which it was demanded, or in any case or proceeding resulting therefrom, or at the end of eighteen months following the date when such material was produced, whichever is the sooner, such organization shall be relieved of the duty to hold such documentary material available for inspection and copying as required by section 3(a): *Provided, however*, That any district court in which a petition may be filed as set forth in section 5 hereof may, upon good cause shown, extend said period of eighteen months.

JURISDICTION OF DISTRICT COURT

SEC. 5. (a) The United States district courts are vested with jurisdiction to hear and determine any petition filed under this Act and to issue upon good cause shown any order which justice may require, including, without limiting the generality of the foregoing, the following:

- (1) an order modifying or setting aside any such demand;
- (2) an order requiring the Attorney General or any organization or individual to perform any duty imposed upon him by the provisions of this Act;
- (3) an order extending the time within which any act allowed or required by this Act must be done, pursuant to a demand issued hereunder, or previous court orders.

(b) At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to modify or set aside a demand issued pursuant to section 3 may be filed in the United States district court for the district in which the principal office or place of business of the organization upon whom such demand was served is located, or in such other district as the parties may agree.

(c) A petition to require the Attorney General or any organization or individual to perform any duty imposed by the provisions of this Act, and all other petitions in connection with a demand, may be filed in the United States district court for the district in which the principal office or place of business of the organization involved is located, or in such other district as the parties may agree.

(d) To the extent that such rules may have application and are not inconsistent with the provisions of this Act, the Federal Rules of Civil Procedure shall apply to any petition under this Act.

PENALTY

SEC. 6. Any organization or individual who, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part, by any organization with any civil investigative demand made under this Act, willfully removes from any place, conceals, withholds, destroys, mutilates, alters or by any other means falsifies

any documentary material in the possession, custody or control of any organization or individual which is the subject of any demand duly served upon any organization shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of \$5,000 or to imprisonment for a term of not more than five years, or both.

SAVING PROVISION

SEC. 7. Nothing contained in this Act shall impair the authority of the Attorney General or any authorized antitrust investigator to (a) lay before any grand jury impaneled before any district court of the United States any evidence concerning any alleged antitrust violation, (b) invoke the power of any such court to compel the production of any evidence before any such grand jury, (c) file a civil complaint or criminal information alleging an antitrust violation which is not described in the demand, or (d) institute any proceeding for the enforcement of any order or process issued in execution of such power, or for the punishment of any organization or individual for disobedience of any such order or process.

Senator KEFAUVER. Judge Hansen, the committee is delighted to have you here this morning, accompanied by your very able aide, Mr. Bicks. We will be glad to hear from you now.

I see that your statement contains a number of footnotes and some quotations. Any portion that you omit in your presentation I will direct be printed in the record.

Mr. HANSEN. Thank you.

STATEMENT OF VICTOR R. HANSEN, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROBERT A. BICKS

Mr. HANSEN. I appear this morning, in response to your chairman's request, to present this Department's views on S. 716 and S. 1003. Both bills would authorize the Attorney General to compel the production of certain documentary material required to make an informed decision to file, or not file, a civil antitrust suit.

Treating these proposals, my plan is, first, to touch on the need for some means to compel production of documents before a civil antitrust case is filed. And, second, just how do the pending bills meet that need?

I. THE NEED FOR THE PROPOSED LEGISLATION

First, the need for enactment of the proposal both bills embody has been widely recognized. In March 1955, after some 19 months of study, the Attorney General's National Committee To Study the Antitrust Laws issued its report. One aspect of this report dealt with the subject of "Antitrust Administration and Enforcement."¹

And recommended there was legislation to give the Antitrust Division power to compel the production of documents necessary to carry out its investigative responsibilities.

Supporting this view, the Economic Reports by the President to the last three Congresses have similarly urged enactment of such legislation.² Finally, the Cabinet Committee on Small Business, in its

¹ "Attorney General's National Committee To Study the Antitrust Laws," Mar. 31, 1955, pp. 343-349.

² "Economic Report of the President," January 1956, p. 79; January 1957, p. 51; January 1958, p. 64, "Economic Report of the President," January 1959, p. 53.

Second Progress Report, issued December 31, 1958,³ reiterated its support of the proposal which it had first approved in the Progress Report of August 7, 1956.⁴

Bills to carry out this widespread recommendation have been presented to the Congress in past sessions.⁵ On February 3 of this year Attorney General Rogers, in letters to the Vice President as Presiding Officer of the Senate and the Speaker of the House, recommended enactment of legislation to strengthen the antitrust laws; among these were civil investigative demand. The need for the prompt enactment of such legislation is clear. As the report of the Attorney General's Committee put it:

The inevitable generality of most statutory antitrust prohibitions renders facts of paramount importance. Accordingly, effective enforcement requires full and comprehensive investigation before formal proceedings * * * are commenced * * *. Thus the adequacy of investigatory processes can make or break any enforcement program (report, pp. 343-344).

As matters now stand, the Department, delving for facts to determine if a violation of the antitrust laws has occurred, has only two alternatives: one, resort to grand jury; or two, voluntary cooperation of concerns under investigation or others in the industry.

(a) Use of the grand jury: As you know, this Division's primary responsibilities involve enforcement of the Sherman and Clayton Acts. The Sherman Act, on the one hand, is enforceable via either civil or criminal proceedings—or, of course, both. The Clayton Act, in sharp contrast, is enforceable only via civil proceedings.

Thus where criminal proceedings under the Sherman Act are contemplated, grand jury powers are available. And a Federal grand jury is equipped with ample powers to permit the fullest investigation. Such powers are not available, however, where we investigate solely with an eye toward civil suit under the Sherman Act or to stop or undo a merger under Clayton Act section 7.

Even where resort to grand jury process may be appropriate, bear in mind that such route may be time consuming and expensive for all parties. In certain Federal judicial districts grand juries are impaneled only once a year; in other districts existing grand juries are busily engaged and special grand juries are not easily obtained.

(b) Voluntary cooperation: Where resort to grand jury processes is not feasible, we must rely for information, before a complaint is filed, on the voluntary cooperation of parties under investigation and others in the industry. Voluntary cooperation has on some occasions proved satisfactory. Parties have opened their files to agents of the Federal Bureau of Investigation who, as you know, conduct most of our investigations and, on occasion, to attorneys of the Antitrust Division. In many instances, the company has furnished information when we were able to make a specific request for exactly the material desired.

As the Attorney General's Committee summed it up (report, p. 344):

Voluntary cooperation of parties under investigation has often been sufficient but compulsory processes are required in some cases. Moreover, a Government agency should not be in a position of sole dependence upon voluntary cooperation for discharge of its responsibilities.

³ "Second Progress Report by Cabinet Committee on Small Business," Dec. 31, 1958 p. 4.

⁴ "Progress Report by the Cabinet Committee on Small Business," Aug. 7, 1956, p. 9.

⁵ H.R. 7309, 84th Cong., 1st sess.; S. 3425, 84th Cong. 2d sess.

And I assure you there are many instances when companies flatly refuse to make any information available. More important, these instances have been growing more numerous in recent years.

Let me cite chapter and verse. You may be interested in three instances where denial of voluntary access to date thwarted investigations under amended Clayton Act section 7.

For one instance, we learned that an acquisition had taken place. We wrote for information after a quick preliminary study on our part indicated that this might be a significant acquisition. After considerable delay, counsel for the acquiring company replied submitting to us a copy of the company's annual report to stockholders and little other information. He stated:

We prefer not to supply the data requested by Judge Barnes' letter except under subpoena.

This merger had already been consummated when it was announced so that even had we considered grand jury process under the Sherman Act, we would not have been able in that case to take any action whatsoever aimed at preventing it. (And that parenthetically is also a good illustration of the need for the premerger notification bill which we are pleased to know has already been approved by this subcommittee.)

Senator KEFAUVER. Judge Hansen, the premerger bill was approved by the subcommittee, but after approval we had some requests for hearings. So Senator O'Mahoney and I, the sponsors of the bill, suggested that it be returned to the subcommittee. It is back with us now, and we will have hearings.

Mr. HANSEN. I see. If we can be helpful at all, we would like to be.

Senator KEFAUVER. We are going to hear testimony of witnesses on Thursday.

Mr. HANSEN. Thank you.

In a second instance, a company was in the process of acquiring a competitor. We had written for information but had received no answer. The lawyer for the acquiring company met one of my staff at a bar meeting and told him the company would supply the information only under subpoena. The Antitrust Division lawyer replied that it sounded just the sort of thing which would serve to highlight the need for the pending legislation. He later changed his mind and gave us some information. In a final instance, counsel for a merging firm supplied information we had requested in piecemeal fashion. After 18 months we still had not received all the information requested. We contacted him for the "umpteenth" time and he told us the balance of the information we had requested was in his view just not relevant to a Clayton Act section 7 inquiry. And, therefore, he did not intend to supply it.

Since we are dependent on voluntary access to data, where such cooperation is denied we must sometimes abandon otherwise promising inquiries. This makes difficult our continuing efforts to enforce the laws equitably and without discrimination.

It is true that filing a civil complaint enables resort to the compulsory discovery processes under the Federal Rules of Civil Procedure, such as interrogatories, motions to produce documents, depositions, etc. These methods have been extensively used in antitrust cases and provide discovery powers almost as sweeping as a grand

jury. But they come into play only after a complaint has been filed. Thus the Department cannot use them to determine whether the institution of formal proceedings is warranted. And I certainly agree with the Judicial Conference of the United States that no plaintiff, including Government, may "pretend to bring charges in order to discover whether actual charges should be brought" (13 FRD 62, 67). These rules "were not intended to make the courts an investigatory adjunct to the Department of Justice" (*ibid.*).

Summing up the need for these bills, the Attorney General's committee concluded:

We recognize that the Department has been handicapped and accept the Judicial Conference conclusion that present civil investigative machinery is inadequate for effective antitrust enforcement. The problem is, therefore, to devise a precomplaint civil discovery process for use where civil proceedings are initially contemplated and voluntary cooperation by those under investigation fails (report, p. 345).

Senator KEFAUVER. Judge Hansen, before you get to the second part of your statement, you have outlined the importance of this legislation in a substantive way to the Department of Justice. I believe the Federal Trade Commission, under section 6 of the Federal Trade Commission Act, has this general power that you are asking for, does it not?

Mr. HANSEN. Substantially, yes.

Senator KEFAUVER. All right, sir.

Mr. HANSEN. Against this background of the need for legislation, I turn to the pending proposals. And, with your permission, I shall focus primarily on S. 1003, which in several details seem preferable to S. 716.

Generally, the bill seems akin to a postcomplaint motion for production of documents under rule 34 of the Federal Rules of Civil Procedure. It seems a sound enforcement tool for the Antitrust Division. At the same time, it should work no hardship on any business concern.

Now for the details of S. 1003. That bill specifies that, enforcing the antitrust laws, "whenever the Attorney General has reason to forbefieve any organization"—but not a natural person—has "possession, custody, or control, of any documentary material relevant to the subject matter" of an antitrust investigation and before suit is filed, he may serve on such organization a written demand which "requiring such organization to produce" the material "and permit inspection and copying." The demand must show (1) the statute involved and the general subject matter of the investigation, (2) the class of documentary material sought with reasonable specificity, (3) the time within which the material is to be produced, and (4) the name of the attorney in the Department of Justice to whom the material is to be made available for inspection and copying. Thus, the demand states concisely all the information that is needed by the organization upon which it is served. Service may be made by an antitrust investigator, U.S. marshal, or deputy marshal by delivery to an executive officer or the principal office or place of business of the organization, or by mail to the principal office or place of business of the organization.

Of course, the demand cannot require the production of any privileged material, not any material which "would not be required to be

disclosed if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged violation;" nor can the demand "contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued" in a grand jury investigation. The traditional safeguards of grand jury process in the subpoenaing of documents are thus incorporated into the civil investigative demand.

The material demanded must be produced for inspection and copying during the regular working day "at the principal office or place of business of the organization" or "at such other times and places as may be agreed upon." This together with the provision of service avoids the problem of, say, an organization with its principal office in Los Angeles or Denver having to produce the material in Washington or New York, unless of course, the organization agrees to do so. This is an advantage to the organization over a grand jury subpoena since in that case the only place where the material can be produced is where the grand jury is sitting. And another and considerable benefit is that, if the documents are current records, the company is not disadvantaged by having the documents far from its principal office at a time when they may be needed.

On the question of confidentiality, the documentary material, including copies, shall not "be produced for inspection or copying by, nor shall the contents be disclosed to, other than an authorized employee of the Department of Justice, without the consent of the organization." Of course, the documents may be used in the performance of his official duties by the Attorney General or authorized employees of the Department of Justice. And this would include their use preparing a case or before a grand jury or court.

An organization which has been served with a demand is relieved of the duty to hold the material available for inspection and copying either at the end of 18 months after the material was produced or when it is no longer required for use in the investigation for which demanded, or in any case or proceeding resulting therefrom, whichever is sooner. The appropriate district court may, upon good cause shown, extend the period beyond 18 months.

I should say a word about one change in this proposal which has evolved over the years since the recommendation of the Attorney General's National Committee. The original proposal suggested the establishment of the office of custodian in the Department of Justice, to which the documents would be delivered in response to a demand. The current proposal in S. 1003 provides, as I mentioned, for the organization served with a demand to produce the material at its principal office or place of business, unless otherwise agreed upon by the organization and the Department representative. This change, it seems clear, is a considerable improvement. It obviates the burden on the Department of becoming a recordkeeping office and enables the organization to pursue its normal business activities without being deprived of its records.

To those persons who feel that the civil investigative demand may be abused by the executive officer, I believe the final answer is that the reviewing power of the court affords a true safeguard which could be utilized by the organization under investigation to curb any

abuse on the part of the officer and to secure a prompt remedy upon appropriate application to the district court.

The bill also provides for criminal penalties not exceeding a fine of \$5,000, 5 years' imprisonment, or both, for anyone convicted of willfully removing, concealing, withholding, destroying, mutilating, altering, or by any other means falsifying any material in his possession, custody or control, with the intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand.

In sum, then, I firmly believe that passage of this bill will aid substantially in the enforcement of the antitrust laws. It should be less expensive and more convenient to us and to business. It should speed up investigations. In view of the evident need for the early enactment of this bill, it is my hope that Congress, in its judgment, will see fit to act on it now.

Senator KEFAUVER. Thank you very much, Judge Hansen, for a very persuasive statement in support of this legislative proposal.

Excuse me, sir. You had something to add?

Mr. HANSEN. I understand that the Federal Trade Commission would like to have an amendment which would make available the information and documents the Justice Department has to them. We have no objection to such an amendment.

Senator KEFAUVER. Let me ask you, then, to refer to S. 716 in connection with that amendment and let us see what you think of it. At the bottom of page 2, section 3, subsection (b), that is where it is provided for in my bill, S. 716.

Mr. HANSEN. Yes.

Senator KEFAUVER (reading):

The term "antitrust agency" means any board, commission, or agency of the United States (other than the Department of Justice) charged by law with the administration or enforcement of any antitrust law or the adjudication of proceedings arising under any such law.

Is that amendment satisfactory or is it too broad?

Mr. HANSEN. No. I think that is entirely satisfactory. That is not a part, however, of S. 1003.

Senator KEFAUVER. Let us get that now. In S. 1003 only the Department of Justice has access to the documents.

Mr. HANSEN. That is correct.

Senator KEFAUVER. Under S. 716 an antitrust agency is defined to mean one charged by law with the administration or enforcement of any antitrust law and any such agency would have access to the papers.

Mr. HANSEN. Right.

Senator KEFAUVER. That is satisfactory?

Mr. HANSEN. Entirely satisfactory.

Mr. PECK. Mr. Chairman, I would like to suggest that the Attorney General's report of 1955 contains such a recommendation on page 346, paragraph No. 2, Judge Hansen.

Mr. HANSEN. That is right.

Senator KEFAUVER. I think we might include in the record that quotation from the Attorney General's report. What is the page number?

Mr. PECK. That was page 346, but I might add that the entire portion of this report recommending this general legislation is contained on pages 343 through 349.

Senator KEFAUVER. That doesn't seem to be excessively long, so let us reprint it in the appendix of the record. That is a fine discussion of the need for this legislation.

(The material referred to may be found on p. 30.)

Mr. HANSEN. I should have volunteered that because it wasn't in my prepared statement.

Senator KEFAUVER. One difference between the two bills, S. 716 and S. 1003, is with respect to who may have access to the information.

Another difference is with respect to the parties to whom the legislation is applicable—upon whom the Department can make the demands. In S. 1003 the demand may be made upon organizations as defined on page 2 of S. 1003, section 2(c):

The term "organization" means any corporation, partnership, firm, association, trust, foundation, company, or other legal entity not a natural person.

Under S. 716, however, the demand may be made on a person defined on page 3, section 2, subsection (g):

The term "person" means any corporation, association, partnership or other legal entity.

That means a natural person as well as a corporation, association, or partnership.

Mr. HANSEN. That is a difference in the two bills.

Senator KEFAUVER. Mr. Peck, what does the Attorney General's report say about upon whom the request should be made?

Mr. PECK. Organizations only, I believe, sir; not upon people. I would like to defer to Mr. Bicks in this particular regard because I notice that he was the executive secretary of the committee which prepared the report. Am I right, Mr. Bicks?

Mr. BICKS. Yes.

Mr. PECK. The Attorney General's report recommends that demands be served upon organizations only and not upon individual persons; is that right?

Mr. BICKS. Roughly, yes.

Senator KEFAUVER. I suppose the basis for that is that if you want after an individual, you might immunize him insofar as criminal prosecution is concerned. Was that the thinking?

Mr. HANSEN. No. That isn't the main reason. We have had very few instances where we have need for such powers where individuals were involved, and, frankly, we felt that it might be burdensome to an individual and that the need was not so great that we ought to place that burden on the individual.

Senator KEFAUVER. Suppose a corporation or an organization, as you define it here, had turned over its papers to an individual.

Mr. HANSEN. I think we could reach that.

Senator KEFAUVER. The organization would no longer have those papers. The individual might not be employed with the organization at the time. Could you reach that person?

Mr. HANSEN. Well, if they are the corporation's record, I think probably we could. I have no objection to including an individual. I just am so anxious that the bill get through that I thought there

might be some objections if we included an individual because it might be burdensome and he might not maintain the type of records that a corporation maintains. But I would certainly be happy with it in there.

Senator KEFAUVER. I was thinking about a situation where a corporation had correspondence or held negotiations with an individual, for some reason under its practices, might have destroyed its records. But the records would be in the hands of an individual on the opposite side. It might be helpful if you could reach the documents in his hands.

Mr. HANSEN. I think your point is very well taken.

Senator KEFAUVER. Then the other point of difference between the two bills, I believe, is a matter of the custodian.

Mr. HANSEN. That is right.

Senator KEFAUVER. In S. 716, on page 6, it calls for—let me get it exactly.

Mr. HANSEN. For a custodian in the Department of Justice.

Senator KEFAUVER. Section 4:

The Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice—

that is you—

shall designate an antitrust investigator to serve as antitrust document custodian, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

I think that was recommended by the Attorney General; was it not?

Mr. HANSEN. It was. As I mentioned—

Senator KEFAUVER. Just what is your objection to it at the present time?

Mr. HANSEN. The objection to it is (1) that it places an added burden on the Department to maintain a series of records, and I think another objection which might be even more valid is that it deprives the corporation of its own records and they may need them in their day-to-day operations, and we feel that we can secure the information and copy the documents without causing the corporation or association to give up its record.

Senator KEFAUVER. Under your proposal, how would it work? Suppose you decided to get the records of a corporation out in Omaha, Nebraska. Would the records be held by the Attorney General at Omaha where the company could have access to them?

Mr. HANSEN. We go right into the company and make our copies there or make arrangements with them to produce the documents where it might be most convenient to both.

Senator KEFAUVER. And then would the original documents be turned back to the Omaha concern?

Mr. HANSEN. That is correct. Unless we needed the documents for actual evidence before a grand jury.

Senator KEFAUVER. And then where would you keep the records that you secured?

Mr. HANSEN. We would take—the copies we made, of course, we would keep them in our files.

Senator KEFAUVER. Would you keep them in Omaha or Washington?

Mr. HANSEN. Either in the field office that is handling the investigation or in our main office here in Washington.

Senator KEFAUVER. In other words, you would work out some plan with the company in Omaha under which it could either have the original records back and you would take the photostats, or you would retain the originals and give it the photostats.

Mr. HANSEN. That is correct.

Senator KEFAUVER. So they could go on with their business.

Mr. HANSEN. That is right.

Senator KEFAUVER. In any event, you would keep your part of the records here in Washington, wouldn't you?

Mr. HANSEN. Well, it depends upon where the investigation may be. It may be in the Chicago office, in Los Angeles, San Francisco, Cleveland, Philadelphia. Wherever the investigation is going on is where we maintain our file and, of course, if we need the records to produce them for a grand jury, we actually take the documents.

Senator KEFAUVER. I think what the Attorney General's committee had in mind and what I had in mind in section 4(a) of my bill was that one custodian could be charged with the responsibility of keeping some records here in Washington and you could designate another custodian for certain records somewhere else.

Mr. HANSEN. Of course, there are some penalties here for destruction of documents by them. They are required to maintain them and if we get photostatic copies of them, I don't think we run much of a danger. I think it is a convenience to the company because in many instances we will be demanding records from a company that might be completely innocent, and to deprive them of their going records or day-to-day records might be a substantial inconvenience to them.

At the same time, I don't think we are hindered in getting our information.

Senator KEFAUVER. As I read S. 1003, you could only inspect and copy records. You couldn't get a photostat if the person or organization wanted to be contrary, could you?

Mr. HANSEN. Well, photostat and copy I suppose are—we can get a copy. Whether they will agree to let us take them and photograph them, that is another question.

Senator KEFAUVER. In S. 716 you will notice that you have the right to get a photostat. Don't you think that is important?

Mr. HANSEN. I think it is important; yes, sir, I do.

Senator KEFAUVER. Would you recommend that that be included in whichever bill is—

Mr. HANSEN. I think the right to take a photostatic copy should be included.

Senator KEFAUVER. And then under S. 716 you will notice in section 4(a) that you not only can designate a custodian here in Washington and if you want to keep some records in the field, you have the right to designate additional custodians. You would have a right to designate a custodian at Omaha where the company was.

Mr. HANSEN. That is right.

Senator KEFAUVER. Would that work out in a satisfactory manner?

Mr. HANSEN. I think it would work out fine. Maybe I am leaning over backward to not recommend something that would place an

undue burden on a company or a corporation who is submitting records to us.

Senator KEFAUVER. If under S. 716 you can designate a custodian to keep the records in Omaha where the company is located and where it could look at them, where you can get photostats and leave the originals with the company, how would that work any more hardship than the proposal in S. 1003?

Mr. HANSEN. I think it would work out as you suggested there without too great a burden, but if we—here if we chose to take the documents here in Washington and keep them in the Department of Justice and have a custodian here, I can see great inconvenience to some company that is in Omaha or Chicago or some other place. Suppose we don't choose to select a custodian there for one reason or another.

Senator KEFAUVER. Under S. 1003 if you chose to bring the records to Washington, you could do so, couldn't you?

Mr. HANSEN. Bring them here? No, I think we have got to go in and copy.

Senator KEFAUVER. If you make photostats and leave the originals there and bring the photostats to Washington, no hardship occurs.

Mr. HANSEN. That is right.

Senator KEFAUVER. Doesn't the Federal Trade Commission do that already?

Mr. HANSEN. I imagine they do. I don't know of my own knowledge. I think the real important feature here is to give us the right to get these documents, and I don't think the details of working it out with them will be very difficult if they know they have got to produce them, and I don't foresee much difficulty in going in even in getting them photographed right in the plant.

Senator KEFAUVER. So as I understand you after your explanation, it doesn't make any difference to you which bill is passed.

Mr. HANSEN. It wouldn't as far as the Department is concerned, but with this one exception. That is, of course, it is going to cost something to maintain records in the Department, and have a custodian which will be some expense we would not have otherwise.

Senator KEFAUVER. On the other hand, you can designate the attorney in Denver to be the custodian if you want to, can't you?

Mr. HANSEN. Yes, that is right. I would be satisfied with either of them.

Senator KEFAUVER. All right.

Any questions of Judge Hansen, Mr. Dixon?

Mr. DIXON. I would like to ask just one, Judge.

If this bill is passed, does it mean that the Department would use it exclusively or would you go on with your grand jury proceedings in those cases where you would have a reasonable belief that there might be a criminal violation?

Mr. HANSEN. We wouldn't use it if we could get them voluntarily. It is a tool that we can use, and I think that probably compliance would be rather complete with our demand without having to fully use this bill.

Senator KEFAUVER. I think it is important for the record to emphasize that the authority in this bill would not be used if you could get the records on a voluntary basis.

Mr. HANSEN. That is correct, and this in no way would discontinue our grand jury procedures where we thought a grand jury was warranted.

Mr. FLURRY. Judge Hansen, under S. 1003 you have the right to copy the records, but under S. 716 you would have the right to hold the original records if you so desired.

If the company would not stipulate that the photostatic copies could be used in any proceeding growing out of the investigation, and for some reason that record were destroyed without criminal liability on its part under the penalty provided here for destruction of records, you would be dependent upon the photostatic copies.

Would there not be some force in the fact that you could hold the originals, under S. 716, unless the company would stipulate that the photostats could be used?

Mr. HANSEN. I don't think there would be much difficulty in laying a foundation to get in secondary evidence if you actually had the copy and you knew it and they failed to produce the original at the time of trial. Certainly under the rules of evidence we could use the copy.

Mr. FLURRY. Yes, that is true, but under S. 716 you could get a stipulation at the beginning and then you would have your own set of records and they would have theirs.

Mr. HANSEN. Naturally, in the process of taking copies, I think it would be a good procedure to have a stipulation at the time that these are the copies of the documents. They might be used as though they were originals, and I wouldn't foresee much difficulty in getting such a stipulation, particularly where we have the power.

Mr. FLURRY. Yes. That is what I meant. Where you have the power I don't think you would have any trouble getting the stipulation.

Mr. DIXON. Mr. Chairman, I would like to ask the judge one other question.

Under S. 716 where an antitrust agency is defined in subsection 2(b), the definition is not broad enough to allow a duly organized congressional committee or subcommittee to have access to the information. Would you object to broadening that definition so that a subcommittee such as this one could have access to information which you would obtain by this process?

Mr. HANSEN. Offhand I don't, but I could see that the companies probably would have some objection. And it may be that there would be some trade secrets involved or some business policies that in fairness should not be made public, particularly if it is a company that is not guilty of any violation but just happens to have records we need.

Mr. DIXON. But, of course, such trade secrets could be preserved just as well by subcommittees such as this, as by the Department of Justice; and if the information was made available to a congressional committee, with that understanding or that reservation, certainly it would make it quite different, would it not, sir?

Mr. BICKS. Mr. Dixon, I don't think that is exactly precisely so, because if trade secrets or confidential information were involved, the company at the time it was produced could get an order from the court binding us as to how that information would be used by objecting within the 20-day period.

Mr. DIXON. Mr. Bicks, the Federal Trade Commission is considered an arm of the Congress. It has a like power under section 6 of the Federal Trade Commission Act. The Commission gathers information, deposits it with a custodian, its secretary. When the committees of the Congress are trying to get factual data to determine whether the law might need to be broadened, a simple request can be made upon the Federal Trade Commission for access to this information. To my knowledge the Federal Trade Commission has always cooperated and made that information available for inspection by, or has furnished copies to, the subcommittee for study by its members and staff.

Of course, we fully realize and appreciate that you are in the executive branch of the Government; but nevertheless you no doubt possess much information that would be helpful to a committee of the Congress that was trying to determine whether the Sherman Act or the Clayton Act should be supplemented. And if you are given this extraordinary power, you are going to have greater access to sources than you presently have.

My question is whether you would have any objection if this definition in 716 is expanded so that in addition to these antitrust agencies the committees of Congress would also have access to this information?

Mr. HANSEN. Well, I was hesitating, and the thought that was going through my mind was this. Would that fact have a tendency to make documents more scarce than they otherwise would be?

Mr. DIXON. Judge, I don't see how that could be, because, with this power, you are not begging. You are demanding with the full power of the court behind you, and with the possibility of a penalty. The way you have to operate today by persuasion, it might make documents more scarce, but if you have your civil demands bill, I don't see that that would follow.

Mr. HANSEN. Well, it may be in this manner. There may be documents we have no knowledge of at all and certainly are not in any position to sufficiently identify them to demand the production of them. I think that if there are such documents, and they were made available to Congress, those documents would not be forthcoming until we had specifically identified them.

Have I made my point, sir? That is the hesitancy I have. I have no particular reason to say that Congress shouldn't see the documents if they are needed for the purpose of studying possible legislation by way of amendment to the antitrust laws. But each time that someone else has an opportunity to see the documents, the personal records or private records of a corporation, the more difficult it is to get those records or to see the records, and I am sure there are instances where it would be difficult for someone not a part of the company or not in the particular industry to readily identify whether it constituted confidential matter or trade secrets or not. Just looking at it to me might not mean anything particularly. To somebody in the industry it would. We would have considerable problems.

Mr. DIXON. Well, also involved in what we are discussing is this problem of trying to make our antitrust laws better able—

Mr. HANSEN. That is right.

Mr. DIXON. To give to the American people the fruits of competition that we all desire.

Now, the duty of Congress is to try to understand whether the laws are effective, and if not, in what respect they are defective. In order to really understand that, it does become necessary upon occasion, not very often, for the Congress to examine certain case histories or investigations; and my inquiry was to try to determine whether it would be wise to pass a law to help you get information and preclude you from turning that information over to the legislative body.

Under S. 716 as proposed here, an antitrust agency is defined rather broadly, but it does not include Congress, so that you could not turn this information over to Congress.

I don't know but what it might be desirable for the Congress to have the right upon occasions to see information that you might obtain.

Mr. BICKS. You have in mind putting documents secured by this civil investigative demand in exactly the same status as rule 34 documents are now.

Mr. DIXON. Right—

Mr. BICKS. I don't think we have any objection to that.

Mr. HANSEN. I voiced what I thought might be an objection. On further thought it might not be. I dislike taking a company's records where the company is in no way at fault or have violated anything, and making those documents public. Of course, if those documents were introduced at the time of trial and became an exhibit, they are made public.

I think it is for Congress to determine that. We certainly wouldn't object to it.

Mr. DIXON. What I had more specifically in mind, Mr. Bicks, is this: for 40 years now the Federal Trade Commission has had this power and for 40 years the Congress has had the right to go down there and look at their documents. This bill would give you that same power and certainly you have needed it for a long time, sir. And I think that the Congress also ought to have the same right to see information and to study it to see if they can help you by supplementing the law to give you a more effective tool to do the job which Congress has given you to do.

Mr. HANSEN. Well, certainly the right hasn't been abused by Congress to my knowledge over these years as far as the Federal Trade Commission is concerned. I have no reason to feel that they will here.

Mr. DIXON. Well, at least we should not pass a law that would preclude you from giving it to Congress.

Mr. HANSEN. I think that is right.

Senator KEFAUVER. For the legislative history, in the colloquy between Mr. Bicks and Mr. Dixon you said rule 34 documents. What is rule 34?

Mr. BICKS. Rule 34 of the Federal Rules of Civil Procedure which enables, after a complaint is filed, a motion for the production of certain documents relevant to the pending complaint. Under that rule we are not barred. We would be subject to the usual considerations of comity and court order.

As I gather, Mr. Dixon is talking about primarily removing a preclusion rather than creating any obligation to turn over.

Mr. DIXON. It would expand the rule, Mr. Bicks, because this power would give you the right to get documents before complaint.

Mr. BICKS. That is right.

Mr. HANSEN. That is the main difference.

Mr. DIXON. There is a lot of difference there. You may not file a complaint, and for the Congress to understand whether the law should be amended in order to give you a better basis for a complaint, they should have the right to see the documents. In a sense Congress could look over your shoulder. There should be no embarrassment, for certainly everyone is headed in the same direction.

Mr. HANSEN. We certainly wouldn't interpose any objection to it. I voiced my hesitancy and maybe it doesn't deserve the weight that my first reflection gave it.

Senator KEFAUVER. One other matter, Judge Hansen. On page 8 of your statement you say :

Of course, the demand cannot require the production of any privileged material. I suppose by that you mean certain types of trade secrets.

Mr. HANSEN. That is right. In other words, if we couldn't secure the document by a subpoena duces tecum, we couldn't get it under our investigative demands.

Mr. BICKS. The lawyer-client relationship.

Senator KEFAUVER. If there were a dispute as to whether it were privileged material, the matter would, of course, be referred to the district court for determination.

Mr. HANSEN. That is right.

Senator KEFAUVER. And might be placed under seal and the court to make the determination.

Mr. HANSEN. That is right.

Senator KEFAUVER. I think it should be pointed out that so far as I know, in the long experience of the Federal Trade Commission under section 6—of course Mr. Kintner will testify to that—there haven't been any substantial arguments between companies and the Federal Trade Commission on this point.

Mr. DIXON. There is a provision in the Federal Trade Commission Act that protects trade secrets and provides a penalty against any officer or employee for disclosure.

I fully appreciate the problem and I think that in any instance where that type of evidence might be in your files and Congress asked you for it, certainly any member of the Senate, upon request by you, would not disclose it.

Senator KEFAUVER. Of course, the argument has been made in the past and will be made now, I am certain, that this enables you to go on a fishing expedition; maybe harass some company and get irrelevant information, and so forth. What do you say to that, Judge Hansen?

Mr. HANSEN. They have got the right to present the matter to the district court. I don't like the term "fishing expedition" in this particular field here of antitrust.

Senator KEFAUVER. I don't like it either, and I am sure there isn't going to be any fishing expedition, but I thought we ought to—

Mr. HANSEN. I don't suppose we ought to criticize that. But human beings are involved and I suppose sometimes they do things they shouldn't do. But in antitrust particularly you see a situation and you have got to investigate it and you don't always know what facts will develop or what causes the economy to function as it does. It is :

broader type of investigation than you would have in a negligence case, or something of that kind. So I suppose that is why we are accused of it. But I think to do a job in antitrust you have got to cover every area and I think you have got to have wide and broad investigation made of it, and I think you have got to analyze lots of documents. But I don't see that this would cause us to act improperly. As a matter of fact, I think it might keep someone in the future from using a grand jury simply for a fishing expedition who shouldn't.

Now, our firm policy is that we do not impanel a grand jury for investigation unless we have what we think is some reasonable ground for feeling that there has been a criminal violation. So therefore unless we confine that, then we are deprived of our means of getting information if they refuse to give it to us, and then I also don't think it is proper simply to file a lawsuit on suspicion and then attempt to develop it under rule 34, and the judicial conference said the same thing. So this is just a necessary tool and rather than cause us to engage in fishing expeditions, I think it might have just the opposite effect.

Senator KEFAUVER. I agree with you, and I think there should be pointed out and reemphasized in the record two answers to the possible claim that this might enable you to go on fishing expeditions. First, if you want to go on a fishing expedition, you can do so by a grand jury under present law and that sometimes this might work a hardship on a company by creating the impression that it is a criminal offense, whereas the essence of it might be a civil one. Second, if you just wanted to go on a fishing expedition, you could bring a suit without having any facts and get them by securing the documents by civil discovery after complaint. This measure would enable you to get the documents without resorting to that procedure.

So I agree with you that rather than encouraging fishing expeditions, the bill would, by an orderly process, eliminate them.

All right, Mr. Chumbris, any questions?

Mr. CHUMBRIS. I believe all the issues have been sufficiently explored, Mr. Chairman.

Senator KEFAUVER. Mr. Peck?

Mr. PECK. I have only one, perhaps a very minor point, Mr. Chairman. I notice that both of these bills provide a maximum of 20 days during which time an organization may bring suit in district court either to set aside or to modify a demand.

Not so much for the purpose of setting aside a demand but for the purpose of modifying or possibly clarifying a demand, I just wonder if 20 days is an adequate period of time.

Mr. BICKS. I know the Federal rules of civil procedure are applicable wherever nothing inconsistent is specified and just as under rule 34 motion now, 20 days is the period, and you can go into court and ask for an extension of time. So it is the same problem.

Mr. PECK. It possibly could be—

Mr. BICKS. Oh, yes. The provision that makes the Federal rules of civil procedure.

Mr. PECK. That certainly answers my question. Thank you very much.

Senator KEFAUVER. Anything else, Judge Hansen or Mr. Bicks?

Mr. HANSEN. No.

Senator KEFAUVER. Thank you very much for your appearance.

Senator KEFAUVER. Mr. Earl Kintner, the General Counsel of the Federal Trade Commission, and Mr. Alvin L. Berman, an Assistant General Counsel of the Commission.

STATEMENT OF EARL W. KINTNER, GENERAL COUNSEL, FEDERAL TRADE COMMISSION; ACCOMPANIED BY ALVIN L. BERMAN, ASSISTANT GENERAL COUNSEL

Mr. KINTNER. Mr. Chairman, you have requested that the Federal Trade Commission report to you its views on S. 716 and S. 1003. I have been directed by the Federal Trade Commission to present a report to the Commission, which is dated March 3, 1959, and with your kind permission I would like to read this report into the record.

Senator KEFAUVER. You may proceed, Mr. Kintner.

Mr. KINTNER. The report is addressed to the Honorable James O. Eastland, chairman, Committee on the Judiciary, U.S. Senate, Washington 25, D.C.

DEAR MR. CHAIRMAN: This is a report upon S. 716 and S. 1003, 86th Congress, 1st session, bills to authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws, and for other purposes.

It is our understanding that the Attorney General has recommended such legislation because of a present lack of authority to compel the production of documents during the investigative or precomplaint stage of civil antitrust proceedings.

Neither bill would amend any of the laws administered by the Federal Trade Commission, and the Commission is obviously not in a position to discuss the detailed requirements of the Department of Justice for investigatory authority preliminary to the institution of antitrust proceedings. At the same time, the Commission, by virtue of its experience in enforcing the Federal Trade Commission and Clayton Acts and the other acts which it administers, fully recognizes the necessity for adequate investigatory powers prior to issuance of complaint.

Such authority is not only essential to properly prepare complaints and undertake the formal presentation of cases, but its exercise is also in the public interest in avoiding the precipitous issuance of complaints in instances where the facts, when fully developed, show that complaints would not be warranted. The Commission is therefore of the opinion that it would be desirable to afford the Department of Justice the authority to issue civil investigative demands for the production of documentary evidence.

The Commission, however, is strongly opposed to the provisions of section 4(a) of S. 1003 to the effect that no documentary material secured by civil investigative demand may be made available, nor the contents disclosed, to any person other than an authorized employee of the Department of Justice. Such a prohibition would completely disrupt the current cooperative practices of the Department of Justice and the Federal Trade Commission to exchange information with each other and to allow the other to inspect, copy, and use evidence other than that secured by grand jury subpoena.

In addition, there are instances where one agency may initiate and develop an investigation to the point where it is mutually determined that it would be more appropriate for the other agency to proceed with the case. Section 4(a), as presently drafted, would prevent the Department of Justice from turning over pertinent materials procured by means of civil investigative demand to the Federal Trade Commission in such a situation.

Antitrust prosecutions often require the development of voluminous factual materials pertaining to the particular respondents or to an entire industry. Much of this data may be historical in nature. Both the Department of Justice and the Federal Trade Commission have developed a considerable amount of such evidentiary material which at the time of requirement may not be available from any other source. Further, to preclude one agency from utilizing the

evidence secured by the other would require the duplication of investigative effort and expense.

The Commission, therefore, opposes the present restrictive provisions of section 4(a) of S. 1003 as hampering the administration and enforcement of the antitrust laws and needlessly requiring the duplication of investigative effort and expense. Recommendation is therefore made that the words "or any antitrust agency" be inserted after the words "Department of Justice" in lines 8 and 16 of page 5 of the bill.

In view of time schedules, this report has not been submitted in advance to the Bureau of the Budget.

By direction of the Commission.

JOHN W. GWYNNE, *Chairman.*

Senator KEFAUVER. Thank you very much, Mr. Kintner. You make quite a point as to the fact that other antitrust agencies ought to have access to the material collected by the Department of Justice if this proposal becomes law. Does the provision on page 2 of S. 716, section 2(b), where an antitrust agency is defined, meet your objection to S. 1003?

Mr. KINTNER. Yes, sir, it does. It might be even more desirable than the alternative that we have suggested.

Senator KEFAUVER. Under section 6 of the Federal Trade Commission Act, do you have the power to secure documents only from corporations?

Mr. KINTNER. We have the power under section 9 to inspect and copy corporation documents. However, under that section we also have a broad subpoena power which permits us, both before and after issuance of complaint, to subpoena individuals for the purpose of securing testimony and documentary material.

Senator KEFAUVER. While the proposal here refers to the Department of Justice, I would think your experience in being able to secure documents from individuals under section 9 might be pertinent. Do you not think that in some extraordinary cases it might be well for the Department of Justice to be able to secure documents not only from a corporation or an organization but also from an individual person?

Mr. KINTNER. In our experience the powers granted to us have been wise powers. They have been sparingly used, but the fact that the broad power exists has I think over the past 40 years resulted in the business community voluntarily giving us most of the information which we need properly to enforce the laws committed to us for enforcement.

Senator KEFAUVER. I take it your answer is, "Yes."

Mr. KINTNER. Yes, sir.

Senator KEFAUVER. Where you have the right to secure documents, under section 6 and section 9, the Federal Trade Commission Act provides that the Secretary shall be the custodian of the documents, does it not?

Mr. KINTNER. All documents of the Federal Trade Commission are in the immediate custody of the Secretary of the Commission. He is the custodian of all the files of the Commission.

Senator KEFAUVER. That is by general enactment?

Mr. KINTNER. Yes, sir; that is right.

Senator KEFAUVER. Defining his duties?

Mr. KINTNER. Yes, sir.

Senator KEFAUVER. So he is the custodian of all documents?

Mr. KINTNER. Yes, sir. Those files may be located at various times in our several field offices or in the Washington office of the Commission.

Senator KEFAUVER. But they are still under his general custody?

Mr. KINTNER. That is correct, sir.

Senator KEFAUVER. Do you find that having a custodian—the Secretary of the Commission—even though under his responsibility the documents may be out in the field offices, that works out satisfactorily with the operation of the companies from whom you get the documents? I mean, is there any hardship?

Mr. KINTNER. Yes, sir. It is a general control. It provides a focal point to which corporations, requiring documents which we have secured and which they need for their day-to-day operations, may apply.

Senator KEFAUVER. Well, then, would you recommend that so far as the Department of Justice is concerned, that there be some provision such as on page 6, section 4 (a) of S. 716, that the Assistant Attorney General in charge of the Antitrust Division designate a custodian or custodians for the safekeeping of these documents?

Mr. KINTNER. I am not sure whether this is necessary as far as the Department of Justice is concerned. I would not like to make a suggestion with respect to the needs of the Department when I am not fully briefed on what those needs may be.

Senator KEFAUVER. If you substitute the Secretary of the Federal Trade Commission, this is the same practice that you follow in your agency.

Mr. KINTNER. On the face of it it seems a reasonable proposal, but I don't want to be in the position of saying, absent my knowledge of the needs of the Department, that the Department should have this particular provision.

Senator KEFAUVER. I understand that.

Mr. KINTNER. It seems a reasonable provision.

Senator KEFAUVER. Would it not make your liaison with the Department of Justice, on documents secured by them, a little easier if you knew exactly who had the responsibility and to whom you should go in order to look at documents that they had secured?

Mr. KINTNER. It might, sir, although I must say that we have the finest type of liaison today. We have no difficulty in that respect.

Senator KEFAUVER. But if some definite person had responsibility, then you would know to whom to address your inquiry, wouldn't you?

Mr. KINTNER. It might be more convenient.

Senator KEFAUVER. And then I would like you to also answer the argument that might be made against this legislation—I don't think it is valid for the reasons that have been stated in my colloquy with Judge Hansen, namely, that it might give the Department of Justice the right to go on fishing expeditions.

Mr. KINTNER. I listened to Judge Hansen's reply in that respect and I would adopt his views 100 percent. Antitrust cases do require in many instances a great deal of background information, and it does not always appear at first blush what is going to be an important fact in a matter. We, of course, all abhor the fishing expedition, but my impression is that in antitrust enforcement, such expeditions have been comparatively rare. Beyond that, the courts have always been quite jealous about insisting that the antitrust agencies stick to relevant matters rather than going off on fishing expeditions.

We have had very few problems in that respect at the Federal Trade Commission. We have tried to make our requests for information reasonable. By and large the business community recognizes this fact and gives us the information that we require.

Of course, we are aware that if our demands are unreasonable, a court will not enforce them. There is that checkrein upon the agency.

Senator KEFAUVER. Then if an antitrust agency wants to go off on a fishing expedition, it can do it via the grand jury or by prematurely filing suit without sufficient facts. Might not this legislation lessen any tendency toward fishing expeditions rather than enlarging it?

Mr. KINTNER. I would say so. I would agree with you.

Senator KEFAUVER. I think that your conclusion is right on that.

Mr. Dixon, do you have any questions?

Mr. DIXON. Mr. Kintner, would you say that because of the fact that there is a section 6 and a section 9 in the Federal Trade Commission Act that the Commission has been successful over the years in obtaining most of its information by persuasion, we might say, rather than by force?

Mr. KINTNER. That is correct. In recent years we have had the policy of going to court and enforcing our requests where we feel that the securing of particular information is necessary and that information is denied to us. The courts have been almost uniformly kind to us, largely I think because our demands and requests have been reasonable.

Mr. DIXON. It might be reasonably said that the existence of this power in the basic act has assisted the Commission in obtaining information voluntarily.

Mr. KINTNER. As you put it, the existence of this broad power has had a most persuasive effect in permitting us to secure information from the business community that we need to properly do our job.

Mr. DIXON. Is it fair to say that both of these bills grant to the Department of Justice similar if not identical power that the Federal Trade Commission today possesses?

Mr. KINTNER. Certainly similar power.

Mr. DIXON. I was just trying to recall the court test of this very power, the court case. Do you remember the name of the case? It is one of the salt cases, as I remember.

Mr. KINTNER. *United States v. Morton Salt* (338 U.S. 632), a 1950 case, is the one that you apparently have in mind.

Mr. DIXON. That was the real first court adjudication of that power, was it not, Mr. Kintner?

Mr. KINTNER. I would say that the leading case is *Oklahoma Press Publishing Company v. Walling* (327 U.S. 186), a 1945 case, although Morton Salt followed the general holding of the Oklahoma Press case and there have been several other cases involving the Federal Trade Commission since the Morton Salt case.

Mr. DIXON. So in those cases we have had an excellent court review of the type of power that this legislation involves.

Mr. KINTNER. Oh, yes.

Mr. DIXON. Thank you, sir.

Senator KEFAUVER. Mr. Flurry, any questions?

Mr. FLURRY. No questions.

Senator KEFAUVER. Mr. Chumbris?

Mr. CHUMBRIS. Mr. Kintner, on page 2 you state:

The Commission, however, is strongly opposed to the provisions of section 4(a) of S. 1003 to the effect that no documentary material secured by civil investigative demand may be made available, nor the contents disclosed, to any person other than an authorized employee of the Department of Justice.

The testimony of Judge Hansen indicates that, as far as the Department of Justice is concerned, he agrees with you that it would be perfectly all right if it was written into S. 1003.

Mr. KINTNER. I so understood, and in our consultation with the Department prior to this hearing, I understood that they had no objection to this amendment.

Mr. CHUMBRIS. And as I notice from Judge Hansen's testimony, the other two issues that Senator Kefauver referred to in his opening statement have been probably resolved here this morning in the colloquies between the chairman and Judge Hansen.

Mr. KINTNER. I believe that is correct.

Mr. CHUMBRIS. As a matter of fact, you even made some suggestions as to the bill by Senator Wiley, S. 1003, as to how it could be amended to take care of the main objection that you have.

Mr. KINTNER. That is correct.

Mr. CHUMBRIS. Other than those three differences, there doesn't seem to be too much difference between Senator Kefauver's bill and Senator Wiley's bill except as to terminology.

Mr. KINTNER. No.

Senator KEFAUVER. Those are the three differences, I believe.

Mr. CHUMBRIS. That is all.

Senator KEFAUVER. Thank you, Mr. Chumbris.

Mr. PECK?

Mr. PECK. I don't believe I have any questions, Mr. Chairman, thank you.

Mr. DIXON. Mr. Chairman, I would like to ask Mr. Kintner one other question.

Mr. Kintner, because the Federal Trade Commission is a statutory agency created by Congress, and always has been considered as an arm of Congress, I would like to ask you if your experience, like mine, have been that the Federal Trade Commission has cooperated very generously and very fully with the Congress with respect to access to its files.

Senator KEFAUVER. With the duly authorized committees.

Mr. DIXON. That is correct, sir.

Mr. KINTNER. Yes. As far as I am aware over the years we have had a policy of cooperation with the Congress. We are quite aware of the responsibilities of the Congress and the fact that the Congress reasonably needs information on which to base any change in existing law or new legislation. The Federal Trade Commission has had a longstanding policy of cooperation with the Congress.

I personally would take issue with you in your describing the Commission as an arm of the Congress. It has been said in concept to be an arm of the Congress. I prefer to think of it as an independent regulatory agency, although, of course, it derives its authority from the Congress by statutory enactment.

Senator KEFAUVER. It derives its authority from a power given to Congress for the regulation of commerce between the States.

Mr. KINTNER. That is quite correct.

Senator KEFAUVER. Which power the Constitution gave to Congress and Congress delegated to you.

Mr. KINTNER. I would agree with the Senator on that premise.

Mr. DIXON. Would you agree it would not of necessity be wise to preclude the Department of Justice by this legislative enactment from allowing Congress to see this information?

Mr. KINTNER. I think that I would agree with the testimony of Mr. Bicks and Judge Hansen on that point which, if I interpret it correctly, was to the effect that they did not feel it would be wise to preclude them from delivering information to the Congress which the Congress might reasonably need in discharging its legislative obligations to the public.

Mr. DIXON. As S. 716 now is written, it might be said that the Department would be precluded, unless that language is changed.

Mr. KINTNER. I listened to the testimony and that seemed a reasonable construction.

Mr. DIXON. Thank you, Mr. Kintner.

That is all, Mr. Chairman.

Senator KEFAUVER. Mr. Kintner, we thank you and Mr. Berman.

Mr. KINTNER. Thank you, sir.

Senator KEFAUVER. Does anyone else here want to testify on these bills? (No reply.) We have had no requests to testify from anyone else. I think we may well hold the record open for 1 week for any statements or to see whether there is anyone else who wants to present their viewpoint about it. This is important legislation and we want to give everybody a chance to be heard. As the matter appears now, there has not been any difference of opinion as to the principle involved. The President has recommended this legislation a number of times. The Attorney General's committee has recommended it. The Department of Justice is asking for it. The Federal Trade Commission thinks it would be valuable.

If anyone else wants to testify in connection with it, we will give him an opportunity or we will receive any statements. The record will be held open for 1 week.

We will stand in recess at this time.

(Whereupon, at 11:30 a.m., the hearing was concluded.)

APPENDIX

THE SECRETARY OF COMMERCE,
Washington, D.C., March 10, 1959.

HON. ESTES KEFAUVER,
Chairman, Subcommittee on Antitrust and Monopoly Legislation,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: We are advised of a hearing by your Subcommittee on Antitrust and Monopoly Legislation, held March 3, 1959, with respect to S. 716 and S. 1003, bills to authorize the Attorney General to compel material required in civil investigations for the enforcement of the antitrust laws.

We are concerned lest this legislation have an unintended effect.

This Department collects from businessmen a multitude of statistics which are submitted to the Department on a confidential basis and which the Department is forbidden under penalty of law to divulge (see, for example, 13 U.S.C. 9 and 50 U.S.C. App. 2155(e)). The Federal Reports Act (5 U.S.C. 139) authorizes the Bureau of the Budget to require one Federal agency to make informa-

tion collected available to other agencies if "the Federal agency to which another Federal agency shall release the information has authority to collect the information itself and such authority is supported by legal provision for criminal penalties against persons failing to supply such information." Since the proposed draft bill provides criminal penalties for withholding material demanded thereunder, it is possible that the proposed legislation would be regarded as falling within the conditions set forth above.

The Department is absolutely convinced that the collection of accurate statistical materials is vital to the national interest. Defense mobilization planning in large measure is based upon statistical information derived by the Government from reports submitted to it by individual businesses. Only if the accuracy and fullness of these reports can be assured can the Government make sound plans for defense mobilization. Any possibility that reports submitted to the Government for these special and vital purposes would be available for prosecution of the reporting businessman under the antitrust or other statutes unrelated to the giving of the report would, in our opinion, seriously impair and curtail the frank and open submission to the Government of the required statistics.

The Congress has taken into consideration these factors and has for that reason included in statistical reports acts the above-mentioned requirements of confidentiality and of prohibition against disclosure for purposes other than the special and vital purposes for which such information and reports were collected.

It should also be noted that in the past this Department has received information from businessmen on the strength of the assurance of confidentiality contained in the acts, and to subject such information to provisions of this legislation would not only defeat future collection of such information, but would constitute a serious breach of faith on the part of the Federal Government with respect to information collected in the past.

The Department, therefore, urges that the legislative history of the proposed legislation make absolutely clear that information and reports collected by Government agencies under provisions of law making the information so collected confidential will not be subject to subpoena or other process by the Antitrust Division. This exemption should also apply to copies of such information and reports retained by the furnishing businessman in his own records so as to assure continuity and accuracy of subsequent reports. We do not intend, of course, that exemptions should extend to the basic corporate or organization records from which such reports were compiled. These clearly should remain within reach of the proposed statute. In this connection it is also suggested that the definition of "organization" be modified to make clear that it does not include a Federal agency or employee thereof as such, unless this is presently apparent.

The Bureau of the Budget has interposed no objection to the transmission of this report and concurs in it.

Sincerely yours,

FREDERICK H. MUELLER,
Under Secretary of Commerce.

[Excerpts from report of the Attorney General's National Committee To Study the Antitrust Laws, pp. 343-349]

CHAPTER VIII. ANTITRUST ADMINISTRATION AND ENFORCEMENT

* * * * *

A. THE DEPARTMENT OF JUSTICE

1. *Antitrust investigations*

The inevitable generality of most statutory antitrust prohibitions renders facts of paramount importance. Accordingly, effective enforcement requires full and comprehensive investigation before formal proceedings, civil or criminal, are commenced. Incomplete investigation may mean proceedings not justified by more careful search and study. Public retreat by the prosecutor may then be difficult, if not impossible, and the result may be a futile trial exhausting the resources of the litigants and increasing court congestion. Thus the adequacy of investigatory processes can make or break any enforcement program.

Present procedures enable the Department of Justice to employ compulsory process to obtain both documentary and testimonial evidence at every stage of

criminal and civil antitrust proceedings—except during the investigative stage of a matter in which civil proceedings are, from the outset, contemplated.

Where indictment is contemplated, the Federal grand jury is equipped with ample powers to permit the fullest investigation. The grand jury subpoena may be used to compel the discovery of all documentary material reasonably required as well as the testimony of witnesses under oath.

In the investigation of civil matters, on the other hand, the Department must:

- (a) depend upon the voluntary cooperation of those under investigation;
- (b) file a civil complaint and make use of discovery processes under the Federal Rules of Civil Procedure; or
- (c) make use of the grand jury.

These procedures do not satisfy civil enforcement needs.

Voluntary cooperation of parties under investigation has often been sufficient, but compulsory processes are required in some cases. Moreover, a Government agency should not be in a position of sole dependence upon voluntary cooperation for discharge of its responsibilities.

Filing a civil complaint enables resort to the compulsory discovery processes under the Federal Rules of Civil Procedure, such as interrogatories, motions to produce documents, depositions, etc. These methods have been extensively used in antitrust cases and provide discovery powers almost as sweeping as a grand jury.¹ But they come into play only after a complaint has been filed: Thus the Department cannot utilize them to determine whether the institution of formal proceedings is warranted. Moreover, the filing of a skeleton complaint in hopes that the Federal Rules' discovery procedures will unearth facts essential to a valid accusation is unwise. For we agree with the Judicial Conference of the United States that no plaintiff, including the Government, may "pretend to bring charges in order to discover whether actual charges should be brought."² These rules "were not intended to make the courts an investigatory adjunct to the Department of Justice."³

The last alternative is the grand jury. Its use where civil proceedings are contemplated from the outset cannot be justified on the purely formal ground that the Sherman Act defines a criminal offense appropriate for consideration by a grand jury, even though it may later be determined that equitable relief is more appropriate. In reality, resort to grand jury in essentially civil investigations stems from lack of an adequate civil discovery alternative.

We believe that the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the Department's policy of proceeding criminally only against flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality.

We recognize that the Department has been handicapped and accept the Judicial Conference conclusion that present civil investigative machinery is inadequate for effective antitrust enforcement.⁴ The problem is, therefore, to devise a precomplaint civil discovery process for use where civil proceedings are initially contemplated and voluntary cooperation by those under investigation fails.

We reject the proposal for legislation authorizing the Department of Justice to issue the type of administrative subpoena typically employed by regulatory agencies.⁵ Unlike the Federal Trade Commission, for example, the Department of Justice is entrusted only with law enforcement. The grant of subpoena powers suggests broader regulatory powers, structural reorganization, a system of hearing officers and a panoply of administrative procedural protections which the committee is not prepared to recommend. We would, in addition, disapprove any subpoena power that would permit prosecuting officers in antitrust investiga-

¹ Interrogatories, according to Rule 33 (Fed. R. Civ. Proc.) "may relate to any matters which can be inquired into under Rule 26(b)." Rule 26(b) (Fed. R. Civ. Proc.), in turn, provides for depositions pending trial "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action * * *." It is no ground for objection. 26(b) continues, "that the testimony will be inadmissible at the trial if * * * [it] appears reasonably calculated to lead to the discovery of admissible evidence." Beyond interrogatories and depositions, discovery and production of documents are available to secure evidence "not privileged" and, under Rule 34 (Fed. R. Civ. Proc.), "relating to any of the matters within the scope of the examination permitted by Rule 26(b)."

² Judicial Conference of the United States, "Report on Procedure in Antitrust and Other Protracted Cases," 13 F.R.D. 62, 67 (1951).

³ *Id.*, at 67.

⁴ *Id.*, at 67.

⁵ See e.g., compulsory process granted the Federal Trade Commission, 15 United States Code (1952) 49.

tions to summon sworn oral testimony by placing businessmen under oath in the absence of a hearing officer and like safeguards. Such authority is alien to our legal traditions, readily susceptible to grave abuse and, moreover, seems unnecessary.

To enable fair and effective enforcement by the Department, the committee recommends legislation, applying only to relevant documents possessed by parties under investigation, which would:

1. Authorize the Attorney General, in a civil antitrust investigation, to issue and have served upon any corporation, partnership, or association a civil investigative demand. This would require the production of existing correspondence and other business records and data or copies thereof, not privileged, in the possession of the party served. Such documents must, however, be relevant to particular antitrust offenses stated to be under investigation. In addition, the demand must describe the records and data sought with reasonable specificity, so as fairly to identify the material demanded, as well as specify a reasonable time for its production.

2. Create the office of custodian in the Department of Justice and require that all documents produced in response to a demand be delivered to the custodian or his deputy at the recipient's principal place of business or at such other district as the parties may agree. The custodian would be charged with receiving and preserving all such documents. He should make them available only to the Antitrust Division or Federal Trade Commission personnel participating in the pending investigation and, under reasonable conditions, to representatives of the corporation, partnership, or association that has delivered them.

3. Restrict the use of documents produced in response to a demand to (a) the pending investigation, (b) submission before a grand jury, (c) Antitrust Division or Federal Trade Commission proceedings that may ensue; and require that they be promptly restored to their rightful owner thereafter.

4. Vest the U.S. district court for the judicial district in which the recipient maintains its principal place of business or in such other district as the parties may agree with power to entertain motions:

(a) With respect to the performance by the custodian of his statutory duties; and

(b) By the United States for an order directing compliance on pain of contempt; and

(c) By a recipient challenging:

(1) The reasonableness of the demand and the relevance of the documents called for in relation to the specific offenses the demand states to be under investigation; or

(2) The reasonableness of the scope of the demand; or

(3) The adequacy and specificity of the description of the material required to be produced.

If the demand does not conform to the statute the court would have the power to modify or set it aside entirely.

5. Provide that a demand may be served and enforced by the courts against any corporation, partnership, or association subject to the jurisdiction of the United States.

6. Provide that whether compliance with a demand is effected in response to a court order or to the demand itself all constitutional and statutory safeguards and immunities shall be fully preserved.

The Attorney General should resort to this demand where requests for voluntary production would probably prove not fully effective. If, as seems likely, the demand in practice becomes an effective tool to compel production of data adequate for precomplaint investigation, its successful use should end the necessity for utilizing the grand jury process in civil antitrust investigations. Thus, it would complement, not supersede, the grand jury, which retains its proper role in criminal investigations.

True, the proposed demand does not carry the same sanction as the grand jury subpoena, which, after all, is the process of the court. With the demand, this would not be the case until it had become the subject of a court order directing compliance. There are sanctions, however, not only in the enforcement procedure proposed but also in the existing criminal statutes making

unlawful the concealment of material facts or the obstruction of justice.⁶ Complementing grand jury recourse, this proposed demand should enable the Department to gather quickly the wealth of data needed to determine probable violation.

With this position, several members disagree. In the words of one:

"I appreciate the fact that the Department of Justice is sometimes handicapped by the refusal of some recalcitrants to cooperate when the Department is seeking evidence upon which to decide whether to file a civil or criminal antitrust action or whether or not facts warrant the filing of a civil action. But the fact is that not more than 10 percent of those who are asked for data refuse to cooperate.

"In addition, I oppose its enactment because: (a) The Department of Justice is an executive department and the Attorney General is an executive officer. This recommendation disregards the basic distinction between the executive power on the one hand and the judicial power on the other.

"(b) The Sherman Antitrust Act is in essence a criminal statute.

"(c) When all is said about it the proposed demand is a form of subpoena duces tecum—and it will originate with the Attorney General. The use by Department agents of such a formal process will be more likely to terrify innocent people than a regular subpoena duces tecum would.

"(d) One of the plainest lessons taught by the history of government in any place and at any time is that freedom of the individual disappears with the growth of executive power.

"It is true, of course, that some are embarrassed by the fact that they may have to appear in a grand jury investigation; but that such appearance carries with it a taint or feeling of criminality I deny.

"(e) I submit that there is really no need for a subpoena duces tecum in any form in any of the circumstances presented by the report. Certainly, the fact that the availability of such an instrument would make easier the work of the Department of Justice is not a strong argument in favor of such an instrument.

Louis B. Schwartz adds:

"The historic functions of grand juries have extended to civil matters regarded as of especial importance, e.g., the conduct of public office, the state of public institutions. Grand jury was simply the investigating arm of the crown and a device for screening out criminal complaints so insubstantial as not to warrant prosecution. Nothing could be more appropriate than the existence and exercise of this sovereign jurisdiction to compel great corporations, whose activities affect the public interest, to disclose the facts as to their acquisition and use of economic power.

"I would have no objections to the civil investigative demand," he concludes, "if it were proposed as a supplement to existing enforcement powers. But in the light of the background of the proposal and the report's animadversions on the grand jury subpoena in 'civil' cases, I can only regard this as a step to curtail the Department's most effective investigative device."

⁶ 18 U.S.C., sec. 1001 (1952) provides: "* * * Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes and false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both."

Complementing that provision is 18 U.S.C., sec. 1503 (1952), which reads: "Influencing or injuring officer, juror, or witness generally: Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any U.S. commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any U.S. commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than 5 years, or both."

Finally, one member fails to see how a civil investigative demand limited to the production of documents can give the Government the information it needs to draft an intelligent complaint or to decide whether to proceed civilly or criminally.

AMERICAN PAPER & PULP ASSOCIATION,
New York, N.Y., March 3, 1959.

HON. ESTES KEFAUVER,
Subcommittee on Antitrust and Monopoly Legislation, Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR KEFAUVER: We are submitting this letter to the Subcommittee on Antitrust and Monopoly Legislation and to the full Senate Judiciary Committee, in lieu of personal appearance to express our views in opposition to bills such as S. 716 and S. 1003, the so-called Antitrust Civil Process Act.

As we understand it after careful study of this legislation, its practical effect would be to grant to the Attorney General power to compel the production of documentary evidence whenever he "has reason to believe that any person may be in possession, custody, or control of any documentary material pertinent to any antitrust investigation." This authorization would be in addition to the authority now in effect which permits a grand jury subpoena duces tecum.

Historically, the Attorney General is charged, and properly so, with the enforcement of the antitrust laws, and we are in full accord with their purpose and intent. If there is any reason to believe that there is a violation of the Sherman or Clayton Acts, there is broad recourse through the medium of the grand jury subpoena to require not only the production of pertinent documentary evidence but also testimony by witnesses possessing relevant information. However, is it not a fact that the Department of Justice, and indeed every governmental agency, frequently receives complaints alleging misconduct under the antitrust laws from disgruntled competitors, customers, or ill-advised members of the public when, in fact, there is no substance to such allegation? If the Attorney General is granted authority to compel the production of documentary evidence, it would, in our opinion, result in granting to him a license to indodge in what could properly be termed "fishing expeditions." These would not, and could not in any manner whatsoever, facilitate the enforcement of the antitrust laws, and in many instances would consume needlessly both the time of the Antitrust Division and of corporate employees, with the inevitable waste of public and private funds.

We feel that the cooperation which industry generally affords the Attorney General in voluntarily making available pertinent documentary material in the course of a bona fide civil investigation provides the Department of Justice with all of the information to which it is legitimately entitled. If, in fact, there is an intentional violation of the antitrust laws, there is always recourse to a grand jury proceeding and the grand jury subpoena may be employed.

We are at a complete loss to comprehend any reason for enactment of legislation such as S. 716 at this time. There has been a complete failure to demonstrate any need for such a bill. We therefore respectfully request the Antitrust and Monopoly Legislation Subcommittee not to report S. 716, S. 1003, or any other Antitrust Civil Process Act.

Very truly yours,

ROBERT E. O'CONNOR, *Executive Secretary.*

STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

This statement is filed on behalf of the National Association of Manufacturers, a voluntary membership corporation with some 20,000 members, ranging in size from the smallest to the largest of manufacturing enterprises. The great bulk of our member companies are small businesses, as that term is generally understood. In fact, 28 percent of the association's members employ 50 or fewer persons, 46.5 percent employ 100 or less, and 83 percent have 500 or fewer employees. Accordingly, this association is vitally interested in this proposed legislation.

This statement is directed to S. 716 and S. 1003, the proposed Antitrust Civil Process Acts.

This association has consistently advocated and strongly endorsed legislation which would aid in an intelligent, fair, and effective administration of the antitrust laws. We believe these bills to be unnecessary, and we fear that the defects and the dangers inherent in the proposal far outweigh such aid, if any, as might be afforded the Department of Justice in connection with civil investigations of antitrust laws.

Briefly, these bills would authorize the Department of Justice to demand the production of certain documentary material which could be used by the Attorney General and other governmental agencies in connection with the investigation of suspected violations of antitrust laws, and in proceedings arising from such investigations.

It has been noted by the proponents of these bills that the Federal Trade Commission already possesses authority similar to that proposed to be conferred on the Attorney General by these bills.

The proponents have not taken note, however, of the dissimilar function performed by the two agencies. The Federal Trade Commission is a regulatory agency. Its investigative proceedings are administrative and not a part of the judicial process. It must be borne in mind that the Department of Justice is an enforcement agency and is not entrusted with any regulatory powers. As one member of the Attorney General's Committee To Study the Antitrust Laws put it, "This recommendation disregards the basic distinction between the executive power on the one hand and the judicial power on the other, * * * One of the plainest lessons taught by the history of government in any place and at any time is that freedom of the individual disappears with the growth of executive power."

It may be that the availability of such an instrument would make easier the work of the Department of Justice, but so might many other devices, foreign to our legal traditions, and violative of our sense of justice. The fact remains, however, that there is no demonstrable need for granting to the Attorney General the extensive authority proposed here.

The Justice Department, in its effort to justify a need for this type of legislation, points to the fact that some parties under investigation will not cooperate by voluntarily supplying evidence sought by the Department.

Undoubtedly the Justice Department encounters some few recalcitrants who refuse to cooperate. This fact falls far short, in our opinion, of affording justification for imposing this kind of requirement on the whole American business and industrial community. It was stated as a fact by a member of the Attorney General's Committee To Study the Antitrust Laws that not more than 10 percent of those who are asked for data refuse to cooperate. Certainly the Justice Department is already sufficiently equipped to handle an uncooperative 10 percent by use of the grand jury or the filing of a formal civil complaint and making use of discovery processes under the Federal Rules of Civil Procedure.

Despite the protestations to the contrary, we are not convinced, human nature being what it is, that the proposed authority would never be abused or would not encourage "fishing expeditions." In view of the broad scope of the authority which would be granted by these bills, it would be an unimaginative antitrust investigator who could not describe the "nature of the conduct" constituting the alleged violation with sufficient breadth to assure the production of a multitude of "pertinent" documents.

It is cold comfort to assert that the reviewing power of the court affords a safeguard to curb any abuse on the part of an antitrust investigator. Our objection goes to the granting of a power susceptible of abuse as this one appears to us to be, and the grant itself is nonetheless objectionable because one is privileged, when subjected to such abuse, to bear the added expense and inconvenience of protecting himself by application to a district court.

Without intending in any way to detract from our opposition to the basic principle embodied in these proposals, we feel it necessary to point out some of the serious deficiencies of the bills before you.

In general they are unbounded in scope, ambiguous in terminology and they invite abuse and tend to hinder rather than expedite the investigative processes. They do not protect against unreasonable demands for documents and they fail in other respects adequately to safeguard and preserve the rights, privileges, and immunities of those upon whom such demands may be served.

The definition of "antitrust law" contained in S. 716 would include the Federal Trade Commission Act and section 3 of the Robinson-Patman Act. Neither of these has ever been included in the traditional definition of the antitrust laws and

should not be considered as such for this purpose or in this fashion. It is noted that S. 1003 contains the same definition of antitrust laws as that contained in the Clayton Act.

S. 716, by authorizing service upon individuals, raises serious questions as to possible conflict with the fourth and fifth amendments to the Constitution, as well as with the Immunities of Witnesses Act, all of which protect the rights of natural persons. By contrast, S. 1003 would limit the issuance of demands to "organizations," which is defined specifically to exclude natural persons.

We find no justifications whatever for the provision found in both bills which would permit service of a demand upon persons or concerns who are neither under investigation nor suspected of any antitrust violations.

By the terms of S. 176, documents produced in compliance with the demand would be required to be made available by the Department of Justice without the consent of the concern which produced the documents to all other agencies charged with the administration or enforcement of any antitrust law. In view of the fact that the Federal Trade Commission and all other such agencies already possess ample investigative powers, these provisions are obviously unnecessary. Furthermore, we believe that business concerns are at least entitled to know which agency or agencies are investigating them and perhaps contemplating commencement of proceedings. S. 1003, on the other hand, would limit the use of such documents to authorized employees of the Justice Department. If, as the proponents asserts, there is a need for such a grant of power to the Justice Department, certainly the use of documents as would be authorized by S. 1003 should satisfy that need.

Both bills are extremely vague in the provisions setting forth what the demand must contain. By requiring only a statement of the general subject matter of the investigations or the nature of the conduct constituting the alleged antitrust violation and the provisions of applicable law, most parties would be left wholly in the dark as to the nature of the alleged offense, and the nature and identity of the documents demanded.

S. 716 would impose undue hardships on concerns served with such demand in that the recipient may be required to produce documents at some place other than its principal place of business. Furthermore, such documents may, after production, be maintained, without consent of the concern which produced them, at points distant from such place of business. It seems entirely unnecessary that the Department of Justice would in any case require custody of relevant documents to any extent or at any place except for examination and copying. In this regard, S. 1003 would only require an organization to make documents available at its place of business during normal business hours for inspection and copying. This would avoid the possibility of a concern being deprived for long periods of time of vital company books and records.

The provisions of S. 716 concerning the return of documents provide no real basis for ascertaining when the original documents themselves must be returned, even though copies have been made. The bill would seem to require perpetual retention of copies, encouraging accumulation of a library of such documents and the natural impetus to the commencement of cases based on ancient history. S. 1003, by requiring only that documents be made available at the place of business, would at least avoid the question of return of the documents themselves. Moreover, the 18-month limitation on the availability of documents in the absence of a court order to the contrary, would offer an organization some protection against unreasonable deprivation of essential records.

The penalty provision of both bills seems to us both unnecessary and unduly harsh. This would pose the possibility of criminal prosecution for wrongly appraising the document as privileged or for innocently carrying out established procedures for the retirement of old records. There is no apparent reason why contempt proceedings would not be adequate for enforcement of such demands.

In summary, we feel that issuance of civil investigative demands by the Justice Department is wholly unnecessary since the vast majority of parties cooperate voluntarily with investigations. Furthermore, the authority proposed to be conferred upon the Attorney General disregards the basic distinctions between the executive and the judicial powers of the Government and would be susceptible of grave abuses.

In any event, both bills, and particularly S. 716, are so defective in both substance and draftsmanship, as to be inappropriate for attainment of the end sought.

We respectfully urge that S. 716 and S. 1003 not be favorably reported by the subcommittee.

STATEMENT OF RICHARD K. DECKER, CHAIRMAN OF THE COMMITTEE ON PRACTICE AND PROCEDURE OF THE ANTITRUST SECTION OF THE AMERICAN BAR ASSOCIATION

The house of delegates of the American Bar Association has, by resolution, authorized the officers and council of the section of antitrust law to recommend to the Congress that legislation be enacted the effect of which is to authorize under appropriate safeguards, the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, in any civil antitrust investigation, to demand the production, at the principal office or place of business of corporations, partnerships, or associations under investigation, for purposes of inspection and copying, of relevant unprivileged documents possessed by them, and to vest the U.S. district court for the district in which such principal office or place of business is located with power to enforce, modify, or set aside such demand.

Two bills are presently being considered by the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary which have as their purpose authorizing the Attorney General to compel the production of documents required in civil investigations for the enforcement of the antitrust laws. These bills are S. 716 introduced by Senator Kefauver and S. 1003, introduced by Senator Wiley. Neither of these bills conforms with all of the recommendations of the American Bar Association. We believe the bill introduced by Senator Wiley, i.e., S. 1003, is in substantial conformance with those recommendations and subject to certain amendments proposed hereinafter we urge approval of S. 1003. We strongly oppose S. 716 for the reasons which will be stated below and we urge its disapproval by this subcommittee.

A draft of a bill containing all of the recommendations approved by the House of delegates of the American Bar Association which are believed to be desirable in legislation granting the Department of Justice the power to demand the production of documents in civil antitrust investigations is attached hereto and made a part of this statement.

THE NEED FOR SUCH LEGISLATION

Adequate investigatory processes are essential for effective antitrust enforcement. Incomplete investigation may result either in the commencement of proceedings which complete investigation would demonstrate to be unwarranted or in the failure to commence proceedings which more thorough investigation would show to be clearly in the public interest.

Where criminal proceedings are contemplated, adequate power exists to compel, through the use of the grand jury subpoena, the production of all documents and testimony necessary to determine whether an indictment should be returned. Similarly, after an indictment has been returned or a civil complaint filed, the Department of Justice has available adequate compulsory process to obtain all documentary and testimonial evidence essential for the trial of the case.

In conducting civil antitrust investigation, however, the Department must either (1) depend upon voluntary cooperation by those under investigation, (2) file a "skeleton" complaint in order to avail itself of the discovery processes afforded by the Federal Rules of Civil Procedure, or (3) under the guise of contemplating criminal proceedings, make use of the grand jury and its powers of subpoena. That the latter two alternatives are undesirable is obvious. As stated by the Judicial Conference of the United States and the Report of the Attorney General's National Committee To Study the Antitrust Laws, no plaintiff should "pretend to bring charges in order to determine whether actual charges should be brought." The use of criminal processes, with their attending stigma, when at the outset only civil proceedings are contemplated, is equally indefensible. Notwithstanding the fact that in many, if not most, cases voluntary cooperation has been sufficient, it is manifest that antitrust enforcement cannot be left dependent upon the voluntary cooperation of those under investigation.

COMMENT ON PROPOSED BILLS

The basic objective of S. 716 (introduced by Senator Kefauver) is to empower the Attorney General and the Assistant Attorney General in charge of the Antitrust Division, to issue and have served a civil investigative demand. With this basic objective, the antitrust section of the American Bar Association is in agreement. In almost every other respect, however, S. 716 fails to conform to the

recommendations of the Attorney General's national committee and to the recommendations of this section. S. 1003, on the other hand, comes much closer to conforming to those recommendations. While there are some aspects of Senator Wiley's bill which we believe should be changed, we believe the procedure prescribed in that bill is much to be desired over that in S. 716. A comparison of the draft bill which is attached hereto and made a part hereof with S. 1003, will disclose the differences which we think are significant and which we think should be incorporated into that bill and into any bill that is passed. Some of these points will be discussed hereafter.

We believe it is desirable to vest the power to issue and to seek judicial enforcement of a civil investigative demand in the Attorney General and in the Assistant Attorney General in charge of the Antitrust Division. Since this would lodge in the executive department considerable power in the nature of a subpoena, it is desirable that this power be exercised with restraint, and that its exercise be surrounded with adequate safeguards against abuse.

We urge that the civil investigative demand be directed only to corporations, partnerships, associations, or other types of business entities but not to a natural person. Inclusion of the individual raises serious questions of possible conflict with the fourth and fifth amendments to the Constitution, as well as with the Immunities of Witnesses Acts, all of which protect the rights of natural persons. In this respect, Senator Wiley's bill provides for a definition of "organization" which excludes a natural person and the term "organization" is then used throughout this bill when referring to those who may be served with a demand. This is an acceptable method of providing for this safeguard as an alternative to the definition of "person" to exclude natural persons which appears in our draft bill. We believe also that the demand should be directed only to those organizations who are under investigation and should not be directed to those who are neither being investigated nor suspected of antitrust violation.

We believe the demand should be authorized to seek only those documents which are "relevant" to the subject matter of the investigation. The language used in S. 716, authorizing a request for documents which are "pertinent" to the investigation, has no accepted meaning, whereas under the Federal Rules of Civil Procedure the courts have had many opportunities to interpret what is "relevant" to a particular subject matter. Since S. 1003, and our draft, provides for application of these rules when not inconsistent with other provisions of the bill, these decisions will be available for guidance. Furthermore, the demand should only be used prior to the institution of a civil or criminal proceeding and should not be available as a substitute for discovery proceedings following the institution of such action. S. 716 does not provide for either of these safeguards.

S. 1003 and the antitrust section propose that the documents sought by the demand be produced or made available for "inspection and copying" at the place of business of the company being served with the demand. S. 716 would require original records to be produced and surrendered, in all likelihood for removal to a point some distance from the principal offices of the concern being investigated. We believe such a procedure is unwarranted. We have substituted for the production and delivery concept a provision that such materials shall be made available for inspection and copying. This is similar to postcomplaint discovery procedure provided by the Federal rules, and similar also to the access to records provision incorporated in antitrust consent decrees for enforcement purposes and will, we believe, serve the purposes of the Antitrust Division without working a hardship on the investigatee. It may also encourage antitrust investigators to take a selective rather than a wholesale approach in drafting the demand. S. 1003 has, for the most part, incorporated these safeguards in its section 3(a). We would be willing to accept the language used in section 3(a) of S. 1003 with the insertion on line 18, of page 2 of that bill of the words "under investigation" following the word "organization."

We believe section 3(b)(1) should provide that the demand state the subject matter of the investigation in some detail. In addition to setting forth the statute and the section or sections thereof under which the investigation is proceeding, the subject matter of the investigation should be set forth as a description of the particular offense involved. The language set forth in our draft in section 3(b)(1) would adequately provide the desirable safeguards and at the same time would not be restrictive on the Antitrust Division. Undoubtedly other language could take care of this situation satisfactorily, and we would agree that our language is not perfect.

The important point here is that 3(b)(1) must, when related to that part of section 3(a) which authorizes the issuance of the demand, create specific standards by which a court can measure the scope of the demand and also from which a company receiving such a demand can determine the return it should make thereto. The company must make some selection of the records it will make available for inspection by the Antitrust Division. It is not possible to do this intelligently unless the demand discloses the nature of the antitrust violation being investigated. A court would need this same information to know whether the demand contained any "unreasonable" or "improper" requirements or whether it encroached upon any recognized "privilege." We feel, therefore, that careful attention should be given to the language used in section 3(b)(1). We do not necessarily mean to say that the proposed language in either S. 716 or S. 1003 will not achieve this purpose. We do not feel that the language we have used in our draft may be a little more explicit and, therefore, more desirable. The same problem exists in 3(b)(2). We believe there is some problem in using the words "class or classes" of documents to be made available and we would prefer that the requirements of this section be directed to the description of the documents themselves with reasonable specificity rather than of the type of document.

We believe the language used in section 3(c) should be broad enough to recognize the rights of investigatees as they exist today in behalf of the corporation which is served with a subpoena duces tecum. (In section 3(c)(1), it is important to have inserted in S. 716 the words "or improper" after the word "unreasonable" in line 3 of page 5. In section 3(c)(2) of S. 716, we think the privilege question is broader than is there provided and should be revised to add the words "or which for any other reason would not be required to be disclosed" after the word "disclosure" in line 7 of page 5. Both of these suggestions are incorporated in section 3(c) of S. 1003. The courts have recognized a distinction between "improper" and "unreasonable" requirements in subpoenas, and we think that this should be preserved as to the demand. Moreover, the courts have recognized that "privileged" documents are not the only ones which should be free from disclosure. For example, it is desirable to incorporate the protection that is accorded to the "work product" of the parties.

In section 3(e) of S. 1003, and in our draft, service of the demand is separated from service of a petition. Section 5 provides for court jurisdiction and power with respect to petitioners. S. 1003, by the use of the defined term "organization" which is referred to above, may be considered to have better language than that in our draft. In any event, we would find the language in section 3(e) of S. 1003 acceptable.

We think it is desirable to have as part of section 3 a provision which would place the burden upon the investigatee of either complying with the demand or going to court to seek relief from its terms. Such a provision appears in S. 1003 as 3(g) and in our draft as 3(f). It does not appear in S. 716. We believe that in the usual case, no other sanctions will be necessary. This is the type of procedure that is applicable to a subpoena duces tecum and we believe the practice there has been found to be workable. When there is failure to comply with the demand, the Attorney General can go into court and get an order enforcing the demand which, if disobeyed, may be punished under contempt procedure. We believe also that the existing statutory provisions (18 U.S.C. 1001) for punishment for concealment of material facts or the obstruction of justice are sufficient penalties, should there be any willful violation of the demand. For this reason we believe there is no need for the "penalty" or "criminal penalty" sections appearing in S. 1003 and S. 716, respectively.

In S. 1003 as in our draft, the procedure of inspection and copying at the principal place of business of the company being served with the demand, is used, and as a result, the Department of Justice will have in its possession copies of documents which it has made during the examinations of the material assembled in response to the demand. Consequently, there would be no need for the cumbersome "custodian" procedure provided for in S. 716. In any event, the "custodian" provided for in S. 716 would be an employee of the Department of Justice and, therefore, subject to the direction and control of the Attorney General. Any independence of action on the part of such a "custodian" would be largely illusory and it is more realistic to make the Attorney General directly responsible for such documentary material. The Office of the Attorney General perpetuates and charging it with such responsibility avoids questions which may arise if a "custodian" has left the employ of the Department or is otherwise unavailable when judicial enforcement of his duties is sought. Our

section 4(a) takes care of this and such a provision should be inserted in S. 1003.

The antitrust section of the American Bar Association disapproves the provisions in both S. 716 and S. 1003 which apparently would authorize perpetual retention of copies of documents produced under a demand. This would not only encourage but would require the accumulation of a library of copies lending natural impetus to the commencement of cases based on ancient history. The Attorney General's National Committee strongly opposed such a practice. The practice would also be contrary to the holding of the Supreme Court in *U.S. v. Wallace & Tiernan Co.* (336 U.S. 793, 801 (1949)). The bill introduced by Senator Kefauver provides no real basis for ascertaining when documents must be returned. Moreover, the concept incorporated in S. 1003 ignores the return of documents and merely provides that at the end of 18 months the investigatee is relieved of the duty of holding the specified documentary material available for inspection and copying. Such a provision does not relieve the burden a demand would place on the investigatee. An investigatee must retain all related documents to those retained by the Department so as to be in a position to meet or explain any charges brought at some subsequent time. As there should be an end to litigation so should there be an end to investigation.

We strongly recommend a requirement that all copies of documents be returned to the company from which they were obtained and that a reasonable period be set in the bill at the end of which such documents must be returned, unless by an order of court upon a showing of good cause that period has been extended. In our draft of a bill this period is 18 months, which coincides with the maximum period of duration of a grand jury.

Copies of documents obtained as a result of the demand should not be disclosed to any one other than authorized employees of the Department of Justice and this restriction on disclosure should extend to the contents of the documents as well as to their physical examination. S. 1003 provides such restriction. S. 716 does not. In view of the fact that the Federal Trade Commission and all other agencies charged by law with the administration or enforcement of any antitrust law already possess plenary investigative powers, access to documents produced under a demand is obviously unnecessary. Moreover, the provisions making such documents available to other agencies are subject to abuse through loose handling and unauthorized disclosure of documentary material so produced. It is our belief that business concerns are at least entitled to know which agency or agencies are investigating them and perhaps contemplating commencement of proceedings. This is not only desirable from a sense of fair play, but it may well be beneficial both to the investigating agency and the company. Since the scope of an investigation being conducted by one agency is not likely to be coincident with that of any other agency, other documents in the possession of an investigated company may well be relevant to a subsequent investigation though they were not to the earlier one. These other documents may place an entirely different light on the documents in the possession of the Government agency conducting the earlier investigation. This may be beneficial to the company and/or this may affect the decisions of the subsequently interested agency.

In our proposal we have drafted section 5 in an effort to clarify the jurisdiction and venue provisions and the use of the petition to enforce or modify the demand. We believe the provisions in our bill and to a large extent, those that appear in S. 1003 are a considerable improvement over the language used in S. 716 and that under the revision, the Department and the investigatee are treated equally and have equal rights and privileges to bring an action to preserve or advance their rights. Sections 5 (a), (b), and (c) of S. 1003 would seem to achieve the purposes of our sections 5 (a), (b), (c), and (d). Our section 5(g) is section 5(d) in S. 1003. S. 716 and S. 1003 provide for a maximum of 20 days within which an investigatee may file a petition attacking the demand. This time is shortened if the return date is less than 20 days. We believe that like the procedure under a subpoena duces tecum the investigatee should be able to attack the demand at any time before the return date and that each demand should provide a reasonable period for the investigatee to assemble the documents for inspection. As with subpoenas this could rarely be less than 20 days and for this reason we believe a maximum of 20 days is too restrictive. Other differences that exist in this section between S. 1003 and our draft are that S. 1003 does not provide for appeal of final orders entered upon a petition nor does it provide for stay of performance under the demand during court proceedings under such a demand. It may be unnecessary to include in this bill a special section providing for ap-

peal of final orders as an appeal would more than likely be available under section 1291 of title 28 of the United States Code irrespective of its inclusion in the bill. It is probably true also that the court would have inherent jurisdiction to stay compliance with a demand pending resolution of questions raised in a petition if the court felt this was desirable. It would seem, however, in the interest of clarity, that both of these sections would be desirable additions to the legislation.

As we have indicated above, we do not believe that section 6 headed "Penalty" in S. 1003 and section 6 headed "Criminal Penalty" in S. 716 are either desirable or necessary. We believe that establishing criminal penalties where a person "with intent to * * * obstruct compliance * * * willfully * * * withholds * * * documentary material" is an unnecessary and unduly harsh provision and we urge that it be deleted. While the intent requirement of the section is some protection to investigatees, the possibility it raises of criminal prosecution for perhaps wrongly appraising a document as privileged or nonresponsive, carrying out established procedures for the retirement of old records, etc., is an unfair burden upon businessmen and their counsel.

If such a penalty provision is, nevertheless, to be included in the legislation it would seem that the language setting the fine for such a violation should read "to a fine not exceeding \$5,000" instead of merely to a fine of \$5,000. The lack of qualifying language might lead a court to conclude that the intention was that the fine must be \$5,000. It is our belief that this is not the intention and that a court could assess a fine below \$5,000.

In S. 1003 and in our draft, the saving provision has been broadened over the language used in S. 716 to make it clear that the description of the antitrust violation investigation of which would be set forth in the demand pursuant to section 3(b)(1) would in no way restrict the type nor scope of proceedings which might be instituted by the Department of Justice at the conclusion of the investigation. In other words, the intent is not to make language used in the descriptive part of the demand language of limitation on the scope of any action or type of action which the Antitrust Division might bring, but is only for the purpose of enabling the investigated company to know what it is being investigated for and to permit intelligent judgments to be formed as to the type and kind of documents which must be made available. This same judgment would have to be made by a court in the event that a petition was filed by either the Attorney General or the investigated company under such demand.

CONCLUSION

As we have pointed out at the outset, and as we hope is evident from the comments and recommendations we have made throughout this statement, the antitrust section of the American Bar Association believes that legislation of this type is desirable and that the Antitrust Division could well use the civil investigative demand procedure to round out its investigative powers.

We do believe, however, that S. 716 does not provide the Antitrust Division with the proper tool, nor does it provide adequate safeguards for the investigated company. We believe that S. 1003 provides a much more desirable procedure and that with the several changes which we have recommended above, we would be willing to accept S. 1003 in lieu of the bill which we have drafted and which is attached and made a part of this statement.

Senator Kefauver, during the hearing that was held on this bill on March 3, 1959, noted in his opening remarks that in his opinion there were three principal differences in substance between S. 716 and S. 1003. These he enumerated as being the provisions in his bill giving the power to the Attorney General to demand documentary evidence from individuals as well as organizations, whereas S. 1003 would exclude individuals. The second being that his bill would permit the Department of Justice to make copies of the documents available to other antitrust agencies, whereas S. 1003 would prevent this. And the third being that S. 716 provides for a "custodian" and S. 1003 does not. As we have indicated above, we believe that the positions taken in S. 1003 are much to be preferred and that the differences between the two bills are real and considerable.

We urgently recommend that S. 1003, amended in the ways in which we have suggested above, should be the bill adopted by this subcommittee.

Respectfully submitted.

SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION,
RICHARD K. DECKER,

Chairman, Practice and Procedure Committee.

(Enclosure.)

A BILL To authorize the Attorney General to compel the production of documentary material required in civil investigations for the enforcement of the antitrust laws, and for other purposes

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

SECTION 1. This Act may be cited as the "Antitrust Civil Process Act of 1959."

DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "antitrust laws" as used herein, is defined in section 1 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (38 Stat. 730, as amended; 15 U.S.C. 12), commonly known as the Clayton Act.

(b) The term "antitrust investigator" means any attorney employed by the Department of Justice who is charged with the duty of enforcing any antitrust law.

(c) The term "person", unless otherwise specified herein, means any corporation, association, partnership, or other legal entity, not including a natural person.

(d) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document in the possession, custody, or control of any person.

CIVIL INVESTIGATIVE DEMAND

SEC. 3. (a) Whenever the Attorney General or the Assistant Attorney General in charge of the Antitrust Division has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material relevant to the subject matter of an antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, execute and issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to make available such documentary material for inspection and copying.

(b) Each such demand shall—

(1) state the subject matter of the investigation, including the particular offense which the Attorney General or the Assistant Attorney General in charge of the Antitrust Division has reason to believe may have been committed, and the statute and section or sections thereof, alleged violations of which is under investigation;

(2) describe the documentary material to be made available thereunder with reasonable specificity so as fairly to identify the material demanded;

(3) prescribe a return date which will provide a reasonable period of time within which the documentary material so demanded may be assembled and made available; and

(4) identify the antitrust investigator to whom such documentary material is to be made available for inspection and copying.

(c) No such demand shall—

(1) contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged violation; or

(2) require the making available of any documentary material which would be privileged from disclosure, or which for any other reason would not be required to be disclosed, if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged violation.

(d) Any such demand may be served by any antitrust investigator or any United States marshal or deputy marshal at any place within the territorial jurisdiction of any court of the United States.

(e) Service of any such demand may be made by—

(1) delivering a duly executed copy thereof to any executive officer of a corporation, association, or other legal entity to be served or to any member of a partnership to be served;

(2) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or other legal entity to be served; or

(3) mailing by registered or certified mail a copy thereof addressed to such partnership, corporation, association, or other legal entity at its principal office or place of business.

A verified return by the individual serving such demand setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) A person upon whom a demand is served pursuant to the provisions of this section shall comply with the terms thereof unless otherwise provided by order of court issued under section 5 hereof.

(g) Documentary material demanded pursuant to the provision of this section shall be made available for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the antitrust investigator identified in the demand.

PRESERVATION AND RETURN OF DOCUMENTS

SEC. 4. (a) The Attorney General shall be responsible for the custody, use, and necessary preservation of any copies of the documentary material made available pursuant to a demand, and for the return thereof as provided by this act.

(b) No copies of material made available pursuant to a demand shall, unless otherwise ordered by a district court for good cause shown, be available for examination or copying by, nor shall the contents thereof be disclosed to, any individual other than an authorized employee of the Department of Justice, without the consent of the person who produced such material: *Provided*, That, under such reasonable terms and conditions as the Attorney General shall prescribe, the copies of such documentary material shall be available for examination and copying by the person who produced such material or any duly authorized representative of such person. Any authorized employee of the Department of Justice may be furnished with such copies of such documentary material as are necessary to the conduct of the investigation for which such material was produced and of any case or proceeding before any court or grand jury involving any alleged antitrust violation.

(c) When copies of any documentary material made available pursuant to a demand are no longer required for use in connection with the investigation for which they were demanded or in a pending proceeding resulting therefrom, or at the end of 18 months following the date when such material was made available, whichever is the sooner, all copies of such material shall be returned to the person who produced it, and such person shall be relieved of the duty to hold such documentary material available for inspection and copying as required by section 3(a); *Provided, however*, That this shall not require the return of such copies of documentary material which have passed into the control of any court; and *Provided further*, That any district court in which a petition may be filed as set forth in section 5 hereof may, upon good cause shown, extend said period of 18 months.

JUDICIAL PROCEEDINGS

JURISDICTION OF DISTRICT COURT

SEC. 5. (a) The U.S. district courts are vested with jurisdiction to hear and determine any petition filed under this act and to issue upon good cause shown any order which justice may require, including, without limiting the generality of the foregoing, the following:

(1) An order enforcing compliance with a demand issued hereunder;

(2) An order modifying or setting aside any such demand;

(3) An order requiring the Attorney General or the Assistant Attorney General in charge of the Antitrust Division to perform any duty imposed upon either or both of them by the provisions of this act;

(4) An order extending the time within which any act must be done, which is allowed or required to be done by this act, pursuant to a demand issued hereunder, or by previous court orders.

(b) A petition to enforce compliance with any demand served upon any person under section 3 may be filed by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division in any U.S. district court in which such person has its principal office or place of business, or in such other district as the parties may agree.

(c) A petition to modify or set aside a demand issued pursuant to section 3 or to require the Attorney General to perform any duty imposed by the pro-

visions of this act may be filed by the person upon which such demand was served in any U.S. district court in which it has its principal office or place of business, or in such other district as the parties may agree.

(d) All other petitions in connection with a demand may be filed in any U.S. district court in which the person upon whom such demand was served has its principal office or place of business, or in such other district as the parties may agree.

APPEALS

(e) Any final order entered upon a petition under this act shall be subject to appeal pursuant to section 1291 of title 28 of the United States Code. Compliance with a demand may be stayed pending appeal, in whole or in part, only by order of court upon good cause shown.

STAY OF PERFORMANCE PENDING COURT PROCEEDINGS

(f) The time allowed for the production of documentary material or the performance of any other act required by this act shall not run during the pendency in a U.S. district court of a petition under this act.

RULES APPLICABLE

(g) To the extent that such rules may have application and are not inconsistent with this act, the Federal Rules of Civil Procedure shall apply to any petitions under this act.

SAVING PROVISION

SEC. 6. Nothing contained in this act shall impair the authority of the Attorney General or any antitrust investigator to (a) lay before any grand jury impaneled before any district court of the United States any evidence concerning any alleged antitrust violation, (b) to invoke the power of any such court to compel the production of any evidence before any such grand jury, (c) file a civil complaint or criminal information alleging an antitrust violation which is not described in section 3(b)(1) hereof, or (d) institute any proceeding for the enforcement of any order or process issued in execution of such power, or for the punishment of any person, including a natural person, for disobedience of any such order or process by any person.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
New York, March 20, 1959.

HON. ESTES KEFAUVER,
U.S. Senate,
Senate Office Building,
Washington, D.C.

DEAR SENATOR KEFAUVER: It was good of you to leave the record open for a statement of the committee on trade regulation of the Association of the Bar of the City of New York on Senate bill 716.

At the meeting of our committee last night the members were unanimous in opposition to Senate bill 716. However, a vote as to which of two reports to adopt was taken, and the committee was evenly divided.

You will find enclosed a copy of each of these two reports: One opposes both Senate bill 716 and Senate bill 1003; the other opposes Senate bill 716 but favors Senate bill 1003. Under the circumstances the committee does not take any position on Senate bill 1003.

We are most grateful to you for your kind letters of March 9 and 18.

Sincerely,

E. NOBLES LOWE,
Chairman, Trade Regulation Committee.

PROPOSED REPORT OPPOSING S. 716 AND S. 1003, MARCH 19, 1959

The committee on trade regulation of the Association of the Bar of the City of New York submits this report to the Subcommittee on Antitrust and Monopoly Legislation of the Senate Committee on the Judiciary, to express its views in opposition to S. 716 and S. 1003, bills providing for an Antitrust Civil Process Act. The committee is opposed to both bills and will set forth the reasons for

its opposition principally in terms of the provisions of S. 716, now before the subcommittee.

The committee understands that the primary reason avouched by the supporters of the proposed legislation for its passage is the need of the Antitrust Division of the Department of Justice to obtain information before the institution of civil litigation, to obviate the use by the Antitrust Division of grand jury proceedings to obtain such information. The committee agrees with the Attorney General's National Committee To Study the Antitrust Laws that "the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the Department's policy of proceeding criminally only against flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality." The committee believes, however, that the present proposals are fundamentally defective in so many important respects that their passage would be a grave mistake. The committee recognizes that, in a few instances, the Antitrust Division has found it difficult to obtain full discovery before the institution of civil proceedings; the committee believes that such difficulties have not been shown to be sufficiently serious to justify enactment of the present proposals with their far-reaching deficiencies.

The primary objection of the committee to these proposals for a civil investigative demand is that such proposals, which purport to provide investigative machinery in addition to grand jury proceedings, voluntary disclosure and civil discovery, disregard the carefully framed distinction between the executive and judicial powers secured by our form of government. In this respect, the proposed legislation goes far beyond the scope of grand jury investigative proceedings since the latter are subject to judicial safeguards which have become well defined and recognized throughout the years. It is axiomatic that a grand jury may be discharged by the courts, may be refused process or expenses, and is subject to the supervision of the courts (with respect to considerations of relevancy, materiality, reasonableness, time, and scope) in a manner not clearly secured by the proposed legislation. The proposed legislation (both S. 716 and S. 1003) would confer upon the executive branch of the Government, without adequate safeguarding of individual rights, many of the powers previously conferred upon the judiciary. In our view, an insufficient showing has been made for the necessity of this legislation in the antitrust field to warrant the extremely dangerous and unique precedent which this legislation would establish in the area of regulation of business by the executive arm of the Government.

It should be further noted that both bills expressly provide (in sec. 7) that the Attorney General may still have recourse to grand jury proceedings with respect to the very matters which would be the subject of any demand.

We note particularly that S. 716 would authorize service upon "natural" persons. The provision wholly ignores the recommendation of the Attorney General's National Committee that any use of the demand should be limited to obtaining documents from corporations, partnerships, and associations. Serious questions are raised as to possible conflict with the fourth and fifth amendments to the Constitution and the Immunities of Witnesses Act.

Section 3 of S. 716 is further inadequate in our view in not making clear that all material sought must meet the test of relevancy, recommended by the Attorney General's National Committee and given definite meaning under the Federal Rules of Civil Procedure. In addition, section 3(b) of S. 716 is insufficient in not requiring that each demand state the "particular antitrust offenses under investigation." Without such an additional safeguard, the passage of this legislation might well encourage "fishing expeditions" on the part of the antitrust agencies.

The committee feels that, from the point of view of companies who may be served with such demands, S. 716 is gravely deficient in (1) requiring the delivery of materials sought to a place outside the offices of the company or individual, and (2) providing that the "custodian" shall take physical possession of the documents in question. These provisions, of themselves, could seriously impede the conduct of the business of the company or individual under investigation and would in all probability cause unreasonable hardship to the company or individual. Both bills are seriously deficient in taking insufficient account of the serious inconvenience to business which authorization of this type of "fishing expedition" will cause. For example, both S. 716 and S. 1003 would require a concern to segregate vital documents and records for as long as 18 months to await inspection and copying.

The committee notes briefly its principal objections to the proposed bills as follows:

(1) S. 716 would appear to be deficient in providing that the proposed procedures would apply to "any statute hereafter enacted" relating to antitrust enforcement. This is viewed by the committee as constituting an unreasonable delegation of authority and would appear to reflect improper drafting.

(2) The committee sees no reason why agencies of the United States other than the Department of Justice should be accorded use of the documents in question, in view of the broad investigative powers already conferred upon the Federal Trade Commission and considerations of fairness to any company or individual in informing them of the agency or agencies investigating their business.

(3) In providing for the designation of an "antitrust document custodian" the proposed legislation improperly delegates authority which in any event should be vested only in the Attorney General in view of the far-ranging nature of the authority.

(4) In providing that any motions to modify or set aside a demand must be made before the return date specified in the demand, section 5(b) enables the Government, by specifying an early return date, to deprive the respondent of any real opportunity to move against such demand. In addition, the bills omit any provision for tolling the demand during the pendency of a petition to modify or set aside the demand to avoid possible default.

(5) This committee regards the penalty provisions of the proposed bill as altogether unnecessary and unduly harsh. There is no reason why contempt proceedings would not be adequate if the legislation is enacted.

We set forth the above comments on the inadequacy of the bills as presently drafted to reenforce our recommendation that the bills should not be passed. We do not believe that a sufficient case has been made for the necessity or propriety of this legislation in view of the extremely dangerous precedent which it would establish in eliminating judicial safeguards established by our system with respect to the powers of the executive.

Although grand jury proceedings have been abused in the past, one fundamental function of the grand jury should be kept in mind. As noted by one commentator :

"The grand jury serves two great functions. One is to bring to trial persons accused of crime upon just grounds. *The other is to protect persons against unfounded or malicious prosecution by insuring that no criminal proceeding will be undertaken without a disinterested determination of probable guilt.*" [Stressing supplied.] (Orfield, "The Federal Grand Jury", 22 F.R.D. 343 (1958).)

In view of the committee, the proposed demand, because of its lack of safeguards against the executive, fundamentally ignores this second function and role of the grand jury.

The committee therefore recommends that both proposed bills should be disapproved by the subcommittee.

PROPOSED REPORT OPPOSING S. 716 BUT FAVORING S. 1003, MARCH 19, 1959

The committee on trade regulation of the Association of the Bar of the City of New York submits this report to the Subcommittee on Antitrust and Monopoly Legislation of the Senate Committee on the Judiciary to express its views in approval of S. 1003 and in opposition to S. 716.

In view of the statement of Assistant Attorney General Victor R. Hansen before your subcommittee on March 3, 1959, expressing the preference of the Department of Justice for S. 1003, this committee will not elaborate on the many objections which it has to S. 716. While he did not oppose S. 716, the reasons he gave for preferring S. 1003 indicate a recognition of those objections. Among the objectionable provisions in S. 716 not contained in S. 1003 are (1) the inclusion of "natural" persons among those subject to service of a demand, (2) it did not sufficiently require a statement of the particular antitrust offenses under investigation, (3) it required the delivery of materials sought to a place outside the offices of the company which might seriously impede the company's operations, (4) it provided that a "custodian" take physical possession of the material, and provided no time limit for their return.

This committee considers the omission of those objectionable features from S. 1003 of greatest importance. While many companies voluntarily respond to requests for documents, it is realized that the Department of Justice needs some procedure for those cases where voluntary responses are not given. S. 1003 provides sufficient machinery for that purpose, while permitting companies