

# Calendar No. 1071

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1st Session      }

SENATE

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REPORT  
No. 1090

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AUTHORIZING THE ATTORNEY GENERAL TO COMPEL THE PRODUCTION OF DOCUMENTARY EVIDENCE REQUIRED IN CIVIL INVESTIGATIONS FOR THE ENFORCEMENT OF THE ANTITRUST LAWS

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SEPTEMBER 20, 1961.—Ordered to be printed

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Mr. KEFAUVER, from the Committee on the Judiciary, submitted the following

## R E P O R T

[To accompany S. 167]

The Committee on the Judiciary, to which was referred the bill (S. 167) 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, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

### AMENDMENTS

Amendment No. 1: On page 1, line 6, strike the words "As used in" and insert in lieu thereof the words "For the purposes of".

Amendment No. 2: On page 4, line 9, strike out the word "pertinent" and insert in lieu thereof the word "relevant".

Amendment No. 3: On page 4, line 10, insert immediately following the word "may" the following:

, prior to the institution of a civil or criminal proceeding thereon,

Amendment No. 4: On page 4, line 23, strike the word "produced," and insert in lieu thereof the words "made available for inspection and copying or reproduction; and"

Amendment No. 5: On page 4, lines 24 and 25, strike the words "evidence is to be delivered; and" and insert in lieu thereof the words "material shall be made available."

Amendment No. 6: On page 5, lines 1 and 2, strike all of lines 1 and 2.

Amendment No. 7: On page 6, line 23, strike the word "deliver" and insert in lieu thereof the word "make".

**2 EVIDENCE FOR ENFORCEMENT OF ANTITRUST LAWS**

Amendment No. 8: On page 6, line 23, after the word "material", insert the words "available for inspection and copying or reproduction."

Amendment No. 9: On page 6, line 24, insert after the words "at the" the word "principal".

Amendment No. 10: On page 6, lines 24 and 25, strike the words "specified therein" and insert in lieu thereof the words "of business of such person."

Amendment No. 11: On page 6, line 25, insert after the word "custodian" the words "and such person."

Amendment No. 12: On page 7, line 1, insert after the word "may" the words "agree and".

Amendment No. 13: On page 7, lines 3 through 14, strike all, beginning with the words "No such" on line 3 and through the word "expense" on line 14, and insert in lieu thereof the sentence:

Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

Amendment No. 14: On page 7, lines 20 and 21, strike the words "by any individual who is entitled,"

Amendment No. 15: On page 8, beginning with the comma on line 3, strike all through the word "Congress" on line 6; on page 9, line 5, strike the comma and insert "or"; on page 9, line 6, strike the words "or any committee of Congress,"

Amendment No. 16: On page 10, line 16, insert after "section 3" and before the comma the following:

or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material,

Amendment No. 17: On page 10, line 21, strike the words "such demand" and insert in lieu thereof the words "this Act."

Amendment No. 18: On page 11, lines 7 and 8, strike the words "the office of the custodian designated therein is situated" and insert in lieu thereof the words "such person resides, is found, or transacts business".

Amendment No. 19: On page 11, line 10, insert after the sentence ending with the word "demand" a new sentence as follows:

The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court.

Amendment No. 20: On page 11, line 14, after the word "constitutional" add the words "or other legal".

Amendment No. 21: On page 12, following line 7, insert the following new subsection:

(e) 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.

Amendment No. 22: On page 12, beginning with line 9, strike all of Section 6 and insert in lieu thereof the following new section:

SEC. 6(a). Section 1505, Title 18, of United States Code is amended to read as follows:

“§ 1505. Obstruction of proceedings before agencies and committees.

“Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

“Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

“Whoever, with intent to avoid, evade, prevent or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

“Whoever 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 and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

“Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.”

(b) The analysis of chapter 73 of title 18 of United States Code is amended so that the title of § 1505 shall read therein as follows:

“1505. Obstruction of proceedings before agencies and committees.”

#### PURPOSE OF THE AMENDMENTS

The first amendment is to assure that the acts included in “antitrust laws” in the bill are only for the purposes of this bill and it does not make such acts “antitrust laws” for any other purposes.

The bill, as amended, makes certain that civil demands are to be used prior to the institution of a civil complaint, criminal information, or indictment and are not to replace the Federal Rules of Procedure subsequent to the institution of such proceedings.

As revised by amendments 4 through 13, the bill provides that the demanded material shall be made available for inspection and copying or reproduction to the custodian at the principal place of business of the person on whom the demand is served or such other place as the custodian and such person agree to. It also provides for agreements

permitting the substitution of originals of the demanded material in lieu of copies or reproductions.

Amendment 15 strikes from the bill the availability to the Judiciary Committees of both Houses of material which is obtained by the Department of Justice under the act. It was believed that the subpoena power of Congress was sufficient to obtain such material independently.

The bill, as amended by amendment 18, places the jurisdiction of a petition seeking to modify or set aside a civil demand in the district court for the judicial district in which the person filing the petition resides, is found or transacts business. By amendment 19, the bill provides that the time allowed for compliance with the demand in whole or in part as deemed proper by the court shall not run during the pendency in the court of such a petition.

Amendment 21 makes the Federal Rules of Civil Procedure applicable to any petition provided for in the bill unless any rule is inconsistent with the provisions of the bill.

Amendment 22 contains a redraft of the criminal penalties, placing them in section 1505 of title 18, United States Code.

#### PURPOSE

The purpose of the proposed legislation, as amended, is to enable the Attorney General or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice to obtain documentary evidence needed in civil investigations for the enforcement of the antitrust laws in civil cases.

To accomplish this the legislation would give to the Attorney General or the Assistant Attorney General in charge of the Antitrust Division the authority to issue a civil investigative demand requiring any person, other than a natural person, to produce documentary material for examination whenever he has reason to believe that any person may be in possession, custody, or control of such material pertinent to any civil antitrust investigation. The legislation would require such a demand to be in writing and to set forth the nature of the conduct constituting the alleged antitrust violation which is under investigation and the applicable provision of law; to describe the documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified; to prescribe a return date for compliance with the demand which would provide a reasonable period of time for the assembling and production of the material; and to identify the custodian designated in the Department of Justice to whom such material is to be delivered. Section 4(b) beginning on page 6, line 22, as amended, provides that the material shall be made available for inspection and reproduction to the custodian at the principal place of business of the person from which it is demanded, or at such other place as such person and the custodian may agree in writing. Such person may upon written agreement with the custodian substitute for copies of all or any part of the demanded material originals thereof.

The bill provides that the demand may be tested in a district court for the district in which the person designated in the demand is situated by the filing in such court of a petition for an order of such court modifying or setting aside such demand. The reasonableness of the demand would be determined upon the same test as the reasonableness

of the requirements 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 violations. The demand may not require the production of any material which would be privileged from disclosure if the same material was demanded by a subpoena duces tecum in aid of a grand-jury investigation of such alleged antitrust violations.

Section 5(b), beginning on page 11, line 3, as amended, provides that such a test may be by a petition filed in the district court of the United States in the judicial district within which the person on whom the demand is made resides, is found, or transacts business within 20 days after the service of the demand. The time allowed for compliance with the demand in whole or in part as deemed proper by the court shall not run during the pendency of the petition in the court.

The proposed legislation provides for service of the civil demand and return of service in manners similar to that provided for service of complaints in civil cases in Federal district courts.

The Assistant Attorney General in charge of the Antitrust Division would be required to designate an antitrust investigator as custodian of the documents required to be produced under any civil demand. Responsibility for the physical possession and control of the documents after delivery until they are returned to the person by whom they were produced is placed on the custodian designated in the civil demand, or his designated successor. While in the custodian's possession the material may be made available only to a duly authorized officer, member, or employee of the Department of Justice or any antitrust agency or to the person who produced such material or any duly authorized representative of such person.

Such material may be used before any court, grand jury, or antitrust agency in any case or proceeding involving any alleged antitrust violation. Upon the conclusion of any such case or proceeding, such documents produced (not including copies made by the Department of Justice) which have 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, shall be returned by the custodian to the person who produced the documents. If no case or proceeding has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, the person producing the documentary evidence may demand in writing the return of all documents so produced by such person.

The bill provides for the enforcement of civil investigative demands. Whenever any person fails to comply with such a demand duly served upon him, or refuses to surrender originals in instances in which satisfactory reproductions cannot be made, the Attorney General may file in the district court of the United States for any district in which such person resides, is found, or transacts business, a petition for an order of such court for the enforcement of such demand and any final order entered by the district court shall be subject to appeal pursuant to section 1291 of title 28 of the United States Code. Disobedience to any final order entered by the court shall be punished as a contempt thereof. The bill also provides that the duties of the custodian of any documentary material delivered by any person in compliance with such a demand may be enforced by such person by the filing of a petition in the district court for the district within which the office

of such custodian is situated for an order of such court requiring the performance by such custodian of any duty imposed upon him by the bill.

Any obstruction of the antitrust civil process as provided in the bill would be punishable by a fine of not more than \$5,000, or imprisonment for not more than 5 years, or both. This is accomplished in the bill by amending chapter 73 of title 18 of the United States Code (relating to obstruction of justice). This amendment would require that the obstruction be done with—

intent to avoid, evade, prevent, or obstruct compliance in whole or in part, by any person with any civil investigative demand—

made pursuant to this bill.

#### STATEMENT

The Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary held public hearings on the proposed legislation on June 7, 1961, and held the record open after those hearings for 1 week for the filing of statements of interested persons and organizations.

#### *History*

Legislation similar to that provided in this bill has been recommended in the Economic Reports by the President to the last four Congresses.<sup>1</sup> President Kennedy and Attorney General Robert Kennedy have asked that this antitrust enforcement tool be given to the Department of Justice. In its second progress report, issued December 31, 1958, the Cabinet Committee on Small Business reiterated its support of legislation giving powers similar to those provided in this bill to the Attorney General which it had first approved in its progress report of August 7, 1956, at page 9.

Bills to carry out these recommendations were presented in the 84th and 85th Congresses.<sup>2</sup> Neither of these bills was acted upon. The Attorney General, in letters under date of February 3, 1959, to the Vice President as Presiding Officer of the Senate and the Speaker of the House, recommended that legislation be passed authorizing the Attorney General to make civil investigative demands for the production of evidence in civil antitrust cases in order to strengthen the antitrust laws. Pursuant to the recommendation of the administration, Senator Estes Kefauver introduced S. 716, and Senator Alexander Wiley introduced bill S. 1003 which was similar to S. 716 in providing authority to the Attorney General to obtain documentary evidence in civil antitrust investigations by the use of civil investigative demands.

In public hearings before the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee on August 5, 1958, Judge Victor R. Hansen, Assistant Attorney General in charge of the Antitrust Division, testified that the antitrust laws and their enforcement would be greatly strengthened by the passage of legislation affording such authority to the Attorney General. Judge Hansen further testified that he would be satisfied with either of the two bills. The Chairman of the Federal Trade Commission stated that authority such as that provided in this legislation is not only essential to properly prepare

<sup>1</sup> "Economic Report of the President," January 1956, p. 79; January 1957, p. 51; January 1958, p. 64; January 1959, p. 53.

<sup>2</sup> H.R. 7309, 84th Cong., 1st sess., and S. 2120, 85th Cong., 2d sess.

complaints but its exercise is in the public interest in avoiding the precipitous issuance of complaints in instances where fuller developed facts show that complaints would not be warranted. He further stated that—

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.

S. 716, as amended in the committee and on the floor of the Senate by Senator Dirksen, was passed by the Senate, but was not acted on by the House. S. 167 as introduced in this Congress is identical with S. 716.

Judge Lee Loevinger, Assistant Attorney General in charge of the Antitrust Division, testified in public hearings before the subcommittee:

Lack of an effective tool of investigation causes even more than a waste of time and money. It impairs the program of antitrust enforcement. \* \* \* The passage of this bill will provide an important and much needed improvement in the enforcement of the antitrust laws.

The Chairman of the Federal Trade Commission, Mr. Paul Rand Dixon, stated the Commission is of the opinion that it would be desirable and in the public interest for the Attorney General to be given the authority provided in this bill.

*Need for such legislation*

Under existing law, when the Department of Justice believes that the antitrust laws are being violated and that a civil case is more appropriate than criminal prosecution, and further facts with respect to the violation are needed, it must follow one of four courses. It may undertake to obtain the cooperation of prospective violators in agreeing to furnish evidence against themselves. This is an unsatisfactory method of enforcement since it leaves the public interest in the enforcement of antitrust laws subject to the will of violators of those laws. Judge Loevinger placed in the record of hearings many instances of investigations by the Antitrust Division in which voluntary cooperation was denied and in which the authority of this bill was needed.

The Department may hold a grand-jury investigation to obtain evidence to be used in a civil case. This appears to be a harsh method for the procurement of civil evidence in the enforcement of the antitrust laws. In addition to the delay and inconvenience for the Government, there may be embarrassment and stigma caused by the Department being required to use grand-jury process for the development of civil evidence. The Assistant Attorney General pointed out that the Supreme Court held, in *United States v. Procter and Gamble* (356 U.S. 677 (1958)), that it is an abuse of process to use a grand jury in an antitrust investigation where there is no intention to bring a criminal case. Third, the Attorney General could request the Federal Trade Commission to conduct an investigation in order to obtain the evidence upon which the Department of Justice would proceed in a civil case. It is clear that the consistent use of this means by the Department of Justice to enforce the antitrust laws in civil cases

would entail delay in action by the Department and greatly encumber the work of the Federal Trade Commission, as well as disrupt the orderly use by the Federal Trade Commission of its staff and funds.

Without the authority provided in this legislation, the Department must use one of the above unsatisfactory methods of obtaining evidence or be placed in the position of filing a civil complaint without sufficient prior information as to the exact nature of the violations and without certainty that sufficient evidence existed to enable a successful prosecution of a civil case. After the filing of such a civil complaint, resort could be had to compulsory discovery process under the Federal Rules of Civil Procedure, such as interrogatories, motions to produce documents, depositions, etc. The Rules of Civil Procedure, however, do not come into play until after the complaint is filed.

The Attorney General's National Committee To Study the Antitrust Laws, in its report on March 31, 1955, page 345, stated:

- ✓ 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.

In discussing the need for legislation such as that provided in this bill, the Attorney General's committee recognizes that antitrust cases are usually extensive and complicated cases. Such cases often involve large and complicated industries and extensive dealings in those industries. Effective enforcement necessarily requires extensive factual information and knowledge of the industry and the conduct within the industry before suit is filed. At pages 343-345 the report of the committee states:

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.

\* \* \* \* \*

Thus the Department cannot utilize them [Rules of Civil Procedure] to determine whether 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."<sup>3</sup> These rules "were not intended to make the courts an investigatory adjunct to the Department of Justice."<sup>4</sup>

<sup>3</sup> Judicial Conference of the United States, "Report on Procedures in Antitrust and Other Protracted Cases," 13 F.R.D. 62, 67 (1951).

<sup>4</sup> Id., at p. 67.

The proposed legislation would place the Department of Justice in position to obtain such evidence as would be available. Upon the basis of such evidence it could determine whether the belief which the Attorney General had that there had been a violation of the antitrust laws was in fact well founded or that no case should be filed. Thus the statement of 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" could be met without detriment to the enforcement of the antitrust laws in civil cases. It is evident that the effects of the bill would be to expedite the obtaining of proper information necessary to a determination of whether charges should be brought without increasing court congestion and unnecessary expenses to parties who are believed to have violated the antitrust laws. We accept the conclusion of the Judicial Conference that present civil investigative machinery is inadequate for effective antitrust enforcement.<sup>5</sup>

The Federal Trade Commission has had similar discovery power since the passage in 1914 of the Federal Trade Commission Act (secs. 6 and 9).

It appears to this committee that S. 167, as amended, would be effective legislation in meeting the problem recognized by the President, the Judicial Conference and the Attorney General's National Committee.

The bill would provide ample power to the Attorney General and the Assistant Attorney General in charge of the Antitrust Division to obtain the evidence from any legal entity which is believed to be in possession of evidence of a violation of the antitrust laws for the purpose of investigating and prosecuting civil violations in civil cases. This legislation would give adequate court remedies to both the Government and those upon whom civil investigative demands are served. The rights of those who produce documents pursuant to such demands and the preservation of their material are fully protected by the provisions of the bill and the enforcement of those rights is assured through proper court action. The civil demands may not go further than the Government could go in subpenas duces tecum issued in aid of grand jury investigations, thereby protecting those to whom civil demands are issued against any unlawful search and seizure by the Government. The validity of the demands made by the Attorney General or the Assistant Attorney General can be examined and determined in the courts whenever any person upon whom such a demand has been served believes that his constitutional or other legal rights have been violated, that the terms of the civil demand are unreasonable, or requires privileged material.

The committee is in agreement with the Department of Justice and the Federal Trade Commission that necessary authorization be given to the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws. The committee believes that the approach taken by this legislation will aid materially in enforcement of the antitrust laws. Accordingly, the committee recommends favorable consideration of S. 167, as amended.

Attached hereto and made a part hereof are the reports on S. 167 from the Department of Justice and the Federal Trade Commission.

<sup>5</sup> Ibid.

DEPARTMENT OF JUSTICE,  
OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
*Washington, D.C., April 25, 1961.*

Hon. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (S. 167) 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.

The Department of Justice does not have the authority to compel the production of documents necessary for the determination of whether or not civil antitrust actions should be instituted. It must depend upon voluntary cooperation of prospective defendants. This is especially true with respect to mergers under section 7 of the Clayton Act. Obviously, proper and effective enforcement of the antitrust statutes requires full and comprehensive investigation before formal proceedings are instituted. The purpose of the bill is to provide the Attorney General with authority, now lacking, to obtain documentary evidence needed in civil investigations for the enforcement of the antitrust laws in civil cases.

The bill would provide that 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.

The bill also provides for the designation of an antitrust investigator to serve as antitrust document custodian. While in the custodian's possession the material may be made available only to a duly authorized officer, member, or employee of the Department of Justice or any antitrust agency and to the person who produced such material or any duly authorized representative of such person, but nothing in the bill shall prevent the Attorney General from making available the material for examination by the Committee on the Judiciary of each House of the Congress.

Whenever any person fails to comply with such a demand duly served upon him, the Attorney General may file in the district court of the United States for any district in which such person resides, is found, or transacts business, a petition for an order of such court for the enforcement of such demand, and any final order entered by the district court shall be subject to appeal pursuant to section 1291 of title 28 of the United States Code.

Any obstruction of the antitrust civil process as provided in the bill would be punishable by a fine of not more than \$5,000, or imprisonment for not more than 5 years, or both.

The need for the authority provided by this bill is well recognized. The provisions of the bill are practical, are fair to all concerned, and it is my view that it will provide a much needed and a most effective antitrust enforcement tool.

The Department of Justice urges the early enactment of the bill.

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

Sincerely yours,

BYRON R. WHITE,  
*Deputy Attorney General.*

FEDERAL TRADE COMMISSION,  
OFFICE OF THE CHAIRMAN,  
*Washington, April 27, 1961.*

Hon. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your letter of February 6, 1961, requesting a report on S. 167, 87th Congress, 1st session, 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.

It is our understanding that the Department of Justice considers this legislation necessary because of a present lack of authority to compel the production of documents during the investigative or precomplaint stage of civil antitrust proceedings.

The Commission notes that the bill would allow other antitrust agencies to examine documentary material taken into custody by the Department of Justice. Thus, there would be no change under the proposal in liaison on antitrust matters existing between the Federal Trade Commission and the Department of Justice.

The bill would not 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 complaints.

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. Since S. 167 would not directly affect the functions or duties of the Commission, we have no comments as to detailed provisions in the proposal.

Pursuant to regulations, this report was submitted to the Bureau of the Budget on February 23, 1961, and on April 25, 1961, the Commission was advised by telephone that there would be no objection to the submission of the report to the committee.

By direction of the Commission:

PAUL RAND DIXON, *Chairman.*

## CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

## DEFINITIONS

*SEC. 2. For the purposes of 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 not a natural person;*

(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 relevant to any antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, 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 made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material evidence shall be made available.

(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 upon a partnership, corporation, association, or other legal entity by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

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

(3) depositing such copy in the United States mails, by registered or certified mail duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(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 make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.*

*(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 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 (c)) 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 (c)) 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) transmit 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 or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, 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 this Act, 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 such person resides, is found, or transacts business and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. 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 or other legal 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.*

*(e) 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.*

*Sec. 6(a). Section 1505, Title 18, of United States Code, is amended to read as follows:*

**[SEC. 1505. Influencing or injuring witnesses before agencies and committees]**

**§ 1505. Obstruction of proceedings before departments, agencies and committees.**

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee or either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or,

Whoever, with intent to avoid, evade, prevent or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act wilfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or,

Whoever 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 and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

*(b) The analysis of Chapter 73 of Title 18 of United States Code is amended so that the title of § 1505 shall read therein as follows:*

*"1505. Obstruction of proceedings before Departments, agencies and committees."*

#### 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.*

