Department of Justice

STATEMENT OF ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, BEFORE THE ANTITRUST SUBCOMMITTEE, HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY ON H.R. 6689, AUGUST 23, 1961

I appear here today in response to the request of your chairman, Congressman Celler, to discuss H.R. 6689, a bill now pending before your Committee. I am grateful for the opportunity to present the Justice Department's views on this bill. We believe that the discovery device which it would create is urgently needed.

The United States Supreme Court has called the Sherman Act a "charter of freedom." Certainly, it is just that. The principles of free enterprise which the antitrust laws are designed to protect and vindicate are economic ideals that underlie the whole structure of a free society. Since the passage of the Sherman Act in 1890, the Congress has continually responded to the need to effectuate these principles. The Clayton Act of 1914, the Robinson-Patman Act of 1936, the Celler-Kefauver Act of 1950, and other Acts, have increased the protection the law affords our system of competitive free enterprise. The Department of Justice realizes that it has no more important function than enforcing these laws. However, we find ourselves hampered in our enforcement program because we lack certain vital tools of investigation.

There cannot be an effective antitrust program unless the means of investigation are thorough and effective. In recent years, antitrust has faced increasingly serious difficulties in this regard. Antitrust violators have become more sophisticated. In the recently discovered price fixing conspiracy in the electrical industry, for example, the conspirators used elaborate codes to communicate with each other, and destroyed whatever notes and memoranda were not essential to their operations. With its tracks carefully covered, this conspiracy was able to go on for years. At one time, American corporations generally allowed antitrust investigators free access to their files. That policy of compliance with the Department of Justice has undergone a marked change in recent years. We are submitting to the Committee today summaries of recent antitrust investigations which describe the sort of situation which occurs more and more frequently. The Department's requests for information or for access to company files are met with stalling and hedging tactics and often with flat refusals. As these summaries will indicate, some companies have now adopted a policy of submitting information or documents only under subpoena.

In any investigation into criminal violations of the Sherman Act, the Department can utilize the Grand Jury and its subpoena duces tecum to compel the production of pertinent material.

In such a case our investigation can proceed effectively. In many other cases, it cannot. The Clayton Act, as amended by the Celler-Kefauver Act is not a criminal statute and the Grand Jury is not available to us in investigations under this Act. In addition, there is an important category of Sherman Act cases in which we cannot use the Grand Jury.

This was declared by the Supreme Court's decision in United States v. Procter and Gamble, 356 U.S. 677 (1958). The Court there held that it was an abuse of process to use the Grand Jury where there was no intention to bring a criminal case. Thus, when we do not contemplate criminal sanctions for antitrust violators, we must depend upon voluntary compliance with requests for documents.

The class of cases affected by the Procter and Gamble decision is every bit as important as the criminal antitrust case. Many Sherman Act violations are best remedied by civil suit alone. A companion criminal case often delays the course of a civil suit. Thus, where it is essential that the civil remedies of injunction or divestiture be obtained quickly, a criminal case may be inadvisable. In other situations, the evidence uncovered may not be strong enough to meet the strict burden of proof in criminal cases. The conduct uncovered may not indicate such wilful disregard for the public interest that the stigma of a criminal conviction is warranted.

In all of these cases, important as they are, we are now unable to use the Grand Jury.

The Procter and Gamble decision threatens to have another serious effect on our enforcement program. We face serious harassment where we recommend to a Grand Jury that an indictment not be returned and then file a civil suit relating to the same subject matter. This happened recently in United States v. Carter Products, Inc., a civil case filed in the Southern District of New York in January 1960. Defendants alleged that the decision not to ask for an indictment was made before the termination of the Grand Jury proceeding. They charged an abuse of process and filed interrogatories, noticed depositions and subpoenaed thirteen attorneys and officials in the Justice Department, including a former Attorney General. A substantial amount of time has already been spent on these proceedings and related motions. Considerably more time will be spent before this phase of the litigation is disposed of. None of this is at all concerned with the merits of the case, and it will contribute nothing to a determination of the merits. As long as the Grand Jury is the only means available to compel the production of evidence, such harassment and delay will continue to occur in civil antitrust litigation.

But this is just one unpleasant side effect of our dilemma. The effect on our antitrust investigations is even more serious because we have no sure way to obtain evidence. Investigations under the Clayton and Celler-Kefauver Acts are particularly affected since these cases require extensive proof of economic facts to define lines of commerce and show production and sales activity. Very often, the only reliable information on these matters is in the files of companies in the industry being investigated. If these companies do not cooperate with us, and often they do not, it is very hard to gather enough evidence to determine whether suit is warranted, or to bring suit where we think it is required. We encounter the same difficulty in many Sherman Act investigations. I am sorry to say that we have had to put investigations aside or drop them completely because we simply could not get reliable sources of information. The seriousness of such a situation is obvious. The bill now before you, H.R. 6689, is designed to eliminate the serious weakness which now exists in the Department's investigative procedures. It does just this and with fairness both to the parties investigated and the Government. The bill would empower the Attorney General and the Assistant Attorney General in charge of the Antitrust Division to issue civil investigative demands for documentary material pertinent to antitrust investigations. Such demands could be directed

only to corporations and not to individuals. These demands would have to state the conduct under investigation and the provisions of law applicable. They would have to describe the documents to be produced with such definiteness that they could be fairly identified. These civil investigative demands would be subject to the same limitations of reasonableness and privilege as those imposed on Grand Jury subpoenas duces tecum. These safeguards insure that this new investigative tool could not be used to harass. The bill's purpose is simply to make available to the Justice Department in civil antitrust cases the same discovery powers it now has in criminal investigations.

This civil investigative demand bill is procedural in nature. I am sure that this will not lead you to understimate its importance. The pressure to compromise the principle of our antitrust laws has never been greater than it is today. The tendency of big business to merge and to concentrate is increasing. There is also disturbing evidence that a significant segment of our business community has not adhered to the principle of competitive enterprise on which these laws are founded. Recent antitrust cases, and investigations by this Committee and its counterpart in the Senate, have helped to educate the public concerning the antitrust laws -- that they exist and that they mean what

they say. But the effect of the laws, moral and economic, will suffer if they are not quickly and effectively enforced.

The need for a civil investigative demand has been widely recognized. In 1955 the Attorney General's Committee to Study the Antitrust Laws recommended the enactment of similar legislation. It was also recommended by the previous Administration. The American Bar Association has endorsed the principle of this legislation.

In conclusion, I respectfully urge the Committee to use its every effort on behalf of this bill. Its enactment would have a great effect in preserving the vitality and effectiveness of the antitrust laws.